DIARY FOR MARCH.

1. Sat ...St. David's day.
2. Sun. ..Quadragesima.
3. Mon....Treaty of San Stephano signed, 1878.
4. Tues ..Court of Appeal sits. County Court sittings for York begin.
6. Thur...York changed to Toronto, 1834,
9. Sun....2nd Sunday in Lent.
16. Sun. ..3rd Sunday in Lent.
17. Mon. ..St. Patrick's Day.
18. Tues ..Completion of Suez Canal, 1869.
19. Wed...Opening 1st Ottoman Parliament, 1877.
23. Sun....4th Sunday in Lent. Sir George Arthur, Lieut.-Gov. U. C., 1838.
28. Fri....Canada ceded to France, 1632.
29. Sat ...B. N. A. Act assented to, 1867.
30. Sun. ...5th Sunday in Lent. Lord Metcalfe, Gov.-General, 1843.

CONTENTS.

Canada Law Journal.

Toronto, March, 1879.

The subtle leaven of Equity is pervading the Common Law Courts. A new development of the maxim which Chancery delights to honour that "Equality is Equity," may be found in the judgment on *Regina* v. *Wilson*, 43 U. C. R. 583, where it is held that "a superior person" has no exceptional privileges in this Province over the common run of litigants, so as to justify the Court in awarding a criminal information at his instance, and for his benefit.

One by one the complexities of the Mechanics' Lien Act are being solved by the judges. The Chancellor, the other day, thought that, when the contract price was payable by instalments, a bill could be filed when the first payment was due, and that application could be made in that suit to be allowed the other instalments as they fell due. He thought this a more merciful course, than requiring a bill to be filed as each payment accrued due.

A correspondent adverts to the fact that, in glancing over the earlier volumes of Grant's reports, he came across a passage which is pertinent to this day, touching the singular fatality which compels Chancery clerks to leave out dates in making up briefs. In 1855, V. C. Spragge, in *Donovan* v. *Lee*, 5 Gr. 352, is thus reported: "While alluding to these defects in this brief, I may refer to the common practice of omitting in briefs the dates of pleadings, and of the taking of depositions. The absence of these dates often leaves facts uncertain and obscure." How many times since has the same observa-

tion been made from the bench! How long will the patient judges abstain from meting out a punishment which would at once eradicate the evil—*i.e.*, direct that for all such slovenly briefs, costs be disallowed.

In a case in the St. Louis Circuit Court a few days since, defendant's counsel assailed the amended petition of plaintiff as "without backbone or bowels," and the Court sustaining the objection, plaintiff took a non-suit before the case reached the jury. Plaintiff's attorney then prayed the Court to set aside the non-suit and grant a new trial thus pathetically: "The Court erred in permitting one of the counsel for the defence to grossly abuse and stigmatize plaintiff's pleadings in the presence of the jury, the Court having good reason to believe the motive which influenced counsel so to do was for the purpose of holding plaintiff's attorney up before the jury in a ridiculous light, thereby scandalizing the proceedings and arousing the resentment of the one attacked, and diverting his mind and attention from a proper consideration of the trial."

A decision of considerable importance has recently been given by Vice-Chancellor Proudfoot in *Re Ford*, which was a case stated under the Vendor and Purchaser Act. A testator devised certain land "with power to the executors herein mentioned to sell, and invest the proceeds," the devisee to receive the interest during his life, and after his death the proceeds to be divided among the family of the testator; and in the clause appointing the executors, the words "to see my will carried into effect" were added. The Vice-Chancellor held that the effect of the will was to vest in the executors "not a bare power, but a power coupled with an interest, vested in them in the character of executors, and, therefore, attached in this will to the office of executors," and that one executor having died, the surviving executor could nevertheless make a good title to the land in the purchaser. A full report of the case will appear next month.

The publishers of the weekly *Legal News* announce that it has been found impossible to continue the publication of that journal, owing to the want of sufficient support to meet the necessary expenses. The publishers speak of a difficulty in reconciling the conflicting wishes of the different Provinces as to the manner in which the space should be occupied so as to be most useful to them. We appreciate the difficulties of their position. We have at various times been urged to do numerous things which it was thought could, should or ought to have been done in connection with this journal; but, whilst thankful for all suggestions and accepting those that were practicable, we have found that the experience of twenty years is of more value than many theories. It is impossible to please all, as our late contemporary has found to his cost. We regret the result, as the *Legal News* was managed with much ability and must have been useful to many. As we well know, the encouragement to enterprise of this kind is very limited in Canada, and the field is circumscribed. Many are willing to take advantage of the labour of others, but few care to pay for it.

The Law Society have advertised for two Reporters, one to be appointed for Common Law Chambers and one for Chancery Chambers. It is quite time that something were done in this matter. The

last arrangement has been eminently unsatisfactory, that is, if there is any necessity for practice reports at all, and we fancy there must be judging from the demand there is for numbers of this Journal, containing reports of cases published by us, without remuneration from the Society. The system adopted before the appointment of the late Practice Reporter (who, not being a bird, could not possibly be in two or three places at the same time—*vide* Boyle Roche), though slightly more expensive than the one now proposed would seem to have been preferable, inasmuch as the Society had then to deal only with one experienced person, who was responsible for the reports, and who made his own arrangements for obtaining, from time to time, with the assistance of juniors paid by him, the information required, and preparing the matter for the printer of the Society. The salaries which it is now proposed to give are not sufficiently large to induce gentlemen at all qualified for the office to accept the position, if looked at from that point of view alone. With an occasional exception, it would be a temptation only to some clerk in a large agency office, whose day is spent almost entirely at Osgoode Hall. But even the most capable students would require some experience to fill the position reasonably well; and by the time they have learned something of their duties they will, in all probability, find some opening which would compel them to give up a position which there would seem to be no sufficient inducement to retain. The Reporting Committee have not the time, and cannot be expected, either to teach new hands, or even to find them when wanted, and the work will, we fear, as a whole, be done in a more or less unsatisfactory manner; at the same time we are glad to see that the Committee are alive to the necessities of the case.

CORROBORATIVE EVIDENCE.

In English jurisprudence it is said to be a universal rule that the Court will not allow as against a person deceased any claim which is sustained only by the uncorroborated testimony of a single witness, and that an interested one: *Bottle* v. *Knocker*, 35 L. J. N. S., 547 (by Bacon, V. C.). Though this is perhaps rather a broad statement of the rule in England, yet such is unquestionably the effect of the Ontario Statute pertaining to this subject: 36 Vict. c. 10 s. 6 (*Rev. Stat.* c. 62, s. 10). The effect of this Statute is considered in *Stoddart* v. *Stoddart*, 39 U. C. R. 211, and the conclusion is reached that corroboration by material evidence is required in the case not only of an *opposite* party, but also of an *interested* party. This corroboration, however, need not be by the oral evidence of another witness confirmatory of the bargain proved by the claimant, but may be by documents, or circumstances: *Cooley* v. *Smith*, 40 U. C. R. 543. As remarked by Chatterton, V. C., in *Hartford* v. *Power*, Ir. R. 3 Eq. 607, unless there is something not necessarily of direct evidence, but of circumstances, at least, corroborating the claim, it would be most unsafe to allow it. See also *Birdsell* v. *Johnson*, 24 Gr. 202; *Findley* v. *Pedan*, 26 C. P. 483.

It is not necessary that the evidence of the party claiming should be corroborated in every particular. That would be, in the language of Sir James Hannen, equivalent to saying that no evidence needing corroboration should be used unless there were proof sufficient to dispense altogether with the evidence to be corroborated. It is enough if independent support is given to the evidence of the chief witness in so many instances that it raises in the mind the conviction that he is to be depended upon even in

these matters in which no corroboration is found elsewhere: *Sugden* v. *Lord St. Leonards*, L. R. 1 P. D. 179. This view was adopted by the Chancellor in *McDonald* v. *McKinnon*, 26 Gr. 12.

