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THE article which recently appeared in this journal on grand juries seems to have attracted a good deal of attention. In this number we publish a letter on the same subject. We promised to return to the matter again and take up the question of some substitute for the grand jury system. An article on this subject has, however, to stand over until next issue from want of space. We shall be glad for any further views from correspondents who have considered the matter.

IN the *Law Times* of the 17th ult. certain rules of practice are published relating to the retainers of counsel, etc., which have been adopted by the Council of the Incorporated Law Society, and approved by the Attorney-General. We draw attention to these rules because we think something of the kind is needed in Ontario. At present members of the bar and solicitors have no authoritative standard to guide them in the matter of retainers. It is in the interest both of the profession and the public, we think, that some rules on this point should be laid down for the guidance of the profession, and the matter should not be left in its present indefinite and undefined condition. This is a subject which, we think, might not unreasonably engage the attention of the Law Society.

SEVERAL changes of importance have recently been made in the English judiciary, consequent on the death of Sir Barnes Peacock. In the first place, Sir James Hannen, who for eighteen years past has presided over the Probate, Divorce, and Admiralty Division, has been made Lord of Appeal in Ordinary, and will take the vacant place of Sir Barnes Peacock in the Judicial Committee. To supply the vacancy thus created in the P. D. and A. Division, Mr. Justice Butt, the *puisne* Judge of the P. D. and A. Division, has been made President of that Division, and Mr. Jeune, Q.C., has been made a *puisne* Judge *vice* Butt, J. In the valedictory address made by Mr. Inderwick, Q.C., to Sir James Hannen, the learned gentleman characterized Sir James' administration of the law as having been distinguished by "courage, courtesy, and kindliness;" and yet, in his reply, the learned president candidly confessed that he had frequently been irritable, and with some emotion asked pardon of any member of the bar whose feelings he might have hurt. Next to avoiding irritability on the bench comes, in point of merit, the honest confession that it is a fault. Whatever faults of temper the learned judge may have manifested, however, one fact speaks volumes for his successful administration of the law, and that is the remarkably few appeals that have been had from his decisions.

THE late decision of the Court of Appeal in *Wright* v. *Bell*, 18 Ont. App., 25, we take to be a further illustration, if any be needed, of the doctrine established by the Supreme Court in *Gray* v. *Richford*, 2 S.C.R., 431, that where a man is in possession of property to which he has a paper title, he cannot be allowed to repudiate his paper title and set up that his possession was wrongful, so as, under the Statute of Limitations, to cut out the rights of others entitled under the paper title, whether as remaindermen or as *cestuis que trustent*. The right to repudiate an estate granted or devised unquestionably exists, and though that repudiation need not be by record or deed, it must at least be by conduct plain and unequivocal. This rule of law applies both to real and personal property: see *Standing* v. *Bowring*, 31 Chy.D., 282; and where a person to whom property is devised or conveyed in trust refuses the office of trustee, not even the bare legal estate will vest in him under the will or conveyance: see *Birchall* v. *Ashton*, 40 Chy.D., 439, per Lindley, L.J. In *Moffatt* v. *Scratch*, 12 Ont. App., 157, this doctrine of repudiation is discussed, and we have there an instance of what was held to be an effectual repudiation of a grant. In addition to the cases referred to in *Wright* v. *Bell*, there are some others in our own court on which this question has been adjudicated upon, *e.g.*, *Re Dunham*, 29 Gr., 258; *Re Defoe*, 2 Ont., 623. The distinction drawn by the Divisional Court of the Chancery Division in *Smith* v. *Smith*, 5 Ont., 690, and which appears to have been approved by the Court of Appeal, is important to be borne in mind, viz., that though a person entering into possession under a will, or other instrument, may be, and generally is, estopped from disputing the title of the devisor or grantor, yet he is not estopped from asserting that the instrument is ineffectual to convey to third parties the rights they claim under it. In that case a party entered into possession under a will made by a married woman, which was void; and it was held that the party so entering into possession might nevertheless rely on its invalidity as against other persons claiming under it.

COMMENTS ON CURRENT ENGLISH DECISIONS.

The Law Reports for January comprise (1891) 1 Q.B., pp. 1-142. (1891), 1 P., pp. 1-8, and (1891), 1 Ch. pp. 1-65.

It will be seen that, with the commencement of this year, a new method of citation has been adopted for the Law Reports. This change is probably made in the interests of the publishers, so as to obviate, if possible, the reluctance of new subscribers to commence subscribing in the middle of a series. Each year in future will be as it were a new starting point. The making of the year a part of the citation, though somewhat cumbrous, will probably be found convenient after we have once become accustomed to it.

BILL OF SALE—BILLS OF SALE ACT, 1878 (41 & 42 VICT., C. 31), S. 4—HIRING AND PURCHASE AGREEMENT.

Beckett v. *Tower Assets Co.* (1891), 1 Q.B., 1, is a case which seems to us to illustrate the apparent ease with which unscrupulous and greedy money-lenders

can evade the wholesome restraints which the rules of equity have imposed upon mortgagees. The action was brought for trespass to the plaintiff's goods, and arose in the following way: The plaintiff was in difficulties and unable to pay his rent; he applied to the defendants for an advance upon a chattel mortgage. They recommended him not to give a mortgage but to get his landlord to put in a friendly distress, under which they would buy in the goods, and then give him the right to repurchase them. The terms on which the repurchase was to be allowed were not then named. The distress was made and the defendants bought the goods for £29 15s., and on the plaintiff going the next day to complete the hire and repurchase, he found that the terms the defendants fixed involved his repaying them £50; this, after expostulation, he submitted to do. He was unable to pay the £50 as stipulated, and the defendants seized and sold the goods under the hire and purchase agreement, and for so doing the action was brought. For the plaintiff it was contended that the hire and purchase agreement was in effect a chattel mortgage, and was void for non-registration under the Bills of Sale Act; but Cave, J., held that it was a hire and purchase agreement and not within the Act, and the action was therefore dismissed. We are not altogether satisfied with the view the learned Judge took. He appears to have considered that because the defendants could not, after they became the purchasers of the goods, have compelled the plaintiff to repay the advance, that therefore the defendants became the absolute owners of the goods; whereas it seems to us that the purchase having been made under the circumstances it was, the plaintiff, whether he could have been compelled to repay the advance or not, had nevertheless a clear equity of redemption, and that in equity the transaction really was a mortgage. Under the Ontario Act (R.S.O., c. 125), it is almost needless to point out, that even if the transaction amounted to a chattel mortgage, its non-registration could not be set up by the mortgagor, but only by his creditors or subsequent purchasers, or mortgagees, in good faith.

SHIP—BILL OF LADING—CHARTER PARTY—DEMURRAGE—FIXED NUMBER OF LAY-DAYS—DELAY OCCASIONED BY STRIKE—INABILITY TO PERFORM SHIP'S SHARE OF UNLOADING.

In *Budgett* v. *Binnington* (1891), 1 Q.B., 35, the plaintiffs, who were indorsers of a bill of lading, claimed to recover from the defendants, who were ship-owners, a sum of money paid by the plaintiffs, under protest, for demurrage. The cargo was shipped under a bill of lading incorporating a clause of the charter party, which fixed the number of lay-days for unloading and allowed other days for demurrage. Neither the bill of lading nor the charter party contained any exception of delays caused by strikes. By the custom of the port of discharge, the cargo was required to be discharged by the joint act of the ship-owner and the consignees. During the lay-days a strike took place, both among the laborers employed by the stevedore of the ship-owners and by the consignees, so that the unloading ceased and could not be resumed until after the expiration of the lay-days. The plaintiffs claimed that the ship-owners were themselves unable to perform their part of the unloading, and they were therefore not entitled to charge demurrage for the period they were in default. The

Court of Appeal (Lord Esher, M.R., and Lindley and Lopes, L.JJ.) were of opinion that the defendants were not responsible for the delay occasioned by the strike, as the laborers were not directly responsible to the defendants, but to the stevedore by whom they had been employed; though they agreed that if the delay had been occasioned by the defendants, or by any persons in their control, they could not have charged demurrage for the delay so occasioned.

SHIP—CHARTER PARTY—FREIGHT PAYABLE IN ADVANCE—LOSS OF CARGO—LIABILITY OF CHARTERER.

Smith v. *Pyman* (1891), 1 Q.B., 42, is another maritime case, in which the question was whether a charter party which provided "one-third of freight, if required, to be advanced, less 3 per cent. for interest and insurance," entitled the ship-owner to demand the advance after the loss of the cargo had occurred. Charles, J., before whom the action was tried, held that the plaintiff was entitled to recover. The *ratio decidendi* may be collected from the following passage: "Advance freight has been decided over and over again to be a payment made for taking the goods on board, and for the undertaking to carry, not for the safe carriage of them; and that being the nature of advanced freight, it has been held, first, that if it has been paid in advance, it cannot be got back again even though the vessel be lost; and secondly, that if there has been an unconditional agreement to pay advance freight, that agreement can be enforced although the vessel has been lost before action be brought or demand made." The only difficulty the learned Judge felt was as to the effect of the words "if required," but he came to the conclusion that they could not be read as limiting the ship-owner's right to require payment only before the loss of the vessel.

PUBLIC HEALTH ACT (38 & 39 VICT., C. 55), SS. 116, 117 (R.S.O., C. 205, S. 99)—UNSOUND MEAT—POSSESSION OF UNSOUND MEAT INTENDED FOR HUMAN FOOD—EXPOSURE FOR SALE, WHETHER NECESSARY TO CONSTITUTE OFFENCE.

Mallinson v. *Carr* (1891), 1 Q.B., 48, was a case stated by justices for the opinion of the court. The defendant was a butcher, who was charged with having in his possession meat for the purpose of preparation for sale and intended for human food, which was unsound and unfit for food. The prosecution took place under the Public Health Act, 1875 (see R.S.O., c. 205, s. 99), and the question submitted was, whether the defendant could be convicted for having the meat in his possession notwithstanding that he had not actually exposed it for sale. Hawkins and Stephens, JJ., held that he could.

MINE—MINES REGULATION ACT, 1872 (35 & 36 VICT., C. 77), S. 23 (53 VICT., C. 10, S. 23, S-S. 11 (O.))—"WORKING SHAFT."

Foster v. *North Hendre Mining Co.* (1891), 1 Q.B., 71, was also a case stated by justices. The defendants were charged with a breach of the Mines Regulation Act, 1872 (see 53 Vict., c. 10, s. 23, s-s. 11 (O.)). The Act provides "every working shaft in which persons are raised" shall, under certain specified circumstances, be provided with guides, and persons contravening this provision are made liable to a penalty. The shaft of the lead mine in question was completed, and a tunnel driven from the bottom of it for the purpose of arriving at

the ore, but no ore had been taken. The men employed in the mine were drawn up in a bucket unprovided with guides, which was the offence charged. The defendants contended that the shaft in question was, under the circumstances above stated, not a "working shaft," but the court (Hawkins and Stephens, JJ.) held that it was, and that the defendants were therefore liable to the penalty, and that it was immaterial whether ore had been obtained or not; it was sufficient that the shaft was being used for the purposes of the mine.

FOREIGN POWER OF ATTORNEY, CONSTRUCTION OF—CONFLICT OF LAWS—ENGLISH LAW, HOW FAR APPLICABLE TO FOREIGN POWER OF ATTORNEY.

Chatenay v. *The Brazilian Submarine Telegraph Co.* (1891), 1 Q.B., 79, was an action brought by plaintiff to compel the defendants to rectify their register of shareholders and restore his name as owner of certain shares which had been transferred in assumed exercise of a power of attorney executed by the plaintiff in Brazil in the Portuguese language in favor of a broker resident in London. A preliminary issue had been directed in the action to determine whether the construction of the power of attorney was to be governed by Brazilian or English law, which issue was tried before Day, J., who decided that it must be governed by English law, and on appeal the Court of Appeal (Lord Esher, M.R., and Lindley and Lopes, L.JJ.) affirmed his decision, holding that in such a case the meaning of the instrument is to be ascertained by the evidence of competent translators and experts, including, if necessary, lawyers of the country where the document was executed, and that if it appears that it was the intention of the donor of the power that it should be acted on in England, then as to anything done under it in England its construction is to be governed by English law, and the certificate of Day, J., was expanded in accordance with this holding.

TRESPASS TO THE PERSON—WOUNDING WITH GUN—ACCIDENT—ABSENCE OF NEGLIGENCE.

In *Stanley* v. *Powell* (1891), 1 Q.B., 86, the plaintiff sought to recover damages for injuries sustained in consequence of a pellet from the defendant's gun having glanced off the bough of a tree and struck the plaintiff. The jury found the defendant was not guilty of negligence, and the court (Denman, J.) held that he was not liable to the plaintiff.

DEFAMATION—LIBEL—CORPORATION, WHEN IT MAY MAINTAIN ACTION FOR LIBEL.

Manchester v. *Williams* (1891), 1 Q.B., 94, was an action for libel brought by a municipal corporation. The libel complained of charged the plaintiffs with bribery and corruption. Day and Laurance, JJ., were of opinion that the action would not lie, and that the limits of a corporation's right to bring such an action were correctly stated by Pollock, C.B., in *Metropolitan Saloon Omnibus Co.* v. *Hawkins*, 4 H. & N., 90, viz., that a corporation may sue for a libel affecting property, but not for one merely affecting personal reputation.

PRACTICE—RENEWAL OF WRIT OF SUMMONS—STATUTE OF LIMITATIONS.

In *Hewett* v. *Barr* (1891), 1 Q.B., 98, the Court of Appeal (Lord Esher, M.R., Lopes and Kay, L.JJ.) affirmed the rule of practice laid down in *Doyle* v. *Kauf-*

man, 3 Q.B.D., 7, 340, to the effect that a renewal of writ of summons will not be granted when, in the absence of such renewal, the claim of the plaintiff would be barred by the Statute of Limitations. The old system of keeping claims alive by issuing a writ, and keeping it renewed, is dead. Kay, L.J., held, however, that under exceptional circumstances there should be a discretion to depart from this rule, *e.g.*, where every reasonable effort had been made to serve the writ without success.

PRACTICE—DEFENDANT OUT OF JURISDICTION—SUBSTITUTED SERVICE OF WRIT—ORD. IX., R. 2; ORD. X. (ONT. RULE 253).

In *Wildhing* v. *Bean* (1891), 1 Q.B., 100, the same point of practice came up which was decided in *Fry* v. *Moore*, 23 Q.B.D., 395 (see *ante* vol. 25, p. 536), that where a writ is issued in ordinary form for service within the jurisdiction, and the defendant before the issue of the writ had left England and had ever since remained out of England, and it did not appear that he had gone out of the jurisdiction to avoid service of the writ, in such a case an order for substituted service of the writ could not be made, and where such an order had been made it was set aside, on the application of the defendant, by the Divisional Court, and this decision was affirmed by the Court of Appeal (Lord Esher, M.R., and Lindley and Lopes, L.JJ.). As Lord Esher, M.R., says, the writ under the circumstances could not have been served on the defendant abroad personally, because it was not in the proper form for service abroad, and, therefore, there could not be substituted service of it. We are inclined to think this distinction has not heretofore been very strictly observed in Ontario in making orders for substituted service of writs.

PRACTICE—SERVICE OUT OF JURISDICTION—"CONTRACT WHICH, ACCORDING TO THE TERMS THEREOF, OUGHT TO BE PERFORMED WITHIN THE JURISDICTION"—ORD. XI., R. 1 (E), (ONT. RULE 271 (E).)

In *Bell* v. *Antwerp L. & B. Line* (1891), 1 Q.B., 103, the Court of Appeal, affirming Cave and Day, JJ., determined that where a foreign company chartered an English ship from England to a foreign port, and by the terms of the charter party it was stipulated that all lighterage should be at charterers' or consignees' risk and expense, the charterers indemnifying the ship-owners from all lighterage on cargo at the port of discharge; but no place was specified for payment of monies that might become due under such contract of indemnity; such a contract was not one which, "according to the terms thereof," ought to be performed within the jurisdiction within the meaning of Ord. xi., r. 1 (*e*), (*Ont. Rule* 271 (*e*)), and therefore leave to serve notice of the writ out of the jurisdiction on the foreign company in an action founded on such a contract could not be given. The court held that the words "according to the terms thereof" in the rule could not be disregarded; although it would seem from the observations of Kay, L.J., that it is not absolutely necessary that the terms should be actually expressed in the contract, and that it is sufficient if they are necessarily implied therefrom.

CRIMINAL LAW—MISAPPROPRIATION BY AGENT—ACCEPTANCE OF BILL OF EXCHANGE—BILL INCOMPLETE AT TIME OF DELIVERY—SECURITY FOR PAYMENT OF MONEY—24 & 25 VICT., C. 96, S. 75 (R.S.C., C. 164, S. 60).

The Queen v. *Bowerman* (1891), 1 Q.B., 112, was a case stated by the Recorder

of London. The prosecutors, being desirous of raising money on their acceptances, entered into an agreement in writing with the prisoner, that he should draw bills on them up to a certain amount, which they should accept, and that the prisoner should endeavor to get the bills discounted and pay the plaintiffs a certain proportion of the proceeds; or upon failure to get them discounted, return the bills to the prosecutors. Bills were accordingly accepted by the prosecutors and delivered to the prisoner, but at the time of the delivery the name of the drawer had not been signed. His own name was subsequently signed by the prisoner as drawer, and he got the bills discounted and converted the whole proceeds to his own use. The question submitted was (1) whether the bills of exchange when entrusted to the prisoner were securities for the payment of money, and (2) whether there was evidence that they had been entrusted to the prisoner as a broker or agent. Upon both points the court (Denman, J., Pollock, B., and Hawkins, Stephens, and Charles, JJ.) decided against the prisoner.

ADMIRALTY—DAMAGES—COLLISION—JOINT TORTFEASORS.

The Avon and Thomas Jolliffe (1891), P. 7, is the only case in this number of the Probate Division which it is necessary to refer to. A tug and a vessel in tow had been found to blame for a collision, and damages awarded against them jointly. The defendants applied to amend the judgment by inserting words to the effect that each of the wrong-doing vessels was severally liable for one-half only of the entire damage. Two American cases were relied on in support of the motion, but Butt, J., held that according to the law of England there can be no apportionment of damages in favor of joint tortfeasors, and that that rule applied to admiralty as well as all other cases.

PRACTICE—SECURITY FOR COSTS—ASSETS WITHIN JURISDICTION

In re Apollinaris Co. (1891), 1 Ch., 1, a foreign company appealed from an order to the Court of Appeal, and the respondent applied for an order for security for costs of the appeal. The appellants showed that they had a branch business as mineral water merchants in England, which they carried on in leasehold premises, where they had a stock in trade worth £12,000; plant, horses, and vans, worth about £1200, and a large amount of book debts. The respondents contended that this was floating property, easily removable, and afforded no sufficient security. The Court of Appeal (Lord Halsbury, L.C., and Bowen and Fry, L.JJ.), however, was of opinion that there was no reasonable doubt that if the appeal were dismissed with costs the respondents would find ample goods on which to levy execution, and therefore refused the order.

CONFLICTING EQUITIES—LEGAL ESTATE—FRAUD—INNOCENT PARTIES.

Taylor v. *Russell* (1891), 1 Ch., 8, is a case which, though under our system of registration of deeds, unlikely ever to arise here, nevertheless may be referred to as illustrating the importance still attached to the acquisition of the legal estate in cases where there are conflicting equities. By the fraud of a mortgagor, two mortgages were made to the plaintiff and defendants: to the defendants he

exhibited his true title, and handed over the genuine title deeds; and to the plaintiff he pretended he claimed under another title by virtue of a deed to himself, which he had forged, and which he handed over to the plaintiff, who believed he had a good legal mortgage. This was a species of fraud which, in this country, it would be difficult, if not impossible, to perpetrate. At the time the mortgages were made it so happened that the legal estate was outstanding in prior mortgagees. As soon as the fraud was discovered the defendants, who were second mortgagees in point of date, after notice of the plaintiff's claim, procured a conveyance of the legal estate to themselves, and it was held, by Kay, J., that they had by that means acquired priority over the mortgage of the plaintiff, which was prior in point of time.

SETTLEMENT—FRAUD ON CREDITORS—13 ELIZ., C. 5, S. 5—PURCHASER FOR VALUE WITHOUT NOTICE.

In *Halifax Banking Co.* v. *Gledhill* (1891), 1 Ch., 31, Kay, J., was called on to decide a question upon which he observes that it was strange there was no direct decision. The action was brought to set aside a settlement as a fraud on creditors, and one of the defendants, without notice of the fraud, had for valuable consideration obtained a charge on the settlor's reversionary life interest thereunder; and the question was whether, notwithstanding the settlement was found to be fraudulent as against creditors, the rights of this defendant were protected by 13 Eliz., c. 5, s. 5. Kay, J., held that they were. The settlement was therefore declared void as against creditors, except as to the reversionary life interest of the settlor thereunder, which was directed to be valued, and its value deducted from the proceeds of the property and applied in payment of the charge.

STATUTE—CONSTRUCTION—"OWNER."

Fillingham v. *Wood* (1891), 1 Ch., 51, deserves a brief notice here. A statute required a notice to be given to an "adjoining owner," and the term "owner" was by the statute defined to apply to every person in possession or receipt either of the whole, or any part of, the rents or profits of any land or tenement, or in the occupation of such land or tenement, other than as tenant from year to year, or for any less term. The question Chitty, J., had to decide was whether a tenant in possession of part of a house under an agreement for a greater interest than as tenant from year to year was an "owner" within the meaning of the Act, and he held that he was, and that in such a case service only on the person in the receipt of the whole of the rents and profits of the premises was an insufficient compliance with the Act, as the word "owner" included everyone within the language of the interpretation clause, even though their interests were merely equitable.

Notes on Exchanges and Legal Scrap Book.