It is a question of difficulty in how far, where two persons are interested in securing benefits from the estates of a person deceased, the evidence of one is to be considered corroboratory of the case of the other. This has not been expressly decided, though it may be that the language of one of the judges in *Brown* v. *Capron*, 24 Gr. 91, is in favour of the sufficiency of such evidence. There it was considered by Burton, J., in appeal, that the evidence of the husband was to be received as sufficient to corroborate the wife, though both would have benefited by the success of the wife's contention in that case.

With regard to what is "material evidence," the views of Draper, C. J., in *Orr* v. *Orr*, 21 Gr. 409, may be referred to. He held it to mean material to the issue to be sustained by the party to be corroborated. Unless the evidence, other than his own, tends to prove the contract, it is not corroborative. Some English and Irish cases give a very liberal construction to similar language in the Imperial Statute, 32-33 Vict. c. 68. This Act provides that in case of action for breach of promise, the parties are competent to give evidence provided that no plaintiff can recover unless his or her evidence "shall be corroborated by some other material evidence in support of such promise." In *Re Bessela* v. *Stern*: the plaintiff's sister was called to corroborate the plaintiff's evidence. The sister said that she heard the plaintiff say to the defendant: "You always promised to marry me, and you don't keep your word." The defendant made no answer. In the Court of Common Pleas, it was held that this was not material evidence in support of the promise, but the Court of Appeal reversed the decision. Cockburn, C. J., said that the corroborative evidence need not go to the length of establishing the contract relied on; what the statute requires is evidence which is confirmatory of the testimony of the principal witness in regard to the contract already in evidence by her, and which makes her statement probable and credible. Bramwell, L. J., was of the like opinion, and observed (in one of the reports) that "material" was held to mean some evidence which corroborates the story of the principal witness, "and that the word gave no additional force": L. R. 2 C. P. D. 265; 37 L. T. N. S. 88; 25 W. R. 561. So corroboration in a material particular was held sufficient in *Hodges* v. *Bennett*, 5 H. & N. 625, and it was observed by Martin B. that this was in analogy to the practice as to the confirmation of the testimony of accomplices in criminal cases.

The last case on this subject is that of *Reg.* v. *Bannerman*, 43 U. C. R. 547, where the prisoner was indicted for forging a promissory note. Hagarty, C. J., there said: "I cannot believe that our Legislature, by the language used, meant corroboration by independent testimony as to every material fact." Armour, J., agreed with this view, but Cameron, J., dissented, holding that the "evidence," meaning the material fact of the case, (*i. e.*, that the prisoner had unlawfully signed the prosecutor's name to the note) must be corroborated.

It is worthy of observation that the Irish Court of Exchequer in 1872 came to the same conclusion as did the Court in England five years later. In *Hickey* v. *Campion*, Ir. R. 6 C. L. 557 (which is not cited in *Bessela* v. *Stern*), the plaintiff deposed that while attending the defendant during a sudden attack of illness in a public house, he said to her: "*Who*

has a better right to take care of me than my wife? and you know no one will now be my wife but you." She had proved that previously the defendant had promised in express terms to marry her. A witness, Neill, who was present during the illness, testified to having heard the words in italics, but did not recollect more. Pigott, C. B., who tried the case, thought there was evidence in corroboration of the promise, which should be submitted to the jury; and the Court affirmed this ruling. In the more elaborate report of this case given in 20 W. R. 752, the grounds of the decision are stated to be in effect that Neill's evidence had verified and confirmed the plaintiff's account of the conversation in question, though it will be marked that it did not verify that part of the expression which imported a promise to marry.

In connection with this subject, the case of *Cook* v. *Fearn*, 27 W. R. 212, may be noted. There, upon the sole evidence of the wife after the death of her husband, a marriage settlement was rectified in her favour, but it appeared that before the marriage the property in question had belonged to the wife.

LAW SOCIETY.

Michaelmas Term, 42nd Victoriæ.

The following is the *resumé* of the proceedings of the Benchers since Michaelmas Term, 1878, published by authority of Convocation:

Mr. D. B. Read occupied the chair in the absence of the Treasurer.

The Report of the Legal Education Committee on the case of Walter J. Read was read, and the matter was referred back to the same Committee for further report.

A communication was received and read from John M. Lauder, Esq., late Judge of the County Court of the County of Lincoln

Ordered that Mr. Lauder be informed by the Secretary that all arrears of Term fees should be paid, according to the Rules of the Society.

Mr. Hodgins, from the Special Committee appointed to confer with the Government on the subject of heating and lighting that portion of the Osgoode Hall occupied by the Courts, laid the Report of the Committee before Convocation.

Ordered that Mr. Hodgins be empowered to conclude an arrangement with the Government on the basis of the Report.

Ordered that Mr. Berthon be employed to paint the portrait of Chief Justice Wilson in the usual form.

The motion of Mr. Hector Cameron, on the subject of appointing a Committee to superintend the writing-up of the Rolls of the Society was ordered to stand over till next Term.

Mr. Cameron's notice of motion, relative to grants of money by the Society to assist in establishing Libraries in the County Towns, is again ordered to stand over till next Term.

Mr. Martin gives notice of motion to rescind the Rule at present in force enabling the Students of any University in this Province to be admitted as Students at Law or Articled Clerks, on presenting the certificate of passing an examination in the subjects prescribed by the Law Society.

Hilary Term, 42nd Victoriæ.

In the absence of the Treasurer, D. B. Read, Esq., was appointed Chairman.

The minutes of the last meeting were read and confirmed.

The Report of the Examiners for Call was received and read (the names of the gentlemen called to the Bar will appear in the usual place).

The Report of the Examiners for Certificates of Fitness was received and read, and the Certificates were issued to the following gentlemen, viz.: W. E. Perdue, T. S. Jarvis, J. Cowan, R. Hodge, G. W. Bain, E. Schoff, C. Keats, R. A. McDonald, J. G. Gordon, D. B. Dingman, P. V. Georgen, A. H. Backhouse, R. W. Shannon, W. J. Delaney, R. Strachan and A. H. Leith.

The Report of the Examiners on the Intermediate Examinations was received and adopted.

February 4th.

Mr. D. B. Read was appointed Chairman in the absence of the Treasurer.

The minutes of the last meeting were read and confirmed.

Mr. Meredith moved, seconded by Mr. Robertson, that the case of E. W. Scatcherd be referred to the Legal Education Committee—Carried.

The Report of the Legal Education Committee on the Petitions of R. R. Waddell and V. Chisholm was received and ordered to be taken into consideration at the next meeting of Convocation.

A cable message was received from the Treasurer, from Nice, France, in these words: "Absent until May, will telegraph resignation if Benchers wish," and read. Ordered that the Secretary acknowledge the same by letter, stating that the Benchers determined to take no action thereon.

Mr. Ernestus Crombie was elected Bencher in the place of Mr. M. C. Cameron, resigned.

Mr. Cameron's motions, as to granting money to Libraries in County Towns and as to writing up the Roll, are ordered to stand until next meeting of Convocation.

Mr. Blake's motion to amend Rule 3, of the Order of Proceedings in Convocation, was adopted by Convocation.

On motion of Mr. Irving, it was ordered that Mr. Blake be a member of the Finance Committee in the place of the Honourable M. C. Cameron, resigned.

February 8th.

In the absence of the Treasurer, Mr. Read was appointed Chairman.

The minutes of the last meeting were read and confirmed.

The Report of the Legal Education Committee on the case of E. Scatcherd was received and adopted—Ordered that Mr. Scatcherd receive a Certificate of Fitness as an Attorney.

The Report of the Legal Education Committee on the petitions of Messrs. Lennox, Perry, Quinlan, Hands and White was received and adopted.

The Report of the Committee on the Preliminary Examinations was read and approved.

The Report of the Legal Education Committee on the case of W. H. Beemer was received and ordered to be considered at the next meeting of Convocation.