MONEY PAID UNDER ILLEGAL CONSIDERATION.—The law as to recovering back moneys paid under illegal contracts is in a most unsatisfactory state, as appears from the considered judgment of the Court of Appeal in *Kearley* v. *Thompson and Ward*. . . . . There £40 was paid to induce the defendants, acting as solicitors for a petitioning creditor, not to oppose a bankrupt's discharge. The bankrupt never came up for discharge, and it was sought to recover the money. Clearly the illegal contract had not been completely performed, but nevertheless the court held that the payer had no *locus pœnitentiæ*, the parties were *in pari delicto*, and the money must remain where it was. Some tribunal some time or other will have to deal with expressions used by Lord Justice Mellish and Lord Esher. The former said in *Taylor* v. *Bowers* (34 L.T. Rep. N.S., 938; Q.B.D., 291): "If money is paid or goods delivered for an illegal purpose, the person who had so paid the money or delivered the goods may recover them back before the illegal purpose is carried out." The latter said, in *Herman* v. *Jeuchner* (15 Q.B.D., at p. 563; 53 L.T. Rep. N.S., 94); "In this case the illegal purpose has been wholly performed and therefore the plaintiff cannot recover." Now it must be taken that, although the contract has not been wholly performed, money paid cannot be recovered back; and consequently we suppose if nothing is done under it at all the same rule applies.—*Law Times.*

THE LAW'S DELAY.—They are supposed to do some things better in France than in England, but so far as the delays and expenses of legal process are concerned the two countries stand in much the same position. A gentleman who lived at Neuilly travelled for years daily between that suburban locality and the Madeleine by tramway. He was a great favorite with the drivers and conductors, to whom he gave *pourboires* frequently, in addition to presents at the New Year. Three years ago he died, bequeathing to the drivers and conductors of his favorite tramway line the sum of £1,600, which meant £40 to each employee, there being forty men thus engaged. The deceased's family, however, attacked the will, and the case went before the law courts. For three years counsel and solicitors have debated and argued, but at last the proceedings have come to an end, the court holding that the legacy was valid and duly executed. On the 5th inst., the forty tramway-men concerned received a circular informing them of this fact, and asking them to call at the office to receive their share of the money. When they did so they were told that instead of the original £40 each one was entitled to only 6s. 9d., all the rest of the money having gone in costs! As they took this miserable remnant of their deceased benefactor's munificence some of them remarked that it was well the suit had ended now, or else, instead of even getting even 6s. 9d., they might have been called upon to contribute something out of their own pockets to enable the lawyers to plead and counter-plead.—*Irish Law Times.*

DEFRAUDING THE SLOT-BOX.—A complicated case was brought into the Central Police Station yesterday afternoon. It was that of a man who had succeeded in beating a "drop-a-nickel-in-the-slot" box, on the corner of Third and Jefferson streets. The man who was able to perform this feat was John Lewis, and he is said to have made a thorough study of the subject before risking his nickel. He first bored a hole in the coin and then fastened to it a small black silk thread. He then dropped the nickel in the slot as directed by the sign and drew out a cigar. Seeing that nothing was stated in the directions as to how many times one nickel could be dropped in, he drew his nickel out and dropped it in again. Succeeding the second time, he continued to drop until he emptied the box. By the time he had drawn the twenty-ninth cigar, quite a crowd had gathered around him, and cheered him on. Their cries attracted officers Schradel and Donohue, who arrested Lewis and took him from the circle in which he had become a hero. At the station-house the question arose as to what he should be charged with. After several suggestions of robbery, burglary, etc., it was decided to place against him disorderly conduct. He was taken out on bond a little later by some of those whose cries had attracted the police.—*Louisville Courier-Journal.*

MALICIOUS PROSECUTION BY A COMPANY.—This question has for years past been an open one. There is a good deal of authority on either side of it, and within the last few days it has reappeared before Baron Pollock in the case of *Kemp* v. *Courage & Co., Limited; Croft* v. *Courage & Co., Limited* ("*Times*," Nov. 11, 1890). It is one of the open pitfalls in our law, which is kept open by the protests of Lord Bramwell, like that of the failure to prosecute a felon (*Ex parte* Ball; *Re* Shepherd, 40 L.T. Rep. N.S., 141; 10 Chy.D., 667; *Roope* v. *D'Avigdor*, 48 L.T. Rep. N.S., 761; 10 Q.B.D., 412). A review, therefore, of the existing position of the question of an action lying against a company for malicious prosecution needs no apology.

The earlier cases upon the question are not directly in point, as they only bear upon it by analogy. In *Rex* v. *City of London* (cited in a note to *Whitfield* v. *South-Eastern Railway Company*, E.B. and E., 122) it was held on demurrer that an action would lie against the corporation of the City of London for maliciously publishing a libel. And in Whitfield's case (*ubi sup.*), Lord Campbell said that "the ground on which it is contended that an action for a libel cannot possibly be maintained against a corporation aggregate, fails." And further, "Considering that an action of tort and trespass will lie against a corporation aggregate, and that an indictment may be preferred against a corporation aggregate, both for commission and omission, to be followed up by fine, though not by imprisonment, there may be great difficulty in maintaining that, under certain circumstances, express malice may not be imputed to and prevail against a corporation." It is clear law nowadays that a corporation may be liable for the publication of a libel. Even Lord Bramwell admits that. The unfortunate word "malice," complains Lord Bramwell, has got into cases of action for libel. "We all know that a man may be the publisher of a libel without a particle of

malice or improper motive. Therefore the case is not the same as where actual and real malice is necessary. Take the case where a person may make an untrue statement of a man in writing, not privileged on account of the occasion of its publication; he would be liable, although he had not a particle of malice against the man. So would a corporation. Suppose that a corporation published a newspaper or printed books, and suppose that it was proved against them that a book so published had been read by an officer of the corporation, in order to see whether it should be published or not, and that it contained a libel; no action for libel lies there, because there is no question of actual malice, or ill-will, or motive": *Abrath* v. *North-Eastern Railway Company*, 55 L.T. Rep. N.S., 63; 11 App. Cas., 247, at p. 254.

It is clear then, upon the authorities, that an action for libel will lie against a company or corporation. It may be noticed in passing, that within the last few weeks it has been decided by Justices Day and Lawrence that a municipal corporation cannot sue for libel: *Mayor, etc., of Manchester* v. *Williams*, 90 L.T., 21. The defendant in the recent case charged two if not three departments of the Manchester City Council with bribery and corruption, and accused the plaintiffs with either participating in these offences or with culpable ignorance of them. The decision is hard to reconcile with that in the *Metropolitan Saloon Omnibus Company* v. *Hawkins*, 4 H. & N. 87, in which the defendant imputed to the company insolvency, mismanagement, and an improper and dishonest carrying on of its affairs, and it was expressly held that the company could maintain an action. In that case, however, Chief Baron Pollock went so far as to say that a corporation cannot sue in respect of a charge of corruption, "for a corporation can not be guilty of corruption, though the individuals composing it may." The question, therefore, whether a corporation can or can not sue for libel must be considered an open one, though it is clear law that a corporation can be sued for libel.

We return to the question, can an action for malicious prosecution be brought against a corporation? To elucidate this more difficult question let us turn again to the authorities: In *Stevens* v. *Midland Counties Railway Company, and Lander*, 10 Exch., 362, which was an action against the defendants for having maliciously and without reasonable or probable cause prosecuted the plaintiff on a charge of having feloniously received some of the property of the company, Baron Alderson and his brethren held that there was abundant evidence for the jury that the act done by Lander was done without reasonable and probable cause and maliciously. Not so with the railway company. But Baron Alderson added that he thought that an action of this description does not lie against a corporation aggregate; for, in order to support the action, it must be shewn that the defendant was actuated by a motive in his mind, and a corporation has no mind. Baron Platt, however, thought the argument that a company is not responsible, as they have no motive, a very weak one. In the next case (*Green* v. *London General Omnibus Company*, 7 C.B.N.S., 290), it was held that a corporation aggregate may be liable to an action for intentional acts of misfeasance by its servants, provided they are sufficiently connected with the scope and object of its incorporation. And Chief Justice Earle remarked that the doctrine relied on, that a corporation having

no soul can not be actuated by a malicious intention, is more quaint than substantial. In other words, the *ratio decidendi* of Baron Alderson was in this case disregarded.

Coming now to the more modern decisions, which are two in number, we find a remarkable difference of judicial opinion. In *Edwards* v. *Midland Railway Co.*, 43 L.T. Rep. N.S., 694; 6 Q.B.D., 287, Lord (then Mr.) Justice Fry declined to follow *Stephens* v. *Midland Railway Company (ubi. sup.)*. There the question arose *simpliciter*, Can a railway company be made liable in an action for malicious prosecution? "Yes," said the judge: "the malice in order to found such an action need not be express malice, but it may be implied from the wrongful action without just cause or excuse. Now, it is a maxim that a corporation has no mind, no *mens rea*, therefore they cannot be guilty of malice; can they therefore escape the consequences of an action which in the case of an ordinary person would be held to imply malice? Counsel suggests to me the case of partners who would be individually liable for an action maliciously instituted by the partnership, and the subsequent incorporation of the partnership into a company; can it be said that the company, consisting of the same persons as before, is not to be made liable for the same wrongful action? It would be strange if it were so, though I must not forget that the individuals who directed such a wrongful action on the part of the company would be personally liable." It was upon this reasoning that Lord Justice Fry refused to follow in the steps of Baron Alderson, which till that day (1880) stood alone. Since that day, however, the House of Lords has decided the case of *Abrath* v. *North-Eastern Railway Company*, 1886; 55 L.T. Rep. N. S., 63; 11 App. Cas., 247.

In Abrath's case the judge, in the action against the railway company for malicious prosecution, directed the jury that it was for the plaintiff to establish a want of reasonable and probable cause and malice, and that it lay on him to show that the defendants had not taken reasonable care to inform themselves of the true facts of the case, and asked the jury whether they were satisfied that the defendants did take reasonable care to inform themselves of the true facts and that they honestly believed in the case which they laid before the magistrates. The jury answered both questions in the affirmative, and the judge entered judgment for the defendants; and the House of Lords held that the direction was right and the judgment rightly entered. It will be seen from this brief statement of the case that it was not necessary for the judgment in Abrath's case to lay down a general rule that an action for malicious prosecution does not lie against a corporation aggregate, a corporation aggregate being incapable of malice or motive. This, however, is what Lord Bramwell did. Lord Selborne pointed out that that important question had not been argued, and was not made the ground of the decisions in the courts below. So that the House of Lords can not be said to have spoken together upon the question whether it is of the essence of an action for malicious prosecution that malice should be proved in a sense not imputable to the corporation. But Lord Bramwell, speaking alone and for himself only, did deliver himself of a strong opinion that no action for malicious prosecution will lie against a corporation. This he laid down, to use

his own words, "directly and peremptorily." His reasoning may be summarized: To maintain an action for a malicious prosecution it must be shewn that there was an absence of reasonable and probable cause, and that there was malice, or some indirect or illegitimate motive in the prosecutor. But a corporation is incapable of malice or motive. "If," said Lord Bramwell, "the whole body of shareholders were to meet, and in so many words to say, 'Prosecute so and so, not because we believe him guilty, but because we believe it will be for our interest to do it,' no action would lie against the corporation, though it would lie against the shareholders who had given such an unbecoming order. If the directors even by resolution at their board, or by order under the common seal of the company (I am putting the case strongly in order that there may be no mistake about it), were maliciously, with the view of putting down a solicitor who had assisted others to get damages against them, to order a prosecution against that man, if they did it from an indirect or improper motive, no action would lie against the corporation, because the act on the part of the directors would be *ultra vires;* they would have no authority to do it. They are only agents of the company; the company acts by them, and they have no authority to bind the company by ordering a malicious prosecution. I say, therefore, that no action lies, even if you assume the strongest case, namely, that of the very shareholder directing it, or the very director ordering it, because it is impossible that a corporation can have malice or motive; and it is perfectly immaterial that some subordinate officer or individual or individuals of a company have such malice or motive." And again: "It is not enough to show that there was an absence of reasonable and probable cause, and that a subordinate had malice." Nothing could be stronger than these expressions of Lord Bramwell's evidently well considered judgment. But we repeat that they were repudiated by the other law lords as *obiter dicta* pronounced upon a question which had not been argued in the court. They stand, therefore, alone, and with the weight of Lord Bramwell's *ipse dixit*, but with nothing more.

How, then, did Baron Pollock find the authorities the other day? On the one hand, we have Lord Justice Fry laying down in plain terms that an action for a malicious prosecution will lie against a company, following the analogous decisions in *Re City of London*, *Whitfield* v. *South-Eastern Railway Company*, and *Green* v. *London General Omnibus Company* (*ubi sup.*), as well as the instances of actions against corporations for false returns to writs of mandamus which, declared Lord Ellenborough, must be numberless: *Yarborough* v. *Bank of England*, 16 East, 6. On the other hand, we have the dictum of Baron Alderson and the plain-spoken words of Lord Bramwell, to the effect that an action for malicious prosecution will not lie against a corporation aggregate. With these rival authorities Baron Pollock was confronted, and he, without expressing any decided opinion of his own, preferred to follow the ruling of Lord Justice Fry, which was that adopted, he said, in other cases subsequently. This being so, he gave judgment against Courage & Co., and in our humble opinion he was right in so doing. Both Baron Alderson and Lord Bramwell's opinions were given *obiter*, and they were based upon the well-known saying that a corporation has

no qualities by which it can be condemned, either morally or physically. In this argument we can see no substance, and we should be glad if the defendants in the recent case would take the question, which is certainly an open one, to the appellate tribunals, and so obtain an authoritative ruling upon an interesting point.—*The Law Times.*

Correspondence.

GRAND JURIES.

To the Editor of THE CANADA LAW JOURNAL:

SIR,—It is to the great difference in the mode of procedure, and to the many changes in the criminal law which favor an accused person, that we may look for an intelligent reason for believing that the grand jury inquest has now lost its utility.

It is only necessary to mention the principal amendments leading up to our present code to show how a criminal prosecution must have weighed heavily against the prisoner before it was recognized that something more than the intervention of a grand jury was required if justice and humanity were not to remain strangers to his defence.

It would appear that the grand jury was the tribunal first to receive and investigate the charge against a prisoner; that there was no formal charge or investigation prior to their inquest. If a true bill was presented, prior to the reign of King Henry II., there was no petit, special, or other kind of jury, to try the indictment. The trial was by ordeal or *battel*. After what delay such inhuman proceedings, founded on superstitious barbarity, were completed, we can only conjecture; but we may fairly conclude that these trials did not follow the presentment of the grand jury with as little delay as trials do now.

Then, without directing our attention to the class of men who first became petit jurors, their vassalage and dependence, and the nature of penalties imposed, when we consider the trial by such a jury at its earliest inception and for centuries after, we can only wonder, if the grand jury was then regarded as a bulwark of British liberty, that a true bill was ever found, unless the guilt of the prisoner was so clear that a trial by another jury would manifestly be a useless and superfluous proceeding.

The Habeas Corpus Act was not passed until the reign of King Charles II. It was not until after the time of the Reformation that legal proceedings were translated into the English language. Prior to the reign of William III., it is doubtful if prisoners were allowed to defend by counsel. They were liable to be tried although absent. They were not entitled to a copy of the indictment or to the names of the jurors, and had not any available process of the court for compelling attendance of witnesses. It was not until Queen Anne's reign that witnesses were allowed to give evidence for a prisoner in cases of felony. That the

rules of evidence were not so favorable to prisoners as at the present time can be readily believed without strict investigation; and that for a very long period jurors were liable to be fined and imprisoned for giving a verdict contrary to the directions of the Judge, is a fact that is beyond question.

What has been accomplished, therefore, in favor of the individual by amendments to our criminal law is so great that it could hardly be ascribed to any advantage possessed by the Crown should any innocent person now be found guilty by a common jury, and it would not be an act of the prisoner consistent with his innocence should he attempt to evade a public trial.

That he does not place any particular advantage in the intervention of a grand jury is evident from the fact of so many electing to be summarily tried before a single Judge.

The magistrates who now receive and investigate criminal charges are independent of the people, yet governed by the interests of the community. They are better qualified to sift and weigh the evidence submitted than the ordinary grand juror, and in this respect they are far superior to the magistrates whose committals were first investigated at the Courts of Assize.

That a magistrate will occasionally commit a person where the circumstances do not quite justify the delay, expense, and trouble, which the prisoner would be put to in order to defend himself before a higher tribunal, is perhaps true. But when it is considered that the worst is done, so far as the man's character is concerned, by the public charge before the magistrate, and that an acquittal in open court by a petit jury is a more satisfactory expurgation than the return by a grand jury of a Scotch verdict of "not proven," the trifling expense and delay of a trial should have little weight with innocent men.

And this objection, if it is one, to the abolition of grand juries, can be met by giving to the presiding Judge at the trial a discretionary power of awarding to a discharged prisoner his reasonable expenses, where the facts and circumstances presented do not appear to have justified his committal.

But beyond, and in addition to all the circumstances before mentioned, there is a power before the throne which is able to protect the interests of the prisoner and curb any arbitrary or eccentric tendencies of a magistrate far better than the historic grand jury ever did or can. I refer to the greatest of all grand juries, the public press. A man is no sooner placed under arrest than all the known facts and circumstances connected with the crime are, by the agency of the press, presented to the public. And so great has the power of this unimpanelled grand jury become during the present century, that notwithstanding certain restrictures, the verdict of a jury is generally anticipated, and it is not an uncommon practice for counsel to brief the evidence for the trial from newspaper clippings.

Yet it is owing to this increasing power of the press that another important question relative to the grand jury system has arisen. With the exposition of the multifarious characters and incidents of human life, the press have also exposed not only the existence of public or class prejudices, but a growing tendency towards creating them.

Now, should it happen that grand jurors become influenced by public or class prejudices, the trial will not be forwarded nor the prisoner suffer thereby, no matter how strong the influence may be in favor of the Crown; but should such prejudices favor the prisoner, the power is in the hands of the grand jurors, or a majority of them, to prevent a trial, although the facts pointing towards a criminal act seem clear and are not likely to be disputed.

It is claimed that a very notable instance of this kind occurred in Hamilton not long ago.

The other important question for consideration, therefore, is, whether the grand jury system is likely to become an element in the administration of criminal justice detrimental to the interests of the community.

We may be slow to abolish this ancient institution merely because it has outlived its usefulness; if, however, there is any ground for believing that it not only does not offer any special protection to innocent prisoners, but may be made subservient to an improper administration of the law, the sooner it is abolished the better.

One good effect of abolishing grand juries would be that a better class of men would be available to serve as petit jurors. If the governors of gaols and asylums should miss the visits of the former, it will be because they have been accustomed to put their houses in order to receive them, a circumstance that has perhaps caused only a sleeping security on the part of the public familiar with the report as to good order and cleanliness which invariably follows the expected periodical visits of these grand inquisitors.

Yours, etc.,

Hamilton, Jan. 24th, 1891. GEO. FRED. JELFS.

Proceedings of Law Societies.

COUNTY OF YORK LAW ASSOCIATION.

ANNUAL REPORT OF THE BOARD OF TRUSTEES FOR 1890.

To the Members of the County of York Law Association:

GENTLEMEN—The trustees, in presenting their fifth annual report, congratulate the members upon the continued prosperity of the association.

The membership now numbers 375; 32 new members subscribed for stock during the year.

The fees of seven members residing in Toronto are in arrear; the fees of seven members who have removed from Toronto without withdrawing from the association also remain unpaid.

Two hundred and twenty-three volumes have been added to the library during the year. There are now one thousand nine hundred aud forty-seven volumes of useful books in the library. During the year, Mr. Read, Q.C., the historian of the association, presented to the association a valuable series of

reports, and Mr. Angus MacMurchy procured from the Provincial Governments gifts of the statutes of the different provinces.

Under the direction of the trustees, the librarian lately visited some of the principal libraries in Boston, and made herself acquainted with the system of card cataloguing.

The librarian is now engaged in the preparation of a catalogue which will form an index to the subjects treated in the books contained in the library and to the articles published from time to time in the various legal periodicals.

The trustees have given much consideration to the plans of the new court house, and have made many suggestions to the architect which, if carried into effect, will be of benefit to the public and the profession.

The last consolidation of the Ontario Statutes did not comprise the provisions of the statute R.S.O., 1877, cap. 168, respecting library associations.

Doubts have arisen as to the mode of securing the incorporation of new Law Associations, and the trustees have submitted to the Attorney-General a draft statute which, if passed, will enable new associations to become incorporated without difficulty.

The growth of Toronto and an increased jurisdiction has given rise to an enormous increase of work in the Division Court of the city and county. The work of the Junior Judge has doubled since his appointment five years ago, and unless some relief is soon given him his health must give way.

Litigants are subjected to the greatest inconvenience and hardship owing to the present press of business in the Division Courts, and to the inability of the Junior Judge to hold more frequent sittings of that court.

The trustees, having made careful enquiry, suggest the appointment of a third County County Judge as a necessity. Upon this Judge should be imposed the duty of holding weekly Division Court Sittings in Toronto, and of sitting in chambers every day when not sitting in court.

The trustees suggest that the attention of the Government be called to the present state of affairs, which is well known to many members of the association, and to the necessity for the immediate doption of the suggestion that a third Judge be appointed.

The Board of Trustees, having learned that a proposal was to be made by the registrars of the several divisions of the High Court to have rules passed to secure uniformity of practice in the several divisions, applied for and were kindly furnished with a copy of some of the suggestions made.

While your Board, in the interest of the profession, highly approve of the suggestions made in many, though not in all respects, they are decidedly averse to the rules being amended as suggested, for the following reasons:

1. The inconsistencies of practice have arisen from the disagreement of the officers as to the construction of various rules. The same rule generally and practically is in force in each division; the interpretation is different. Hence what is required is not an amendment of the rule, which again may produce diverse interpretations, but agreement amongst the officials, or if that is impossible, an arbitrary interpretation by some superior.

2. Some of the suggestions made tend towards a further separation rather than a consolidation of the Divisional Courts. The rules as consolidated tend towards a consolidation; and in the opinion of your Board, they are the result of a quasi compact between the Bench and the Bar Associations to remedy the evils that undoubtedly existed before. These rules are suspended by the operation of a rule which was passed merely to postpone the coming into operation of the consolidation until a convenient period. Your Board believe that it would be a violation of that compact to retrograde in any particular, and they take this opportunity of expressing their opinion that the rule suspending the operation of the consolidating rule should be repealed, and that unity and uniformity should be established in all matters.

Arrangements have been made with the county authorities which will make the room adjoining the present library available as a reading-room.

The trustees again record their appreciation of the services of the librarian. Under her care, the books have been kept in good order, the reports have been noted to date, and no books have been lost from the library since its formation.

The historian of the association during the year published the life of Governor Simcoe, another valuable addition to the history of this province.

An extract from the report of the Inspector upon the library of the association accompanies this report.

The trustees record with deep regret the death during the year of two members: Mr. A. J. Cattanach, Q.C., and Mr. J. H. Morris, Q.C.

The particulars required by the by-laws accompany this report as follows:

1. The names of members admitted during the year.
2. The names of members at the date of the report.
3. A list of books contained in the library.
4. A list of books added to the library during the year.
5. A list of periodicals received during the year.
6. A detailed statement of the assets and liabilities of the association at the date of this report, and of the receipts and disbursements during the year.

The treasurer's accounts have been duly audited and the report of the auditors will be submitted to you for approval.

(Sgd.) JOHN HOSKIN, *President.*

December 31st, 1890. WALTER BARWICK, *Treasurer.*

It was resolved that the members of the association are of opinion that the press of work in the Division Court in Toronto necessitates the immediate appointment of a third Judge, and the trustees are requested to forward a copy of their report and this resolution to the Attorney-General.

The following officers were elected for the year 1891: Mr. Moss, Q.C., President; Mr. Kingsmill, Q.C., Vice-President; Mr. W. Barwick, Treasurer; Mr. Armour, Q.C., Curator. Messrs. Bigelow, Q.C., Delamere, Q.C., A. MacMurchy, A. Cassels, and J. T. Small, Trustees. Messrs. Worrell, Q.C., and H. Cassels, Auditors. Mr. F. A. Drake, Secretary.

DIARY FOR FEBRUARY.