The Report of the Special Committee on the case of H. Jex was received and read.

Ordered, that Mr. Jex receive a Certificate of Fitness and be called to the Bar on payment of a special fee of $200 in addition to the usual fee.

The Report of the Legal Education Committee on the petition of R. R. Waddell was considered.

Mr. Meredith moved for a special committee to enquire as to the practicability and expediency, and if found expedient and practicable to report a scheme for aiding in the establishment and maintenance of branch Libraries in County Towns. Carried, and the following gentlemen appointed a Special Committee for that purpose, viz.: Messrs. Blake, Cameron, Irving, Osler, Read, Hodgins and Meredith.

All other notices of motion to stand over until next meeting of Convocation.

Mr. Maclennan, the Chairman of the Reporting Committee, moved to continue the subscription to the Supreme Court Reports for another year—Carried.

Mr. Osler gave notice of motion for next meeting that all minutes of proceedings in Convocation, notices of motion, resolutions, orders of Convocation and reports of Committees, should hereafter be printed as soon as practicable after the end of each term, and laid before Convocation on the first day of the following Term.

February 14th.

Mr. D. B. Read was appointed Chairman in the absence of the Treasurer.

The minutes of the last meeting were read and confirmed.

The Report of the Legal Education Committee respecting Law Students and Articled Clerks was received and adopted as to clauses 2, 3 and 4, and referred back to the same Committee as to clause 1, with instructions to report thereon during the present sitting of Convocation.

The Report of the Legal Education Committee on the petition of C. McMichael was received, read and adopted.

Mr. Osler moved that Messrs. Hoskin, Crombie and Martin be a committee to conduct the examination specified in the Report—Carried.

The Report of the Legal Education Committee on the case of Leith and others was received, read and adopted, with the exception of the 4th clause.

The Report of the Legal Education Committee on the cases of G. F. Cairns and others was received and adopted.

The Report of the Library Committee was received and read.

The Report of the Finance Committee was received and read.

The Report of the Legal Education Committee on Mr. Beemer's case was received, read and adopted.

The Report of the Legal Education Committee on the subject of the remuneration of examiners was received, read and referred to the Finance Committee.

Mr. Osler moved the resolution as to printing of minutes, &c., of Convocation. Motion referred to Finance Committee to ascertain probable cost of carrying out the same—report to be made next term.

On motion of Mr. Irving,

The Report of the Library Committee was considered.

Mr. Maclennan moved the immediate consideration of the report of the Reporting Committee—Carried.

Mr. Osler moved that reporters be appointed for Common Law Chambers and Chancery Chambers at annual salary of $250 each, and that the advertisement calling for applications for the appointments be at once published.

The Special Committee report that Mr. C. McMichael has been examined and is entitled to be called to the Bar.

Ordered, that Mr. C. McMichael be called to the Bar.

Mr. Blake moved that the report of the Finance Committee be taken into consideration—Carried.

Mr. Blake moved the adoption of the Report of the Finance Committee—Carried.

Moved by Mr. Lees, seconded by Mr. Irving, that the report of the Finance Committee now adopted be printed with appendices, and a copy thereof furnished to each member of Convocation—Carried.

Mr. Irving moved that the thanks of Convocation be given to V. C. Proudfoot, for his gift to the Library of his collection of appeal cases—Carried.

Ordered that Convocation do now adjourn until the 1st of March next, at 10:30 A.M., when the Benchers will meet to appoint Reporters in Chambers.

Ordered that the usual notice be given to each member.

SELECTIONS.

POWER OF COUNTY COURT JUDGES TO COMMIT FOR CONTEMPT.

Sir Richard Harrington, the County Court Judge of District No. 22, has just given a judgment on a point of the greatest practical importance to the litigant portion of the public—viz. as to the power of County Court Judges to commit for contempt committed *extra faciem curiæ*. Though, however, the point in discussion was confined to Contempts of Court falling within the category just mentioned the judgment deals exhaustively with the general powers of County Court Judges under the various statutes to punish for contempt; and it is a most valuable and eloquent exposition of the whole subject.

The immediate question at issue was whether the County Court Judge had jurisdiction to commit the defendant in an action for disobeying an injunction against the continuing of a nuisance complained of by the plaintiff. The action was tried on May 24, 1876; and the plaintiff, under section 89 of 36-37 Vict. c. 66 (Judicature Act, 1873), claimed damages, and, as already stated, an injunction to restrain the defendant from continuing the nuisance complained of—viz. stenches issuing from a manure manufactory of the defendant, and interfering with the plaintiff in the enjoyment of his dwelling-house. The Court, as already stated, granted the injunction which had been since disobeyed, and the plaintiff sought that the defendant

should for such disobedience be punished by imprisonment for his contumacy. The defendant, in answer to the plaintiff's application, filed affidavits on the merits; and, in addition, asserted that the Court had no jurisdiction to punish him for contempt, it not having been committed in the presence of the judge, and not being one of the forms of contempt specified in 9-10 Vict. c. 95. Section 113 of this Act is as follows:—

"And be it enacted that if any person shall wilfully insult the judge, or any juror, or any bailiff, clerk, or officer of the said Court for the time being during his sitting or attendance in Court, or in going to or returning from the Court, or shall wilfully interrupt the proceeding of the Court, or otherwise misbehave in Court, it shall be lawful for any bailiff or officer of the Court, with or without the assistance of any other person, by the order of the judge, to take such person into custody and detain him until the rising of the Court; and the judge shall be empowered, if he think fit, by a warrant under his hand, and sealed with the seal of the Court, to commit any such offender, to any prison to which he has power to commit offenders under this Act, for any time not exceeding seven days, or impose upon any such offender a fine not exceeding 5*l.* for every such offence; and in default of payment thereof to commit the offender to any such prison as aforesaid, for any time not exceeding seven days, unless the said fine be sooner paid."

The various County Court Acts passed after the above statute, and up to the County Court Act, 1865 (28-29 Vict. c. 99), contain no provision directly or indirectly affecting the power of the Court as to dealing with contempts. By section 1, however, of the last mentioned Act (which conferred a large equity jurisdiction on these Courts), the County Courts, in certain matters then only cognisable in a Court of Equity, are to have and exercise all the powers and authority of the High Court of Chancery; and, by section 2, in all suits and matters, the judge is, in addition to all the powers and authorities then possessed by him, to have all the powers and authorities, for the purpose of the Act, of a judge of the High Court of Chancery. Section 8 of this Act further provides that,

For the execution of any judgment, decree, or order made under the authority of this Act, ... the Court shall have power to order, and the registrar, upon such order, shall have authority to seal and issue, and the high bailiff to execute, any writ or warrant of possession, writ or warrant of execution, or other process of execution for carrying into effect any judgment, decree, or order of the said Court; and such writs, warrants, and processes shall be in the form and executed at the time and in the manner to be set forth in the rules and orders to be framed, &c.

The last statutory provision bearing on this subject is that contained in the Judicature Act of 1873, section 89 of which enacts as follows:—

Every inferior Court which now has, or which may after the passing of this Act have, jurisdiction in equity, or at law and in equity, and in admiralty respectively, shall, as regards all causes of action within its jurisdiction for the time being, have power to grant, and shall grant, in any proceeding before such Court, such relief, redress, or remedy, or combination of remedies, either absolute or conditional, and shall in every proceeding give such and the like effect to every ground of defence or counterclaim, equitable or legal, ... in as full and ample a manner as might and ought to be done in the like case by the High Court of Justice.