1. Sun.....*Sexagesima.* Sir Edw. Coke born, 1552.
2. Mon.....Hilary term commences. Criminal Assizes, Toronto. H.C.J., Q.B.D. and C.P.D. Sittings begin. County Court Non-Jury Sittings in York.
6. Fri.....W. H. Draper, 2nd C.J, of C.P., 1856.
8. Sun.....*Quinquagesima.*
9. Mon.....Union of Upper and Lower Canada, 1841.
10. Tues.....Canada ceded to Great Britain, 1763.
11. Wed.....Ash Wednesday. T. Robertson appointed to Chy. Div., 1887.
14. Sat.....Hilary Term and High Court of Justice Sittings end. Toronto University burned, 1890.
15. Sun.....*1st Sunday in Lent.*
17. Tues.....Supreme Court of Canada sits.
19. Thur.....Chancery Division High Court of Justice sits.
22. Sun.....*2nd Sunday in Lent,*
24. Tues,....St. Matthias.
27. Fri.. .....Sir John Colborne, Administrator, 1838.
28. Sat.....Indian Mutiny began, 1857.

Early Notes of Canadian Cases.

EXCHEQUER COURT OF CANADA.

BURBIDGE, J.] [Jan. 19.

THE QUEEN *v.* THOMAS.

Cancellation of a land patent—33 Vict., c. 3, s. 32, s-s. 4—38 Vict., c. 52, s. 1—Improvidence in granting patent—Indian gratuity, effect of half-breed sharing in.

T., a half-breed, was, on the 15th day of July, 1870, in actual peaceable possession of a lot of land in the Province of Manitoba, previously purchased by him, and of which he had been for some years in undisturbed occupancy. On the 3rd of August, 1871, he shared in the gratuity given to certain Chippewa and Swampy Cree Indians under a treaty then concluded with them, and in the years 1871, 1872, 1873, and 1874, he participated in the annuities payable thereunder. But before taking any monies under the treaty, he enquired of the Commissioner, who acted for Her Majesty in its negotiation, whether by accepting such money he would prejudice his rights to his private property, and was informed that he would not; and when in 1874 he learned for the first time that by reason of his sharing in such annuities he was liable to be accounted an Indian, and to lose his right as a half-breed, he returned the money paid to him in that year. Subsequently his status as a half-breed was recognized by the issue to him in 1876 of half-breed scrip.

Held, that under The Manitoba Act and amendments (33 Vict., c. 3, s. 32, s-s. 4, and 38 Vict., c. 52, s. 1) he was entitled to letters-patent for the lot mentioned.

Aikins, Q.C., and *Culver*, Q.C., for Crown.

Howell, Q.C., and *Cumberland*, for defendant.

BERTRAND *v.* THE QUEEN.

Damages to property from government railway —The government Railway Act, 1881, s. 27 —Claimant's acquiescence in construction of culverts, effect of—Negligence of Crown's servants—Estoppel.

The suppliant sought to recover damages for the flooding of a portion of his farm at Isle Verte, P.Q., resulting from the construction of certain works connected with the Intercolonial Railway. The Crown produced a release under the hand of the suppliant, given subsequent to the time of the expropriation of a portion of his farm for the right of way of a section of the Intercolonial Railway, whereby he accepted a certain sum "in full compensation and final settlement for deprivation of water, fence rails taken, damage by water, and all damages, past, present, and prospective, arising out of the construction of the Intercolonial Railway," and released the Crown "from all claims and demands whatever in connection therewith." It was also proved that although the works which caused the injury were executed subsequent to the date of this release, they were undertaken at the request of the suppliant and for his benefit, and not for the benefit of the railway, and that with respect to part of them, he was present when it was being constructed and actively interfered in such construction.

Held, that he was not entitled to compensation.

2. The Crown is not under an obligation to maintain drains or back-ditches constructed under 52 Vict., c. 13, s. 4.

Pouliot for claimants.

Hogg, Q.C., for the Crown.

BRADY *v.* THE QUEEN.

Petition of right—Demurrer—Personal injuries received on public work— Negligence of Crown's servants—Liability of Crown therefor.

Demurrer to petition of right.

Suppliant alleged in his petition that on a

certain date he was driving slowly along a road in the Rocky Mountain Park, N.W.T., when his buggy came in contact with a wire stretched across the road, whereby the suppliant was thrown from his buggy to the ground and sustained severe bodily injury. He further alleged that the Rocky Mountain Park was a public work of Canada, under the control of the Minister of the Interior and the Governor-in-Council, who had appointed one S. superintendent thereof; that S. had notice of the obstruction to traffic caused by the wire and had negligently failed to remove it, contrary to his duty in that behalf; and that the Crown was liable in damages for the injuries so received by him. The Crown demurred to the petition on the ground that the claim and cause of action were founded in tort, and could not be maintained or enforced.

Held, that the petition disclosed a claim against the Crown arising out of an injury to the person on a public work resulting from the negligence of an officer or servant of the Crown while acting within the scope of his duties and employment, and therefore came within the meaning of 50-51 Vict., c. 16, s. 16 (c), which provides a remedy in such cases.

City of Quebec v. *The Queen*, *ante*, referred to.

Demurrer overruled with costs.

Hogg, Q.C., in support of demurrer.

Chrysler, Q.C., and *Lewis*, contra.

CITY OF QUEBEC *v.* THE QUEEN.

Petition of right—Demurrer—Injury to property resulting from negligence of Crown's servants on public work—Crown's liability therefor—50-51 Vict., c. 16, s. 16 (c.)—Interpretation.

Demurrer to a petition of right.

1. The grounds upon which the petition was founded are as follows: On the 19th of September, 1889, a large portion of rock fell from a part of the cliff alleged to be the property of the Crown, under the citadel at Quebec, blocking up a public thoroughfare in that city, known as Champlain street, to such an extent that communication was rendered impossible between the two ends thereof.

2. The suppliants charged in their petition that this accident was caused by the execution of works by the Crown which had the effect of breaking the flank side of the cliff, the daily firing of guns from the citadel, and the fact that no precautions were taken by the Crown to prevent the occurrence of such an accident. The Crown demurred to the petition on the ground, *inter alia*, that no action will lie to enforce a claim founded on the negligence, carelessness, or misconduct of the Crown or its servants or officers.

Held, there being no allegation in the petition that the property mentioned was a work of defence or other public work, or part of a public work, and it not appearing therein that any officer or servant of the Crown had any duty or employment in connection with the property mentioned, or that the acts complained of were committed by such officers while acting within the scope of their duties or employment, no case was shown by the suppliants in respect of which the court had jurisdiction under the Exchequer Court Act, 50-51 Vict., c. 16, s. 16(c).

3. Section 16 (c) of the said Act is substantially a re-enactment of R.S.C, c. 40, s. 11, and under it the Crown is liable in damages for any death or injury to property on any public work, when such death or injury arises either from the misfeasance or non-feasance of any servant or officer of the Crown while acting within the scope of his duties or employment.

4. The Crown's immunity from liability for personal negligence is in no way altered by section 16 (c) of said Act.

Demurrer allowed with costs, and leave granted to suppliants to amend petition of right.

Hogg, Q.C., in support of demurrer.

Belcourt, contra.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

COURT OF APPEAL.

From 1st Div. Ct., Wentworth.] [Dec. 31.

SAWYER *v.* THOMAS.

Bills of exchange and promissory notes—Cheque—Presentment—Notice of dishonor—Debtor and creditor—Payment.

Where a creditor accepts from his debtor the cheque of a third person, he must, without undue delay, present that cheque for payment, and if it is dishonored notify the defendant of the fact and claim recourse against him on the original

indebtedness. Unless this is done, the creditor must be taken to have accepted the cheque in payment of the debt, and the debtor is discharged.

Judgment of the First Division Court of Wentworth affirmed.

E. Martin, Q.C., for the appellants.

John Crerar, Q.C., for the respondents.

From STREET, J.] [Jan. 13.

HUNTINGDON *v.* ATTRILL.

Judgment—Foreign judgment--Penalty--Action to enforce.

The Courts of this Province will not indirectly enforce the penal laws of a foreign country by entertaining an action founded on a judgment obtained in that foreign country in a penal action.

The court being divided in opinion as to the penal nature of the judgment in question the appeal was dismissed, and the judgment of STREET, J., 17 O.R. 245, affirmed.

N. Kingsmill and *H. Symons* for the appellant.

McCarthy, Q.C., and *A. R. Creelman*, Q.C., for the respondent.

[Jan. 13.

BLACKLEY *v.* KENNEY (No. 2).

Surety—Extending time—Discharge—Notice of suretyship.

This was an appeal by the plaintiff from the judgment of ROBERTSON, J., reported 19 O.R. 169, and came on to be heard before this court (HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A.) on the 29th of May, 1890.

Aylesworth, Q.C., and *W. Macdonald*, for the appellant.

A. C. Galt for the respondents.

The facts are fully stated in the report of the case below and in the reports of previous appeals to this court, 16 A.R. 272, and 16 A.R. 522.

The court allowed the appeal with costs upon the ground (not taken in the court below) that as there was no evidence whatever of the plaintiff's knowledge of the covenant under which the alleged suretyship arose, and as he had no reason to think that the relation of principal and surety existed, his dealings with the debtor did not work a release, assuming that that relationship did exist.

From STREET, J.] [Jan. 13.

GIBBONS *v.* MCDONALD.

Assignments and preferences—Bankruptcy and insolvency—R.S.O. (1887), c. 124, s. 2.

A security for a pre-existing debt, given when the debtor is in insolvent circumstances, cannot be impeached, though working a preference, if it has been taken in good faith and without knowledge of the insolvency.

Johnson v. *Hope*, 17 A.R. 10, and *Molsons Bank* v. *Halter*, 16 A.R. 323, and in the Supreme Court (not yet reported) considered.

Judgment of STREET, J., 19 O.R. 290, affirmed.

Moss, Q.C., and *Hayes*, for the appellant.

Lash, Q.C., and *Mabee*, for the respondent.

From Chy.D.] [Jan. 13.

SIBBALD *v.* GRAND TRUNK RAILWAY CO.

TREMAYNE *v.* GRAND TRUNK RAILWAY CO.

Railways—Level Crossings—Defect in construction—Trespassers — Negligence—Damages—New trial.

Where a railway company in constructing their railway cross an existing highway in a diagonal direction, leaving the road-bed of the line some feet below the level of the highway, they exceed their statutory powers, and are liable to indictment. They are therefore trespassers *ab initio* and chargeable with all injuries resulting even indirectly in consequence of the dangerous condition of the highway to those lawfully using it, and this liability attaches to a company operating the line who have not themselves been concerned in the original improper construction.

Rosenberger v. *Grand Trunk R. W. Co.*, 8 A.R. 482, 9 S.C.R. 311, considered.

Judgment of the Chancery Division, 19 O.R. 164, affirmed, BURTON, J.A., dissenting.

McCarthy, Q.C., and *W. Nesbitt*, for the appellants.

Shepley, Q.C., and *S. W. Burns*, for the respondents.

From County Court, York] [Jan. 13

RADFORD *v.* MACDONALD.

Evidence—Executor and administrator—Corroboration—R.S.O. (1887), c. 61, s. 10.

To enable an opposite or interested party to recover in an action against the estate of a

deceased person it is sufficient if his evidence is corroborated, *i.e.*, strengthened, by evidence which appreciably helps the judicial mind to believe one or more of the material statements or facts deposed to. It is not necessary that the case should be wholly proved by independent testimony.

Parker v. *Parker*, 32 C.P. 127, approved.

The production by the plaintiff, an architect claiming payment for his services in drawing plans and making estimates for the erection of a house, of a memorandum in the deceased's handwriting, showing the rooms and accommodation required and the suggested cost, held (BURTON, J.A., dissenting) sufficient corroboration of the plaintiff's evidence.

Judgment of the County Court of York affirmed.

George Bell for the appellant.

P. H. Drayton for the respondent.

HIGH COURT OF JUSTICE.