There are, apparently, no decisions on any of these enactments except that first quoted—viz. the 9-10 Vict. c. 95; but these decisions have a direct and important bearing on the question which was involved in this case. It was laid down in *Levy* v. *Moylan*, 19 Law J. Rep. C.P. 308, that there were strong reasons for the opinion that the courts held under that Act are inferior courts, though courts of record. In *Owens* v. *Breese*, 20 Law J. Rep. Exch. 359, it was held, in the Exchequer Chamber that though courts of record they were not courts of of record "proceeding according to course of the common law." Lastly, in *Ex parte Jolliffe*, 42 Law J. Rep. Q.B. 121, and referred to in Sir R. Harrington's judgment under the name of *Regina* v. *Lefroy*, it was held under section 3, in conjunction with section 13 of 9-10 Vict. c. 95, that a County Court Judge cannot commit for contempt a person who has published language of a contumelious character against him in a local newspaper, on the ground that the contempt was not *in facie curiæ*, and that it was not one of the contempts mentioned in

the Act. Lord Chief Justice Cockburn, in giving judgment, pointed out that if the County Courts, in the absence of express provision, possessed the same powers of punishing for contempt as the Superior Courts (that is, by indefinite imprisonment for contempts either *in facie* or *extra faciem curiæ*), there would be an obvious inconsistency in limiting the imprisonment for a gross contempt in the face of the Court to seven days, and to allow it, in the case of a contempt committed out of Court, to be extended to months or even years.

It was mainly on the authority of this case that Sir R. Harrington declined to commit the defendant for contempt for refusing to obey the injunction of the Court, on the ground that he had no jurisdiction to order a committal for a contempt not committed *in facie curiæ*, and not being one of the contempts mentioned in 9-10 Vict. c. 95. While, however, intimating that he felt bound by this decision he does not conceal that he disapproves of the reasoning on which it is founded; and while fully concurring in the opinion of the Court that the jurisdiction of an inferior court, though a court of record, is limited to those contempts which are actually or constructively committed *in facie curiæ*, he strenuously disputes the accuracy of the assumption that the jurisdiction of County Courts to commit for contempt is wholly founded on, and limited by sections 13 and 14 of 9-10 Vict. c. 95. Referring to the argument of Sir Alexander Cockburn, L.C.J., above mentioned, he says:—

"The attention of the learned Lord Chief Justice does not appear to have been called during the argument to the provisions of 28-29 Vict. c. 99, ss. 1 and 2, or we should probably have heard some further observations on the inconsistency and anomaly introduced by the Legislature itself in giving to a judge of these limited powers in ordinary matters the power to punish by imprisonment at discretion the breach of any order of Court, in however trivial a matter, made under the powers of the Act. For, notwithstanding *Regina* v. *Lefroy* (*i.e. Ex parte Jolliffe* above cited), I do not think it can be doubted that the language of 28-29 Vict. c. 99, s. 2, is strong enough to give the Judge of the County Court the same power to punish contumacious disobedience to orders of court *quoad* the subject-matter of the Act as was then possessed by the Vice-Chancellor; and, if this had been a proceeding under that Act, I should have no hesitation in exercising, if I had thought it otherwise just, the power of commitment."

We may add that this view of the power conferred by the Act just mentioned is confirmed by the order, rule, and forms under it. The order and rule prescribe the steps to be taken for committing for contempt for disobeying injunctions, and there is a form of order of committal given for disobeying injunctions. (See Order XVI., Rule 6; and Forms 41, 42, and 43.)

We cannot help remarking here that it seems rather a strange circumstance that the injunction was not applied for under the above Act, instead of under the Judicature Act, 1873. In looking through the form for an order of commitment for breach of injunction, we find, among the examples of matters ordered or forbidden by the injunction, the discontinuance of certain nuisances, as the obstruction of the plaintiff's light, &c.; from which it seems pretty clear that this case would have come under that Act. Again, although the injunction was granted under the provisions of the Judicature Act, 1873, if the application to commit the defendant for disobeying it was made without reference to the provision of any particular statute, would it not have been open to the judge to order the commitment under the above Act.—viz. 28-29 Vict. c. 99?

There is unquestionably some solid reasoning in support of the view that the Court of Queen's Bench erroneously decided that the power of commital by the County Court is limited to the case mentioned in sections 13 and 14 of 9-10 Vict. c. 95. The weak part of that decision is that, in limiting the power to the cases enumerated in those sections, you deprive the Court of the power of committal in cases which are at least constructively contempts *in facie curiæ*. Take for instance, the case of witnesses or others who remain in Court after an order that they should retire. Take, again, the case of a witness who refuses to answer a material question when ordered by the Court to answer it. These would be contempts *in facie curiæ*; but if the power to commit is limited to the cases

enumerated in the above sections, it would not extend to them. No doubt, as regards the case of a witness refusing to answer, the framers of the Act seem to have treated the case as one not involving a contempt *in facie curiæ*, and by section 98 prescribe another mode of dealing with such a witness—viz. by fine. But what of the other case, and many similar ones which one can easily conceive may at any moment arise? We have very little doubt, had the Court of Queen's Bench foreseen the effect of its decision—not in the merely granting or making absolute the rule for the prohibition, but in founding that decision on the assumption that 9-10 Vict. c. 95 impliedly limited the power of committal for contempt to the cases therein specified—it would have strictly based its conclusion simply on the ground that the contempt in that case was *extra faciem curiæ*. Had the decision gone on this ground *alone*, the County Court Judge in the present case may consistently with it have ordered a committal, as the case is very different indeed from *Regina* v. *Lefroy* (*Ex parte Jolliffe*); for there there was no pretence for contending that even constructively the contempt was *in facie curiæ;* whereas, in the present case it may very well be contended that disobedience to an order of the Court comes under the scientific conception of a constructive contempt *in facie curiæ*. It was, however, impossible, in the face of the judgment in the Queen's Bench, even assuming this to have constituted such a constructive contempt, to hold that the Court had the power to commit for it, as it is not one of the cases mentioned in section 13.

We confess, however, that we are not altogether satisfied by the reasoning which appears to have led Sir R. Harrington to the conclusion that the Judicature Act of 1873 did not empower him to make the order. He seems to us to attach undue importance to the circumstance that the provision giving the inferior "Court" certain powers, in language certainly wide enough to include that of committal for contempt in disobeying its orders, is not followed by a provision corresponding with that of 29-30 Vict. c. 99, giving the "judge" similar powers. The omission of this in the Judicature Act of 1873 does not seem to have been intentional; and the word "Court," as applied to County Courts, seems inevitably to include the judge of the Court. Had it been a provision relating to the Court of Bankruptcy, with regard to which it was held that a judge thereof did not come under the word "Court" (*Regina* v. *Faulkner*, 4 Law J. Rep. Exch. 308), the inferences may have been sustainable. But, as was pointed out in the argument in *Regina* v. *Lefroy*, that decision could not apply to the County Court, in which there was only one judge. Again, the conclusion drawn from the case of *Dawkins* v. *Rokeby* (cited from L. R. 8 Q.B. at p. 267; s.c. 42 Law J. Rep. Q.B. 63, in which it was laid down—but only as an *obiter dictum*—that the imprisonment of the defendant is no "redress" to the plaintiff), against including commitment for contempt for disobeying an injunction in the term "redress" used in the Judicature Act, 1873, does not seem to be accurately deduced. In the case of *Dawkins* v. *Rokeby* it was the imprisonment of a false witness which was stated not to be "redress" to the person against whom the false evidence was given. Here, as the imprisonment would tend, though only indirectly, to cause a discontinuance of the grievance which was the foundation of the proceeding, it may very well be contended that it would come under the word "redress." Again, the ground for holding that in this case imprisonment for disobeying the injunction would not be a "remedy" within the meaning of Judicature Act of 1873, is not more satisfactory. It is simply an opinion that the word applied rather to the granting of the injunction than to the proposed measure for enforcing the remedy already granted. But how can an injunction which the Court itself declines to enforce, by the only means by which it can enforce it, be called a remedy? The learned judge, however, points out that the remedy by injunction is not wholly nugatory, as the defendant may be proceeded against by indictment for disobeying it. As we do not see how an indictment could tend to the discontinuance of the original grievance, except through a corrupt compromise, we fail to see how the liability to

prosecution of a disobedient defendant in such a case would invest the injunction with the character of a "remedy" without the only action of the Court granting it, which would give it effect and vitality.

We trust that the invitation offered by the learned judge, towards the conclusion of his judgment, to the plaintiff to apply for a rule to compel him to hear the case on the merits, will be accepted and acted on; and that either the effect of the judgment in *Regina* v. *Lefroy* may be modified, or else that the attention of the Legislature may be called to a state of the law which certainly appears to require some alteration.—*Law Journal.*

PRIVILEGES OF COUNSEL.

When Mr. Justice Lindley was suddenly, at the end of a Long Vacation, translated from the ranks of the bar at Lincoln's Inn to the Court of Common Pleas, and remitted to the task of trying special jury cases, the desire of the counsel who practised before him to make his path easy was most marked. No one sought to embarrass him with subtle objections and artful stratagems, or to presume in any way on his inexperience of Nisi Prius work; and his lordship got through the November sittings without a hitch in the progress of business, without a dispute with counsel, and without betrayal of his noviciate. Lord Justice Cotton, who last week was called upon to leave the serene regions of the Court of Appeal for the troubled scenes of a Criminal Court, was not so fortunate as Mr. Justice Lindley. It was his lordship's fate to try two murderers; and we can quite understand the weight of responsibility that must have been felt under such circumstances by a judge who, for all we know, may never on any previous occasion have been present at the trial of a criminal. But, as if the burden thus thrown on the judge was not sufficient, his lordship was brought into collision with the counsel who defended the prisoner in one of these cases, and felt himself compelled to complain of the conduct of that counsel towards the bench. Such encounters as these are always matters to be deplored. They are rare—happily so. But when the judge is new to the work set before him, they become yet more regrettable, because they give rise, however unjustly, to the suspicion that an attempt has been made by counsel to presume upon the inexperience of the judge, and to invade his province for the purpose of unduly influencing the jury. We say "however unjustly," for we do not for a moment desire to impute any such design to Mr. Ribton, the counsel to whose conduct we refer. On the contrary, we are sure that his fault, if any, was attributable purely to his earnest zeal for his client, and not to any premeditated intent to impede the action of the judge. Indeed, the apology which Mr. Ribton tendered to the judge, and which his lordship frankly accepted, clearly exonerates Mr. Ribton from any imputation of such intent.

In the early party of his address to the jury the learned counsel used expressions of belief as to his client's innocence of the charge of murder; and the Lord Justice, following a notable precedent set by the Lord Chief Justice, at once interrupted him. Mr. Ribton explained that he was speaking of his belief in the proposition of law that the facts proved were such as to reduce the crime from murder to manslaughter. We hope the painful scene of counsel expressing belief in a client's innocence will never be witnessed in our days, and we are glad to think that Mr. Ribton was misunderstood by the judge. The expression of belief in a legal proposition is of course justifiable, although the form of expression is very apt to mislead. But in this case the jury could hardly have misinterpreted the language of counsel; for his whole argument was, that, all the facts being admitted, a certain legal consequence would follow. On this part of the case, therefore, it seems to us, that, although Mr. Ribton might have been more guarded in language, yet he did not mean for a moment to express any sort of belief upon the issues of fact before the jury.

What occurred, however, at the close of the trial cannot be so easily disposed of. It was proved that the prisoner Mumford had said to the police officer: "She has been a bad wife to me; she has aggravated me; she has taunted me, telling me that her unborn child was not mine." Mr. Ribton argued that the jury might conclude that the wounds from which Mumford's wife died were inflicted by Mum-

ford immediately on his hearing these words, so as to bring the case within the ruling of Lord Blackburn under like circumstances, and reduce the crime to manslaughter. Lord Justice Cotton, on the other hand, in summing up, pointed out to the jury that the proper inference from the facts proved was, that this was not so; but that the prisoner, in what he said to the constable, was speaking of language used by the woman on a previous occasion. So far counsel and judge were acting plainly within their respective provinces. But after the learned judge had addressed the jury, Mr. Ribton again rose, and re-stated his argument. What occurred was thus reported in the *Times*:—

Mr. Ribton, before the jury retired, said he must submit to his lordship that it might be presumed the prisoner in his statement to the officer after he was charged before the magistrate must have made it with reference to that charge, and therefore with reference to the night in question.

The Lord Justice: Mr. Ribton, that observation ought not to have been made; for, as I have pointed out, the statement was made in the same connection as a statement which clearly referred to something that had occurred on a previous occasion.

Mr. Ribton still urged that the presumption was that it was made with reference to the night in question.

The Lord Justice: Mr. Ribton, you are not justified in making those observations. I have endeavoured—and it is a very painful duty—to lay down the law correctly to the jury, and it is their duty to take the law from me and to find such a verdict on the evidence as their consciences may dictate in accordance with that direction.

Mr. Ribton still argued that there was a legal presumption.

The Lord Justice: Mr. Ribton, really, I cannot allow this.

Mr. Ribton: My lord, you are very peremptory.

The Lord Justice: Mr. Ribton, I am compelled to be so.

Mr. Ribton: My lord, this a case of life and death, and I am not to be put down in the discharge of my duty.

Mr. Ribton then admitted that it had appeared that the prisoner had had previous suspicions; but still he urged that it was to be presumed, from the prisoner's own statement, that the taunt had been made to him on the night in question, and that if it had been so made it was calculated to arouse him to a state of frenzy by confirming his previous suspicions.

The Lord Justice, with great calmness: Gentlemen, I think that counsel has exceeded his duty upon this occasion. It is the duty of the judge, as calmly as possible, to hold an even hand between the prosecution and the prisoner, and I hope I have done so; and in consequence of these observations of the prisoner's counsel I will read to you again what was said by the police constable, the witness who spoke to the prisoner's statement.

His lordship then read the evidence again, and made some further comments thereon, in effect re-stating the propositions contained in his summing up.

Now just as at the close of a summing up by the judge at Nisi Prius, counsel are at liberty to make a reference to a direction given on a matter of law by the judge for the purpose of asking the judge to correct the same, or to state it more definitely, or it may be with some addition or limitation, so also we take it that in a criminal prosecution counsel may submit that the case ought not to go to the jury with the direction on matter of law given by the judge. But, on the other hand, it is manifest that counsel has no right, under cover of his privilege, to win the last word with the jury, or to attempt at that stage to make the jury believe that in law they are bound to find any given verdict in the face of what has fallen from the judge. Every one who has attended criminal trials must have noticed the great latitude allowed to the counsel for the prisoner. There is practically no limit to his right of cross-examination, however harsh he may be towards the witness, or however wide may be the scope of the questions put. So, also, the flights of his oratory are boundless. But when counsel has had his turn, it is the duty of the judge to address the jury, and, as the Lord Justice so well said, "to hold an even hand between the prosecution and the prisoner;" and after that it is not the duty, nor the privilege, nor in any sense the right, even in matters of life and death, for counsel to intervene between

judge and jury, and to attempt in any way to lessen the effect produced on the mind of the jury by the words of the judge. That Mr. Ribton exceeded his privilege must, we fear, be admitted. Indeed his own apology shows that he thought so. Had the mistake been committed by a young and inexperienced advocate, the matter would have scarcely attracted attention. But Mr. Ribton is no novice, and he can hardly avoid the censure that must wait on those who set a bad example. The Lord Justice acted throughout with characteristic calmness and forbearance, and accepted Mr. Ribton's apology with frankness and generosity. There have been, and are, judges who would have been more prompt to rebuke, and less ready to condone.—*Law Journal.*

NOTES OF CASES.

IN THE ONTARIO COURTS, PUBLISHED IN ADVANCE, BY ORDER OF THE LAW SOCIETY.

COURT OF APPEAL.

From Q. B.] [Feb. 3.

Denny v. The Montreal Telegraph Company.

Trap-door—Negligence—Contributory negligence—Evidence.