Queen's Bench Division.

Div'l Ct.] [Dec. 31.

CARTER *v.* STONE.

Assignment for benefit of creditors—Priority over executions—Purchase money of land sold under mortgage judgment—R.S.O., c. 124 s. 9.

On April 8th, 1890, the plaintiff obtained a judgment for sale of lands by the court to realize the amount of his mortgage and a judgment against the owner of the equity of redemption. On 24th April, 1890, execution creditors of the owner of the equity were made parties in the Master's office. On the 17th May, 1890, the lands were sold. On 9th June, 1890, before the purchase money fell due and before any of the parties had established their claims to it, the owner of the equity of redemption made an assignment for the benefit of his creditors.

Held, that by R.S.O., c. 124, s. 9, the assignee was given precedence as to the purchase money over the executions; in other words, the purchase money passed to him discharged by the statute of any liability to satisfy the executions out of it.

E. T. Malone for the execution creditors.

James Reeve, Q.C., for the assignee.

Div'l Ct.] [Dec. 31.

IN RE FIELD *v.* RICE.

Prohibition — Division Court—Garnishee suit —Money handed by prisoner to constable—Question of fact.

The defendant was arrested, and when taken to the police station handed over the money in his possession to a constable. Creditors of the defendant sought to garnishee this money by Division Court suits. The judge in the Division Court found that the money was handed over voluntarily and held that it could be garnished.

Held, that the question whether the garnishee was indebted to the defendant was a question of fact within the jurisdiction of the inferior court, and that prohibition did not lie.

Du Vernet for the defendant.

S. A. Jones for the plaintiffs.

Chancery Division.

BOYD, C.] [Dec. 5.

SMITH *v.* BENTON.

Canada Temperance Act—Action for liquors sold for use in a county where the Canada Temperance Act was in force—Right to recover—Distinction between those sold before and after a successful vote for the repeal of the Act.

In an action for the price of certain liquors sold for use in a county where the Canada Temperance Act was in force,

Held, following *Pearce* v. *Brooks*, L.R. 1 Ex., at p. 217, that any person who contributes to the performance of an illegal act by supplying a thing with the knowledge that it is going to be used for that purpose cannot recover the price of the thing so supplied, and that the plaintiff could not recover. But

Held, also, that a distinction should be drawn between the liquors sold before the successful vote for the repeal of the Act and between the vote and the revocation of the Order-in-Council bringing the Act into force. The latter were in contemplation of the lawful traffic thereafter expected, and the inference from the facts should not be against the legality of the dealings at this point between the parties, and that the plaintiff was entitled to succeed as to them.

Charles Macdonald for the plaintiff.

N. Mills for the defendant.

BOYD, C.] [Dec. 22.

SCOTT ET AL *v.* SCOTT.

Life insurance—Benevolent society—Endorsement on policy—Devise by will inconsistent with endorsement—Who entitled—Trustee—Executors—R.S.O., c. 136, s. 5.

J.H.S. took out a policy of life insurance with the Order of Foresters, a benevolent society, conditioned to be paid "To the widow or orphans or personal representatives of the said brother (J.H.S.)," and endorsed and signed on it, "I hereby direct that the endowment benefit due at my death on this endowment certificate shall be paid to my daughter, L.A.S." Subsequently, by his will, he devised to his executors all the rest of his estate, "Including the proceeds of a life insurance policy in the Independent Order of Foresters for the sum of $3,000," on certain trusts. After his death the proceeds of the policy were claimed by his executors and by his widow, who had been appointed guardian to the infant daughter, L.A.S.

Held, that the policy was within the meaning of R.S.O., c. 136, s. 5. That the effect of the endorsement was to withdraw the money from the control of the insured, so that upon his death it did not "form part of his estate." That such money was, however, payable "under the policy," and he could appoint trustees to receive and invest it where the person entitled was an infant, and that such trustee should be distinguished from his executors.

Held, also, that as the testator had directed his executors to hold this and other moneys in trust with directions repugnant to the absolute right of the daughter (L.A.S.), it would lead to confusion to let this money be mingled with other estate moneys in the hands of the executors, and that they were not competent trustees within the meaning of the Act (s. 11); and that as the widow had been duly appointed guardian for the infant daughter, and had given security for the due performance of her duties and the proper application of the money, she should be entrusted with it rather than the executors, and that the will was invalid so far as it assumed to deal with the policy.

D. M. Christie for the petitioners.

W. M. Douglas for the respondent.

BOYD, C.] [Jan. 6.

BEATTY *v.* DAVIS.

Gaming rights—Navigable water.

Ownership of land or water (though not enclosed) gives to the proprietor, under the common law, the sole and exclusive right to fish, fowl, hunt, or shoot, within the precincts of that private property, subject to the game laws when pertinent. And this exclusive right is not diminished by the fact that the land may be covered by navigable water. The right of navigation, when it exists, is to be used so as not to unnecessarily disturb or interfere with the enjoyment of the subordinate private rights of fishing and shooting. The public can only use the water for *bona fide* purposes of navigation, but not so as to occupy the water for the purposes of fishing or fowling when the soil underneath is the private property of one who objects to such occupation.

McCarthy, Q.C., and *H. S. Osler*, for the plaintiff.

Patterson, Q.C., for the defendant.

Practice.

Court of Appeal.] [Jan. 13.

MCNAIR *v.* BOYD.

Costs—Order of judge as to, under Rule 1172—"Good cause"—Allowing appeal without costs.

The words of Rule 1172, "The Judge or court makes no order respecting the costs," do not confer any wholly discretionary power on the Judge, but must be read with Rule 1170, as to an order made "for good cause."

And where, in an action in a County Court for damages for bodily injuries sustained by the plaintiff through the alleged negligence of the defendant, the jury found for the plaintiff and assessed the damages at $30, and added that the defendant should pay "the Court expenses," and the Judge made an order that the defendant should have full County Court costs, and that the defendant should not have the set-off provided by Rule 1172, because, in his opinion, the injury done to the plaintiff was attended by circumstances of great aggravation, and the jury ought to have given larger damages,

Held, OSLER, J.A., dissenting, that these were not circumstances which constituted "good

cause" within the meaning of Rule 1170; for the very matters relied upon by the Judge as "good cause" had been passed upon adversely by the jury; and therefore the costs should follow the event under Rule 1172.

Becket v. *Stiles*, 5 Times L.R. 88, followed.

Per OSLER, J.A.: The English cases where the question is, whether the successful party shall be deprived of costs altogether or shall have less costs than would ordinarily follow the recovery, do not apply. The Judge has power under Rule 1172 to order for good cause that the plaintiff shall have his costs upon the scale of the court in which the action has been brought, and not upon that of the court which would have had jurisdiction to the amount of the damages actually awarded. In this case the plaintiff had reasonable ground for bringing her action in the higher court, and there was, therefore, good cause for making the order.

Under the circumstances of the case, the appeal was allowed without costs; but

Per BURTON, J.A.: The only reason for withholding costs from the successful appellant was that the case was the first one that had come before the court upon the new rule, about which there had been much difference of opinion.

J. B. Clarke, Q.C., for the appellant.

Wm. Kingston, Q.C., for the respondent.

BOYD, C.] [Jan. 13.

GILMOUR *v.* MAGEE.

Writ of summons- Renewal of—Leave to serve renewed writ—Rules 238, 442—Forms 92, 124—Grounds for renewal—Discretion—Jurisdiction of local judge.

A writ of summons cannot be renewed without a Judge's order, and to satisfy the terms of Rule 238 leave to serve the writ after the lapse of a year should also be obtained.

But where an order for renewal was obtained and the writ renewed pursuant thereto, and served without any order for leave to serve, it was dealt with under Rule 442 and the service confirmed. Inconsistency in Rule 238 and Forms Nos. 92 and 124 pointed out. Where the delay in serving the writ arose from the pendency of an appeal in an action between the same parties, the decision of which would affect the plaintiff's course, and service was not made till that appeal was decided,

Held, that a local Judge's discretion in extending the time for service should not be interfered with.

A local Judge has jurisdiction under Rule 238.

St. Louis v. *O'Callaghan*, 13 P.R. 322, followed.

D. Armour for the plaintiff.

Middleton for the defendant.

BOYD, C.] [Jan. 14.

FLETT *v.* WAY.

Order—Power of Judge or Master-in-Chambers to rescind—Ex parte order—Order made after notice upon default—Rule 536.

A Judge or the Master-in-Chambers has power to reconsider a matter which has been brought before him *ex parte*, on the application of an opposing party; and he can also open up a matter in respect of which an order has been made after notice and upon default to show cause, if he is satisfied that opposition was intended and that any injustice has arisen.

Semble, that if necessary the words "*ex parte* order" in Rule 536 may be read so as to cover cases going by default, where through some slip cause has not been shown.

Titus for the plaintiff.

J. M. Clark for the defendant.

Chy. Div'l Ct.] [Jan. 19.

DUFFY *v.* DONOVAN.

Security for costs—Plaintiff out of jurisdiction—Defendants possessed of plaintiff's funds—Joint trustees—Discretion of court—Appeal—Acquiescence—Waiver.

In cases where the defendants are possessed of funds belonging to the plaintiff, the discretion of the court will be exercised against hampering the plaintiff by ordering security for costs.

The plaintiff, who lived out of the jurisdiction and had lately attained his majority, sued the defendants for an account and payment of funds which he alleged they held as joint trustees for him, he having had no account. The receipt of trust funds by both defendants was proved, but one defendant put the blame of their not being forthcoming on the other, and swore that he had a good defence to the action, though he did not disclose it. The other defendant did not defend.

Held, not a case in which the plaintiff should be required to give security for costs.

Compliance with an order for security for costs by giving security under protest, and with notice to the opposite party that it was under protest, and proceeding in the action,

Held, not an acceptance of and acquiescence in the order which waived the right of appeal.

Foy, Q.C., for the plaintiff.

C. Millar for the defendant, Haldane.

ROSE, J.] [Jan. 28.

MAHONEY *v.* HORKINS.

Mortgage action—Appearance disputing amount claimed—Statement of claim not required—Præcipe judgment—Rule 718—Motion to Court for judgment—Rules 551 and 753.

In a mortgage action for payment, foreclosure, etc., the defendant entered an appearance in which she stated that she did not require the delivery of a statement of claim, and added, "Take notice that the defendant disputes the amount claimed by the plaintiff."

Held, that the record was then complete, and that a statement of claim was unnecessary and irregular.

Peel v. *White*, 11 P.R. 177, approved and followed.

Held, also, that the case was not within Rule 718, and the plaintiff could not obtain a judgment on præcipe.

Upon motion to the Court upon the record as contained in the writ of summons and the appearance, an order was made under Rules 551 and 753, directing a reference to take the mortgage account, and directing that if the referee should find any amount due to the plaintiff, the plaintiff should have judgment according to the writ with costs.

Douglas Armour for the plaintiff.

Masten for the defendant.

Chy. Div'l Ct.] [Feb. 3.

HEASLIP *v.* HEASLIP.

Costs—Taxation—Appeal to Master under Rule 854—Order upon appeal—Further appeal from order, to Judge—Appeal from certificate of taxing officer—"Costs between solicitor and client"—"Costs as between solicitor and client."

The decision of FERGUSON, J., 14 P.R. 21, affirmed.

C. Millar for the plaintiff.

A. Hoskin, Q.C., for the defendant.

MANITOBA.

KILLAM, J.] [Jan. 7.

GRANT *v.* HUNTER.

Trial of issue under Real Property Act—Insufficient evidence of identity of plaintiff's grantor.