The part of the defendants' office devoted to the public was some sixteen and a half feet long, from south to north, the entrance door being at the south, and the width was five feet seven inches. About four feet nine inches from the south, and on the east wall was a desk or counter, for writing messages, seven feet six inches long, and one foot seven inches wide. About five inches north of the counter, and in the centre of the apartment there was a trap-door leading to the cellar about two feet nine inches square. On the west side of the apartment was a partition about six feet high, separating the public office from the operators' apartment, the entrance to which was at the north end of the partition. In this partition there was an opening with a desk in it, where also messages were written and delivered to the operator. D. came in quickly to send a message, spoke to the operator at this opening, and then went beyond the counter as if to go into the operators' room, when, the trap-door being open, he fell through into the cellar, and received injuries of which he died. There was evidence given to show that deceased said it was his own fault, and that he ought not to have been where he was; that the office was a very light one, and that there was no difficulty in seeing the trap, but it also appeared that other persons on other occasions had nearly fallen into it. The learned Judge who tried the case, without a jury, and viewed the premises, found that the deceased was guilty of contributory negligence, which precluded the plaintiff, his administratrix, from recovering. Held in the Court of Queen's Bench that the defendants were liable; that the evidence of the open trap-door in the part appropriated for the public was negligence for which the defendants were chargeable; that there was no evidence of contributory negligence on the part of the deceased; and that the plaintiff would be entitled to have the verdict entered for him if the damages had been assessed; but this not having been done a new trial was ordered.

Held, in the Court of Appeal, dismissing the appeal, (without deciding whether they would have come to the same conclusion in reversing the decision of the learned Judge who tried the case, as the Court of Queen's Bench,) that sitting as an appellate court, there was no sufficient reason for arriving at a different conclusion; and, that, under the judgment pronounced in the Court below, it would be useless to submit the case to another jury, the Court below should have assessed the damages which they now did.

C. Robinson, Q.C., for the appellant.

S. Richards, Q.C., for the respondent.

Appeal dismissed.

From Chy.] [Feb. 3.

Nelles v. Paul.

Insolvent Act 1875—Payment—Fraudulent preference.

The insolvent paid a note within thirty days of his being placed in insolvency in

accordance with a request made by the sureties just before the issue of the writ of attachment. It appeared that when the sureties made this request, neither they nor the creditor knew or had probable cause for believing that the insolvent was unable to meet his engagements in full.

Held, reversing the decree of Proudfoot, V.C., that the payment was not void within the meaning of the Insolvent Act.

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

J. A. Boyd, Q.C., for the respondents.

Appeal allowed.

From C. C. Carleton.] [Feb. 3.

Kelly v. Ottawa Street Railway Co.

Limitation of action against Railway Co.—C. S. C. c. 66, s. 83.

The plaintiff sued the defendants for an injury sustained by him while engaged in his lawful occupation upon the street by the negligent management of the defendants' car, and the unskilful or reckless driving of their servant.

Held, reversing the judgment of the County Court, that the 83rd section of the Railway Act, which was incorporated with the defendants' special Act, applied to a suit of this nature, and the action not having been brought within six months, the plaintiff must fail.

Snelling for the appellants.

Shepley for the respondent.

Appeal allowed.

From C. C. York.] [Feb 3.

Shepley v. Hurd.

Action on note—Plea that plaintiff not lawful holder.

A note having been placed in the hands of a firm of solicitors to sue, they got the authority of the plaintiff, who was then a clerk in their office, to use his name for the purpose of the suit, as the holder, for some reason, wished to take proceedings without his name appearing.

Held, reversing the judgment of the County Court, that a plea that the plaintiff was not the lawful holder was bad.

Semble that it is not essential that the plaintiff should have had physical possession of the note.

Bain, for the appellants.

McMichael, Q.C., for the respondents.

From Chy.] [Feb. 3.

Russell v. Romanes.

Specific performance.

The bill was filed to enforce specific performance of an agreement to sell certain land, made by one R. since deceased. The original agreement was cancelled, and on the 22nd May, 1866, another agreement contained in a lease of the land from R. to the plaintiff was substituted therefor. In November of 1865, when the original agreement was entered into, R. who held two mortgages on the land in question, thought he had obtained an absolute title thereto, by proceedings on a foreclosure suit on these mortgages. It afterwards, however, appeared that long prior to the first of the mortgages held by R., the mortgagor T. H. had by a voluntary deed conveyed 50 acres of the land to his son E. H. subsequently to the first mortgage to R., but prior to the second mortgage, E. H. mortgaged the 50 acres to one A. E. H. was not made a party to the foreclosure suit, but A. was served with notice of the proceedings in the Master's office, and not having appeared, he and the mortgagor were declared foreclosed. Soon after the above agreement for sale, E. H.'s outstanding equity of redemption was discovered, and in September, 1866, R. filed a bill against T. H., E. H. and A. for the foreclosure of his two mortgages against all these defendants, when a decree was made declaring the deed to E. H. to be void against R., and that A.'s mortgage was subject to the first mortgage, but had priority over the second mortgage held by R., and he was directed to pay into Court a certain sum as the price of redemption, which payment was made at the appointed time.

It appeared that the plaintiff had actual notice of E. H's outstanding equity of redemption soon after the substituted agreement, and before he made any improvements; and that he made them in reliance upon R. holding him harmless.

Held, affirming the decree of Proudfoot, V. C., that the plaintiff was not entitled to a decree for specific performance against the representatives of R., as they had no power to convey, nor against A., because there was no priority between him and the plaintiff, and no equity to make him bound by the agreement.

Held, also, that the plaintiff was not entitled to a lien on the land for his improvements.

The *Attorney-General* and *Bethune*, Q.C., for appellants.

Boyd, Q.C., *W. Cassels*, *C. Atkinson*, *and Machar*, for the respondents.

Appeal dismissed.

From Chy.] [February 3.

Fisken v. Brooke.

Equitable execution.

Under his father's will the defendant J. E. B. was entitled to certain real and personal estate, which was bequeathed to him. upon the following trust "in the first place to and for the support and maintenance of his wife in a fit and suitable manner according to their rank and station, during their joint lives and during the life of the survivor of them; secondly for the support, education and maintenance of the children of the said J. E. B. and B. J. B., now living, or which may be hereafter born, the fruit of their marriage, according to their rank and station in life, and at the discretion of the said J. E. D. and B. J. B.

Power was given to the defendant and his wife jointly during their lives, and to him, if he was the survivor, but not to her if she was the survivor, to sell the lands, mortgages and all other securities and to stand possessed of the proceeds upon the same trusts. Further power was given to them jointly and to the survivor to divide the real and personal estate or the proceeds thereof, or so much thereof as there remained unexpended and unappropriated in carrying out the trusts between the said children and their said heirs, if any, in such manner and in such proportion as to them might seem fit, or to exclude any of them entirely from any benefit or portion thereof if they should see fit, so to do or to convey or make over to any of them by way of advancement any portion of the same to become theirs absolutely.

Held, (reversing the decree of Proudfoot, V. C.) that the gift was for the benefit of the defendant and his wife jointly, and that the defendant's interest could not be attached by an execution creditor.

Dalton McCarthy, Q.C., and *Hoskin*, Q.C., for the appellants.

Boyd, Q. C., for the respondent.

Appeal allowed.

From C. P.] [Feb. 14.

Fowler v. Vail.

Foreign judgment—Pleading—23 Vic., c. 24, sec. 1; 39 Vic., c. 7, O.; 31 Vic., c. 1, sec. 34.

To an action on a foreign judgment commenced previous to the repeal by 39 Vic., c. 7, O., of 23 Vic., c. 24, sec. 1, which allowed the defendant to set up to the action on the judgment any defence which was or might have been set up to the original suit, the defendant, after the passing of the repealing Act, pleaded several pleas setting up such defences.

Held, reversing the judgment of the Common Pleas, that they could be pleaded as the right to plead was an existing right within the meaning of section 34 of the Interpretation Act, 31 Vict., c. 1, O.

A further plea to the judgment averred that the defendant was not at the commencement of the action nor down to the judgment resident or domiciled in the foreign country, and was never served with any process, summons, or complaint, nor did he appear to the action or before the recovery of judgment have any notice or knowledge of any process or proceedings in the action, nor of any opportunity of defending himself therein.

Held, affirming the judgment of the Court of Common Pleas, that plea was bad for not averring that the defendant was not a subject of the foreign country.

C. Robinson, Q. C., (with him, *A. Bruce*) for the appellants.

J. K. Kerr, Q.C., (with him, *J. W. Jones*) for respondents.

Appeal allowed without costs.

VACATION COURT.

February 21, 1879.

Reynolds v. Corporation of Ontario.

Action by Sheriff—Audit by County Auditor—Whether Conclusive.

Action by the Sheriff of Ontario to recover $5654.88 for services stated to have been rendered by the plaintiff in connection with the administration of justice within the county, alleging that the amount was duly rendered to the proper officer and duly audited and allowed by the County Board of Auditors in accordance with the Statute, and that plaintiff thereupon became entitled to recover the same out of the funds of the county, and that though the plaintiff had duly demanded payment from the defendants and their treasurer, they had neglected and refused to pay the same.

Held by Cameron J. that the audit was not conclusive, but the circumstances under which it was made may be shown; a plea therefore setting up such power was held a good plea.

C. Robinson, Q. C., and *H. J. Scott* for the plaintiff.

Hector Cameron, Q.C., for the defendant.

CANADA REPORTS.

ONTARIO.

CHANCERY CHAMBERS.

(*Reported for the* Law Journal *by* F. Lefroy, *Barrister-at-Law.*)

Mallory v. Mallory.

Appointment of next friend.

Where the defendant's solicitor, on asking the plaintiff's solicitor to consent to give further time to answer, handed to him the affidavit on which he intended to move, which stated his object to be to gain time to apply for a next friend, *but omitted to call the attention of the plaintiff's solicitor to this statement. Held*, that the asking for the consent, notwithstanding the said statement, amounted to a waiver of defendant's right to apply for a next friend.

[Mr. Stephens, Nov. 9—Chancellor, Dec. 23, 1878.

In this suit a bill had been filed by a married woman without a next friend. The plaintiff married before March 2, 1878.

Black now moved for an order to take the bill off the files for irregularity, in having been filed without a next friend. He referred to R. S. O., c. 125, sec. 20, and cited *Redman* v. *Brownscombe*, 6 Pr. R. 84; *Royal Canadian Bank* v. *Mitchell*, 14 Gr. 412; *Chamberlain* v. *Macdonald*, 14 Gr. 447.

Hoyles, contra: The affidavits show that the plaintiff has waived his right to ask for the order, as he asked for and obtained further time to answer. The application is equivalent to a demurrer, and a defendant cannot demur after getting time to answer, *Boultbee* v. *Cameron*, 2 Chy. Ch. 41; *Chamberlain* v. *Macdonald*, 2 Chy. Ch. 204. The objection should have been taken at the earliest opportunity, Dan. Chy. Pr. 5th Eng. Ed. 30, 103; *Arthur* v. *Brown*, 3 Chy. Ch. 396; *Atkins* v. *Cooke*, 3 Drew. 694. An objection for want of a next friend stands on the same footing as the right to security for costs.

Black, in reply: The irregularity here is not such as those referred to in the cases cited. The Court may order a next friend to be appointed at any time, Dan. Chy. Pr. 103. There has been no waiver. When the defendant's solicitor asked for time to answer he placed the affidavit upon which he intended to move in the hands of the solicitor for the plaintiff. This affidavit shewed that the object was to obtain time to make an application to have a next friend appointed. The plaintiff's solicitor endorsed his consent to give ten days further time to answer upon this affidavit presumably after having read it. In the report of *Boultbee* v. *Cameron*, on which our practice seems founded, it appears that when the defendant's solicitor applied for time to answer, "*nothing was said at the time as to demurring.*" Hence *Boultbee* v. *Cameron*, and *Chamberlain* v. *Macdonald*, which follows it, have no application to the present case.

The Referee granted the order, holding that as the affidavit on which the defendant intended to move was sent by the solicitor to his agent for the express purpose of being shewn to the plaintiff's solicitor, and was, in fact, handed to him as the material on which the motion would be made, and as it was not stated or insinuated that there was any intentional suppression of fact, the defendant ought not, under all the circumstances, to be considered to have waived his right to demand the appointment of a next friend.

The plaintiff appealed from the order of the Referee.

The appeal was heard by the Chancellor on the above date.

Counsel urged the same arguments as before.

The CHANCELLOR: The cases shew that where a suit is instituted by a married woman against her husband in respect of property, it is a general rule that she must sue by her next friend. I do not understand it to be contended by the solicitor of the plaintiff that the subject of this suit is of such a nature as to take it out of the general rule; but his contention is that the solicitor for the husband, on the day before that on which the time for answering could expire, asked and obtained from the solicitor of the plaintiff ten days' further time to answer; and this he contends was a waiver of his right to require that the plaintiff should sue by her next friend.

He contends, and I think rightly, that an objection for the want of a next friend, whether taken by demurrer or otherwise, stands upon the same footing as the right to security for costs; and it is clear that in the latter case the plaintiff waives his right. That, at least, was my opinion in *Boultbee* v. *Cameron*, 2 Chy. Ch. 41, where a defendant having obtained from the plaintiff's solicitor further time to answer demurred instead of answering, I directed the demurrer to be taken off the file. The language of V. C. Kindersley in *Atkins* v. *Cooke*, 3 Drewry 695, supports my opinion.

The learned Chancellor then quoted a passage from the judgment of V. C. Kindersley in that case and continued:

The consent in this case ran thus: "We consent to an order giving defendant ten days further time to answer." This consent was endorsed upon an affidavit which, as it afterwards appeared, contained a statement to the effect that it would be necessary to apply to have a next friend appointed to the plaintiff before answering. This was not brought under the notice of the plaintiff's solicitor, as it certainly ought to have been. He was informed by the gentlemen who asked for his consent that the defendant's solicitor had received instructions to defend only the previous day. Being told this, and the request being for time to answer—not for time to take objections to the plaintiff's proceedings—he had a right to infer that it was only for the purpose of answering that time was asked. He states in his affidavit that if he had been aware that the affidavit contained the statement in question, he would not have given time to answer, but would have noted the bill *pro con.* as soon as the time for answering had expired.

I look upon what passed on the application to the plaintiff's solicitor for his consent for time to answer as a suppression of that which ought to have been disclosed, and I am clear that the defendant can derive no advantage from that suppression.

What the defendant's solicitor would have done if the consent had not been given is beside the question. The consent was obtained for time to answer, and time obtained for *that* purpose could not, in good faith, be used for any other purpose.

Appeal allowed with costs.

BECHER v. WEBB.

Admission of incumbrancer foreclosed by Master's report.

Where an incumbrancer had been foreclosed by the Master's report but the neglect to come in was partially explained, and the application was made promptly, he was admitted to prove, but only on his relinquishing priority over a puisne incumbrancer who had come in within time.

[Mr. Stephens, Jan. 9.

In this matter two incumbrancers having been made parties in the Master's office, the puisne incumbrancer came in and proved his claim, but A., the prior incumbrancer, omitted to do so, and was foreclosed by the Master's report, filed Nov. 6, 1878.

Langton now moved for an order to allow A. to come in and prove his claim, and to have priority over the puisne incumbrancer. It appeared by the affidavit of A. that (1) the affidavit sent to him by his solicitors to make, in order to prove his claim, had been mislaid, and was not discovered till his time for proving had expired; (2) that some time then elapsed before he could identify the original defendant to be the man against whom he had recovered certain judgments;

(3) that he had not been able to discover that the defendant had any other property except that in question in this suit. *Sterling* v. *Campbell*, 1 Chy. Ch. 147, was cited to show that if A. was admitted he had a right to his priority over the puisne incumbrancer.