At the trial of an issue as to whether the plaintiff acquired by conveyance from the patentee an estate in fee simple as against the defendants, the defendants' counsel, at the request of the counsel for the plaintiff, produced the letters patent by which, after reciting that "Bernard Vivier, son of Michael Vivier, in his lifetime, of the Parish of St. Francois Xavier and Baie St. Paul, in the Province of Manitoba," had applied for the grant of the lands therein mentioned, and had been found entitled thereto, and that Bernard Vivier had since died intestate, leaving him surviving "Michael Vivier, of the said Parish of St. Francois Xavier and Baie St. Paul, his father, and sole heir-at-law," the lands were granted to Michael Vivier in fee simple.

The plaintiff produced a conveyance to her of the lands, purporting to be made by "Michael Vivier, of Edmonton, in the Northwest Territories of Canada, father and sole heir-at-law of Bernard Vivier, of the Parish of St. Francois Xavier, in the Province of Manitoba, deceased." This deed was executed by a marksman, the name being written as "Michel Vivier." At the trial a witness to this deed was called and deposed that he went for Vivier and told him plaintiff's husband wanted him to sign a deed. Witness did not know Vivier, and had never seen him before; he stated that Vivier knew nothing of the matter, or even that he owned the land, and told him that he had not sold it. Another witness stated he had known Bernard Vivier, but did not know whether he was then alive or dead; he did not know his father, but stated he knew a Michael Vivier, who formerly lived in St Francois Xavier, but went to Edmonton in 1866. The defendants did not offer any evidence, but rested their case on the objection that there was not sufficient evidence of the identity of the plaintiff's grantor with the patentee.

Held, that the evidence was not sufficient to entitle plaintiff to recover. Plaintiff non-suited.

J. S. Ewart, Q.C., and *C. W. Bradshaw*, for plaintiffs.

H. M. Howell, Q.C., and *T. D. Cumberland*, for defendants.

KILLAM, J.]

WARD *v.* BRAUN.

Set-off of costs—Certificate to prevent.

Motion for certificate to prevent a set-off of costs. See Administration of Justice Act, 48 Vict., c. 17, s. 133, s-s. 2, as amended by 49 Vict., c. 25, s. 17, as to taxing costs in case an action of the proper competence of the County Court be brought in the Court of Queen's Bench.

Plaintiff sued in the Q.B. and recovered a verdict for $116.15.

Held, that the onus was upon the plaintiff to bring out in evidence any facts upon which the certificate might be based. Placing upon plaintiff's services nearly the full value claimed, and allowing credits admitted by him, the case was within the jurisdiction of the County Court. Certificate refused.

J. S. Ewart, Q.C., and *C. P. Wilson*, for plaintiff.

N. F. Hagel, Q.C., and *G. Davis*, for defendant.

TAYLOR, C.J.] Jan. 8.

WHITE *v.* THE MUNICIPALITY OF LOUISE.

By-law stopping up road allowance—Application to quash—Notice insufficient—Estoppel—Question of compensation.

W. applied under section 258 of the Municipal Institutions Act, 53 Vict., c. 51, Man., 1890, to quash a by-law passed by defendant municipality, stopping up an original road allowance and selling the same to an adjoining owner.

The notice given was not dated; it was to the effect that the Council at their next meeting, "on the first day of September next," intended to pass a by-law to close a portion of the original road allowance.

The by-law passed not only closed the road, but provided for selling same to an adjoining owner. Section 435 of the Municipal Institutions Act provides that "No Council shall pass a by-law . . . for selling any original allowance for road, until written or printed notices have been posted up," etc.

Held, that notice being given was a condition precedent to the right to pass the by-law. That applicant, by attending the meeting of the Council, and opposing the passing of the by-law, was not estopped from taking exception to the want of notice of the by-law actually passed.

That providing compensation is not a condition precedent to the passing of a by-law to close a road.

Section 440 of the Act provides, "No Council shall close up any public road . . . . whereby any person will be excluded from ingress or egress . . . . unless the Council, in addition to compensation, also provide some other convenient road," etc. The applicant had another means of access than the road closed up.

Under such circumstances, to hold that another road must be provided would be most unreasonable. It is only where a person would be, by the closing of the road, excluded from all ingress and egress to or from his land, that he can demand some other convenient road or way of access. If he had access otherwise than by the closed road, but not so convenient, it is a case for compensation.

By-law quashed, with costs.

F. C. Wade and *A. Wheeller* for applicant.

J. Campbell, Q.C., for municipality.

KILLAM, J.] [Jan. 19.

RE STARK & STEPHENSON.

Trial of issue under Real Property Act—Assignment and conveyance from same grantor—Notice—Question of priorities.

On Nov. 16, 1889, McKay, who was entitled to a conveyance in fee simple from trustees of a town site, on payment of certain monies, executed an assignment of his interest to Stark and Isbister; they filed the assignment with the trustees on Nov. 20th, 1889, and received from the trustees a deed bearing date Nov. 20th, 1889, which was registered on Jan. 27th, 1890. On Nov. 20th, 1889, McKay executed a conveyance to Stephenson, which was registered on Nov. 21st, 1889.

On Stark and Isbister applying to bring the land under the Real Property Act, Stephenson entered a caveat, and an issue was directed to determine whether Stark and Isbister, the plaintiffs in the issue, acquired the interest of McKay in the land as against Stephenson, the defendant in the issue.

On the trial it was shown that defendant had some notice of the negotiations with plaintiffs prior to the execution of the transfer to them, and that there was some verbal arrangement for the transfer. Defendant forbore to make any enquiry of plaintiffs, but went to McKay

and asked him if he had given any written agreement to plaintiffs, and McKay told him that he had not done so.

Held, that there was not sufficient proof of actual notice to defendant of the assignment to plaintiffs to defeat his priority of registration. By the execution of the first assignment, as between McKay and the plaintiffs, the latter became entitled to his interest in the contract with the trustees, and to acquire the land from them. As between them and the defendant, the plaintiffs were the first assignees of the contract, and had become entitled to obtain the legal estate.

Except, then, for the effect of the Registry Act, the issue should be found for the plaintiffs. A second assignment, in proper form, if first registered without notice of the previous one, would take priority, even though the first assignee should have completed the purchase and acquired the legal estate.

There was not, on the deed, an affidavit of execution by the grantee.

Held, that, notwithstanding that, the deed was properly registered.

H. M. Howell, Q.C., for plaintiffs.

J. S. Ewart, Q.C., for defendant.

TAYLOR, C.J.] [Jan. 21.

JAMES *v.* BELL.

Injunction to restrain issue of tax sale deed—Costs—Sale rescinded by municipality.

The plaintiff, owner of land sold for taxes, filed a bill against the purchaser, and the mayor and secretary-treasurer of the town, to restrain the issue of a deed to the purchaser. The principal objection taken was that no by-law had ever been passed authorizing the sale. Before the motion for injunction came on for hearing, the sale was rescinded by the Council.

Held, that, as it was shown by plaintiff on his bill, that no by-law had been passed, the issuing of the deed could not prejudice the owner's right to set aside the sale, even after the deed had been issued.

Ryan *v.* Whelan, 6 Man.R., 565, followed.

The plaintiff was not justified in applying for the injunction against the mayor and treasurer, and they were entitled to their costs of the motion.

J. D. Cameron for plaintiff.

C. P. Wilson for defendants.

KILLAM, J.] [Jan 24.

SAWYER *v.* BASKERVILLE.

Sale of machinery—Possession resumed by vendors—Re-sale—Bill to enforce lien for balance due.

The plaintiffs agreed to sell, and defendants to buy, a threshing machine and outfit, the property not to pass until payment; terms to be part cash and part notes, plaintiffs to have a lien on defendants' farm for balance due. The machine was delivered, but defendants considered it did not work according to the warranty which they alleged was given them, and they returned the machine to plaintiffs' agent, refusing to make any payment or to sign the notes. The plaintiffs took the machine and re-sold it; they then filed a bill seeking to charge defendants with the difference, asking for an order for payment and that the balance due might be declared a charge on defendants' lands.

Bill dismissed without costs, and without prejudice to any action at law for breach of the contract. Decree to contain a declaration that plaintiffs had no charge on defendants' lands. Plaintiffs might bring an action at law for damages for refusing to accept and pay for the machinery, but not for the price, as such, they having sold the machinery.

In re-selling the machinery the plaintiffs must be taken to have elected to rescind the contract, and to rely upon their claim for damages.

J. A. M. Aikins, Q.C., and *W. H. Culver*, Q.C., for plaintiffs.

J. S. Ewart, Q.C., and *J. E. Porter*, for defendants.

TAYLOR, C.J.] [Jan. 26.

RE LAKE WINNIPEG TRANSPORTATION CO.

Petition to wind up company—Preliminary objections—Charter not ultra vires—Execution against company, "unsatisfied."

An execution creditor applied to wind up the company. The company did not appear, but several other creditors opposed the application. The petitioner took the objection, that on the application for the winding up order, only the company could be heard to oppose it; creditors could be heard on the appointment of a liquidator.

Held: Objection invalid. The fact that the petitioner was a subsequent execution creditor was no bar to his filing the petition.

The objection was taken that since the passing of The Winding-up Amendment Act, 1889, no order could be made for winding-up a company in Manitoba; as to such companies The Winding-up Act, R.S.C., c. 129, was, by reason of the third section of the Amendment Act, no longer in force.

Held, that the provisions of The Winding-up Amendment Act, 1889, which are not made applicable to proceedings under The Winding-up Act, do not, in consequence of section 3 of the amending Act, apply to cases in which a petition has been presented to wind up a company incorporated in Manitoba. As to such companies the court has only the powers conferred by The Winding-up Act, R.S.C., c. 129, and those given by the amending Act, expressly made applicable to proceedings under the former Act.

The objects of the company were "Lake and river transportation of passengers and goods within the Province of Manitoba, cutting of logs, manufacture of lumber, etc., catching and dealing in fish, trading and dealing in general merchandise." It was objected that the charter of the company dealt with navigation and shipping and inland fisheries, matters which were reserved for the Parliament of Canada, and that the company was not one which could be incorporated by the Lieutenant-Governor under Con. Stat. Man., c. 9, s. 226.

Held, that the purposes for which the company was formed were within provincial authority, and did not infringe upon matters reserved for the Parliament of Canada; and that the purposes for which the company was incorporated were within the definition "Trading Company" in The Winding-up Act, s. 2, s-s. (c).

The sheriff fixed the 3rd of January, 1891, for the sale under the execution in his hands; it was shown that the writ was unsatisfied on the 30th December, 1890.

By section 5, s-s. (h) of The Winding-up Act, a company is to be deemed insolvent "If it permits any execution issued against it . . . to remain unsatisfied until within four days of the time fixed by the sheriff for the sale."

Held, that the writ in question was one unsatisfied within four days of or before the day of sale, and that the company was insolvent. Order made to wind up the company.

T. G. Mathers for petitioners.

J. S. Hough and *W. F. McCreary* for consenting creditors.

J. W. E. Darby and *J. D. Cameron* for opposing creditors.

BAIN, J.] [Jan. 26.

MCKAY *v.* NANTON.

Real Property Act—Preliminary objections to petition—Misnomer—Address for service.

The caveatee, Nanton, having applied for a certificate of title, McKay filed a caveat and petition for the purpose of establishing his claim to the lands.

The objection was taken that in the caveat the name of the applicant was stated to be Augustus Meredith "Newton," the proper name of applicant being Augustus Meredith Nanton.

Held, that the caveat was not invalid on that account; the mistake was only an irregularity that did not affect the substantial justice of the proceeding.

Another objection was, that the petition did not show that the lands had not been registered under the Act.

Held, that as the petition alleged that the caveatee had applied to bring the land under the Act, and the petitioner had filed a caveat forbidding this, it would be assumed that the caveat was lodged before the registration of the certificate of title.

By the Real Property Act, 1889, s. 130, sub.-sec. 8, it is provided that every caveat "shall state some address or place within the Province of Manitoba, at which notices and proceedings relating to such caveat may be served." Schedule "O" to the Act gives a form as follows: "I appoint . . . . as the place at which notices and proceedings thereto may be served." The caveat filed in this case was as follows: "I forbid the bringing of such lands under the operation of the Real Property Act, 1889, appoint A. N. M., Commissioner of Railways' Office, Winnipeg, my agent, on whom notices and proceedings thereto may be served."

Held, that "the Commissioner of Railways' Office, Winnipeg," was merely descriptive of the person named and could not be taken to be the place at which service might be made. The direction in the statute must be deemed to be imperative, and a party seeking the benefit of the statute must comply with it strictly.

The petition cannot be entertained, but the dismissal should be without prejudice to the caveator's right to apply to file another caveat.

C. P. Wilson for caveator.

J. H. Munson for caveatee.

BAIN, J.] [Jan. 29.

DOUGALL *v.* LEGGO.

Prohibition—Unsettled account—Right to abandon excess beyond amount within jurisdiction of County Court.

Application for writ of prohibition to County Judge.

By the County Court Act, 1887, s. 41, s-s. 2, the County Court has jurisdiction in "all personal actions for claims and demands of debt, account, etc., when the amount or balance payable does not exceed $250." By section 45, "no greater sum than $250 shall be recovered in any action for the balance of an unsettled account, nor shall any action for such balance be sustained when the unsettled account forming the subject matter to be investigated in the whole exceeds $400."

Plaintiff issued a writ of attachment against defendant, claiming $573 for rent of hack and repairs to same. At the trial plaintiff abandoned the excess over $250, and judgment was entered for that amount; an objection that the amount of the claim was beyond the jurisdiction of the court was overruled.

On an application for a writ of prohibition,

Held, that the account sued for was an unsettled one. Such an action, if commenced by an ordinary writ, could not be maintained But where the action was commenced, as in this case, by writ of attachment under section 164, it would be maintainable. By section 174, it is provided that "no plaintiff shall divide any cause of action . . . . but any plaintiff having a cause of action above the value of $250, for which an attachment might be issued if the same were not above the value of $250, may abandon the excess, and upon proving his case may recover to an amount not exceeding $250." This section is not affected by the restriction in section 45.

Rule *nisi* discharged with costs.

F. H. Phippen for plaintiff.

Ghent Davis and *R. L. Ashbaugh* for defendant.

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F. MACKELCAN, Q.C. J. H. FERGUSON, Q.C.

W. R. MEREDITH, Q.C. N. KINGSMILL, Q.C.

This notice is designed to afford necessary information to Students-at-Law and Articled Clerks, and those intending to become such, in regard to their course of study and examinations. They are, however, also recommended to read carefully in connection herewith the Rules of the Law Society which came into force June 25th, 1889, and September 21st, 1889, respectively, copies of which may be obtained from the Secretary of the Society, or from the Principal of the Law School.

Those Students-at-Law and Articled Clerks, who, under the Rules, are required to attend the Law School during all the three terms of the School Course, will pass all their examinations in the School, and are governed by the School Curriculum only. Those who are entirely exempt from attendance in the School will pass all their examinations under the existing Curriculum of The Law Society Examinations as heretofore. Those who are required to attend the School during one term or two terms only will pass the School Examination for such term or terms, and their other Examination or Examinations at the usual Law Society Examinations under the existing Curriculum.

Provision will be made for Law Society Examinations under the existing Curriculum as formerly for those students and clerks who are wholly or partially exempt from attendance in the Law School.

Each Curriculum is therefore published herein accompanied by those directions which appear to be most necessary for the guidance of the student.

CURRICULUM OF THE LAW SCHOOL, OSGOODE HALL, TORONTO.

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

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

The School is established by the Law Society of Upper Canada, under the provisions of rules passed by the Society with the assent of the Visitors.

Its purpose is to promote legal education by affording instruction in law and legal subjects to all Students entering the Law Society.

The course in the School is a three years' course. The term commences on the fourth Monday in September and closes on the first Monday in May; with a vacation commencing on the Saturday before Christmas and ending on the Saturday after New Year's Day.

Students before entering the School must have been admitted upon the books of the Law Society as Students-at-Law or Articled Clerks. The steps required to procure such admission are provided for by the rules of the Society, numbers 126 to 141 inclusive.

The School term, if duly attended by a Student-at-Law or Articled Clerk is allowed as part of the term of attendance in a Barrister's chambers or service under articles.

The Law School examinations at the close of the School term, which include the work of the first and second years of the School course respectively, constitute the First and Second Intermediate Examinations respectively, which by the rules of the Law Society, each student and articled clerk is required to pass during his course; and the school examination which includes the work of the third year of the School course, constitutes the examination for Call to the Bar, and admission as a Solicitor.

Honors, Scholarships, and Medals are awarded in connection with these examinations. Three Scholarships, one of $100, one of $60, and one of $40, are offered for competition in connection with each of the first and second year's examinations, and one gold medal, one silver medal, and one bronze medal in connection with the third year's examination, as provided by rules 196 to 205, both inclusive.

The following Students-at-Law and Articled Clerks are exempt from attendance at the School.

1. All Students-at-Law and Articled Clerks attending in a Barrister's chambers or serving under articles elsewhere than in Toronto, and who were admitted prior to Hilary Term, 1889.

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

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

In regard to all other Students-at-Law and Articled Clerks, attendance at the School for one or more terms is compulsory as provided by the Rules numbers 155 to 166 inclusive.

Any Student-at-Law or Articled Clerk may attend any term in the School upon payment of the prescribed fees.

Students and clerks who are exempt, either in whole or in part, from attendance at The Law School, may elect to attend the School, and to pass the School examinations, in lieu of those under the existing Law Society Curriculum. Such election shall be in writing, and, after making it, the Student or Clerk will be bound to attend the lectures, and pass the School examination as if originally required by the rules to do so.

A Student or Clerk who is required to attend the School during one term only, will attend during that term which ends in the last year of his period of attendance in a Barrister's Chambers or Service under Articles, and will be entitled to present himself for his final examination at the close of such term in May, although his period of attendance in Chambers or Service under Articles may not have expired. In like manner those who are required to attend during two terms, or three terms, will attend during those terms which end in the last two, or the last three years respectively of their period of attendance, or Service, as the case may be.

Every Student-at-Law and Articled Clerk, before being allowed to attend the School, must present to the Principal a certificate of the Secretary of the Law Society shewing that he has been duly admitted upon the books of the Society, and that he has paid the prescribed fee for the term.

The Course during each term embraces lectures, recitations, discussions, and other oral

methods of instruction, and the holding of moot courts under the supervision of the Principal and Lecturers.

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

The subjects and text-books for lectures and examinations are those set forth in the following Curriculum :

FIRST YEAR.

Contracts.

Smith on Contracts.
Anson on Contracts.

Real Property.

Williams on Real Property, Leith's edition.

Common Law.

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

Equity.

Snell's Principles of Equity.

Statute Law.

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

SECOND YEAR.

Criminal Law.

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

Real Property.

Kerr's Student's Blackstone, Book 2.
Leith & Smith's Blackstone.
Deane's Principles of Conveyancing.

Personal Property.

Williams on Personal Property.

Contracts and Torts.

Leake on Contracts.
Bigelow on Torts—English Edition.

Equity.

H. A. Smith's Principles of Equity.

Evidence.

Powell on Evidence.

Canadian Constitutional History and Law.

Bourinot's Manual of the Constitutional History of Canada. O'Sullivan's Government in Canada.

Practice and Procedure.

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

Statute Law.

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

THIRD YEAR.

Contracts.

Leake on Contracts.

Real Property.

Dart on Vendors and Purchasers.
Hawkins on Wills.
Armour on Titles.

Criminal Law.

Harris's Principles of Criminal Law.
Criminal Statutes of Canada.

Equity.

Lewin on Trusts.

Torts.

Pollock on Torts.
Smith on Negligence, 2nd edition

Evidence.

Best on Evidence.

Commercial Law.

Benjamin on Sales.
Smith's Mercantile Law.
Chalmers on Bills.

Private International Law.

Westlake's Private International Law.

Construction and Operation of Statutes.

Hardcastle's Construction and Effect of Statutory Law.

Canadian Constitutional Law.

British North America Act and cases thereunder.

Practice and Procedure.

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

Statute Law.

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

During the School term of 1890-91, the hours of lectures will be 9 a.m., 3.30 p.m., and 4.30 p.m., each lecture occupying one hour, and two lectures being delivered at each of the above hours.

Friday of each week will be devoted exclusively to Moot Courts. Two of these Courts will be held every Friday at 3.30 p.m., one for the Second year Students, and the other for the Third year Students. The First year Students will be required to attend, and may be allowed to take part in one or other of these Moot Courts.

Printed programmes showing the dates and hours of all the lectures throughout the term, will be furnished to the Students at the commencement of the term.

GENERAL PROVISIONS.

The term lecture where used alone is intended to include discussions, recitations by, and oral examinations of, students from day to day, which exercises are designed to be prominent features of the mode of instruction.

The statutes prescribed will be included in and dealt with by the lectures on those subjects which they affect respectively.

The Moot Courts will be presided over by the Principal or the Lecturer whose series of lectures is in progress at the time in the year for which the Moot Court is held. The case to be argued will be stated by the Principal or Lecturer who is to preside, and shall be upon the subject of his lectures then in progress, and two students on each side of the case will be appointed by him to argue it, of which notice will be given at least one week before the argument. The decision of the Chairman will be pronounced at the next Moot Court, if not given at the close of the argument.

At each lecture and Moot Court the roll will be called and the attendance of students noted, of which a record will be faithfully kept.

At the close of each term the Principal will certify to the Legal Education Committee the names of those students who appear by the record to have duly attended the lectures of that term. No student will be certified as having duly attended the lectures unless he has attended at least five-sixths of the aggregate number of lectures, and at least four-fifths of the number of lectures of each series during the term, and pertaining to his year. If any student who has failed to attend the required number of lectures satisfies the Principal that such failure has been due to illness or other good cause, the Principal will make a special report upon the matter to the Legal Education Committee. For the purpose of this provision the word "lectures" shall be taken to include Moot Courts.

Examinations will be held immediately after the close of the term upon the subjects and text books embraced in the Curriculum for that term.

The percentage of marks which must be obtained in order to pass any of such examinations is 55 per cent. of the aggregate number of marks obtainable, and 29 per cent. of the marks obtainable on each paper.

Examinations will also take place in the week commencing with the first Monday in September for students who were not entitled to present themselves for the earlier examination, or who having presented themselves thereat, failed in whole or in part.

Students whose attendance at lectures has been allowed as sufficient, and who have failed at the May examinations, may present themselves at the September examinations at their own option, either in all the subjects, or in those subjects only in which they failed to obtain 55 per cent. of the marks obtainable in such subjects. Students desiring to present themselves at the September examinations must give notice in writing to the Secretary of the Law Society, at least two weeks prior to the time fixed for such examinations, of their intention to present themselves, stating whether they intend to present themselves in all the subjects, or in those only in which they failed to obtain 55 per cent. of the marks obtainable, mentioning the names of such subjects.

Students are required to complete the course and pass the examination in the first term in which they are required to attend before being permitted to enter upon the course of the next term.

Upon passing all the examinations required of him in the School, a Student-at-Law or Articled Clerk having observed the requirements of the Society's Rules in other respects, becomes entitled to be called to the Bar or admitted to practise as a Solicitor without any further examination.

The fee for attendance for each Term of the Course is the sum of $10, payable in advance to the Secretary.

Further information can be obtained either personally or by mail from the Principal, whose office is at Osgoode Hall, Toronto, Ontario.