Hoyles, contra : (1) Having neglected to come in and prove, A. should not now be admitted to the prejudice of another incumbrancer, *Cameron* v. *Wolfe Island Co.*, 6 Pr. 91; (2) the puisne incumbrancer having, by his diligence, secured his rights, ought not to be deprived of them : *Hall* v. *Falconer*, 11 Jur., N. S. 151; *Cattell* v. *Simons*, 8 Beav. 243; (3) the delay will not be passed over merely because A. will thereby be unable to realise his debt, *Finnegan* v. *Keenan*, 14 L. J. N. S. 123; (4) the applicant has no equity against the puisne incumbrancer, and has not accounted for his negligence.

Fletcher, for plaintiff, consented to the order being made, but asked for costs.

The Referee granted an order allowing A. to come in and prove his claim on his undertaking to rank after those who had already proved.

McDermid v. McDermid.

Sale under decree—Right of mortgagee to notice of payment in of purchase money—G. O. 389.

Where lands encumbered by a mortgage are sold in a partition suit, a mortgagee of the interest of a tenant in common, though a party to the suit, is entitled to notice of the payment into court of the money out of which his claim is to be satisfied, and where the rate of interest reserved in the mortgage is more than the legal rate, it is incumbent on the mortgagor to see that such notice is given, in order to protect him from liability to such higher rate.

[Referee, Dec. 18, 1878.—Proudfoot, V. C., Jan. 20, 1879.

Here the decree was the usual one in a partition suit. Under it one C., a mortgagee of the undivided shares of the defendants J. and A. in the lands in question was made a party. J. and A. put in a cash tender for the lands which was accepted, and they were declared the purchasers, the purchase money to be paid into court by the 15th of March. The report, dated 1st March, computed interest on C's mortgage (which had three years yet to run) up to the 15th March. The money was not paid into court before 26th Sept. following. Shortly after payment in the purchasers obtained a vesting order on notice to the plaintiff's solicitors, but they served no notice of payment in on C., their mortgagee, and he only learnt by chance of such payment on or about the 15th of Nov., when as soon as possible he made this application.

Seton Gordon, for the mortgagee, moved for payment, out of the shares of the mortgagors of the purchase money in court, of the amount of the applicant's claim with interest at the rate named in the mortgage to date, with six months' subsequent interest at the same rate, and for the costs of the application. A mortgagee always has a right to retain his security until the amount due thereon is duly and properly tendered him. The fact that he has been made a party under a decree does not affect this right. Here the applicant submitted in the Master's office to take the amount due to him on his mortgage up to March 15th, on the understanding that the money was to be paid into court on that day, according to agreement. The money was not so paid, hence, the contract being broken, the mortgagee is released from his engagement, and now claims interest as above, as given by the decree, and as he might have claimed in the Master's office. He had undoubted right to notice of the payment into court. An analogy may be found in G. O. 486, relating to administration suits.

Foster, for plaintiffs, had no objection to order being made so far as J. and A. were concerned, but submitted that no part could be charged against the other parties.

Hoyles, for defendants J. and A., referred to the Vesting Order and paper filed on that application to show notice was given to the mortgagee of payment into court. In a partition suit an incumbrancer can be compelled to accept the money at any time, and is not entitled to six months' interest. *Dalby* v. *Humphrey*, 37 Q. B., 514; *Cook* v. *Fowler*, L. R. 7 H. L. 27.

Gordon in reply : This does not apply where the mortgage is not due.

The Referee held that by letting so many months go past without enquiry or action, the applicant had deprived himself of the right to demand additional interest after the payment of the purchase money into court, if he ever had any such right; and that the application should be dismissed. Under the order made by the Referee interest was therefore allowed at 12 per cent. up to the date of payment into court only, and bank interest afterwards.

On appeal from this decision the demand for six months' subsequent interest at the rate in the mortgage was dropped.

W. Cassels, for mortgagee, claimed interest at said rate up to date. Under the proviso in the mortgage 12 per cent. is payable till the time fixed. The purchasers were mortgagors and therefore liable under their covenants to pay this. No relief is asked against the plaintiff.

Hoyles, for the mortgagors: Under G.O. 389, purchaser is only bound to give notice to the plaintiff of payment in, and it is plaintiff's duty to notify other parties. Laches of C. disentitle him to relief. C. is a party, and after decree all parties are actors: he should have pressed for payment in.

Foster, for plaintiff, asks for costs.

Proudfoot, V.C., gave judgment as follows, after first stating the facts:—

The Referee gave the mortgagee interest at the rate specified in the mortgage until time of payment into Court.

It is now contended that he was entitled to interest till notice of payment into court. And I think him so entitled, and at 12 per cent. The time for payment of the mortgage had not arrived, and the contract for this rate of interest covered the period in question—distinguishing it from the cases where the contest was for the rate specified in the security after the time for payment had elapsed.

The purchasers in the capacity of purchasers were, under Reg. Gen. 389, only bound to notify the person having the conduct of the sale. But they also filled the character of morgagors, to relieve themselves from liablity on the mortgage were bound to see that the money reached the mortgagee, and this they did not do.

The amount is not large and it is contended that an appeal should not be entertained. But the appellant is a mortgagee and is entitled to all the costs incurred in necessarily enforcing his security. And there is a question of principle involved in the application, which takes out of the rule acted on in *McQueen* v. *McQueen*, 2 Chy Ch. 344.

Appeal allowed with costs.

Re Kingsland's Mortgage.

Payment into Court—Imp. Act, 10-11 *Vict. c.* 96.

Where trustees, having had a certain mortgage assigned to them to secure a debt due to the trust estate, realized the security, and after satisfying the claim, still had a surplus remaining. *Held*, they were entitled to pay their surplus into Court under the Imperial Trustee Relief Act. 10-11 Vict., c. 96.

[Spragge, C., Jan. 27, 1879.

In this matter, K. being a debtor to a certain estate assigned a mortgage, of which he was holder, to the trustees of the said estate, as security for the debt due by him to the estate. The trustees realized the mortgage which left a surplus in their hands after payment of the said debt. A third party then put in a claim to the surplus, averring an assignment from K. who had left the country: he, however, produced no proofs of title.

W. Roaf now moved *ex parte* on petition on behalf of the trustees for an order that the trustees should pay the surplus in their hands into Court, under the Imperial Trustee Relief Act, 10-11 Vict. c. 96 (R. S. O. c. 40, sec. 36.) He cited *Roberts* v. *Ball*, 24 L. J. N.S. Chy. 471, and *Western Canada Loan and Savings Co.* v. *Court*, 25 Gr. 151, submitting that the latter case was an authority in favour of the motion, although the head note might give a contrary impression.

The Chancellor:—Mr. Roaf refers me to *Roberts* v. *Ball*, 24 L. J. Chy., as an authority for the payment into court of the balance in the hands of the petitioners after satisfying the mortgage of which they were holders as trustees. There was no question in the case as reported,

as to the propriety of the first mortgagee paying into court the surplus remaining in his hands after satisfying his own mortgage. He had already done this and the second mortgagee came into court upon petition raising other questions not in point in this suit. All that the case shows is that what is asked in this court had been done without, so far as appears, any question in that case.

In the *Western Canada Loan & Savings Co.* v. *Court* 25 Gr. 151, a mortgagee had sold under a power of sale in his mortgage, and there was a surplus which was claimed by two contesting parties, and the mortgagee thereupon filed a bill of interpleader. Court, one of the defendants, objected that the mortgagee should have done what the petitioners in this case have done, apply to pay the money into court under the Trustee Relief Act, but my Brother Proudfoot held an interpleader bill proper, observing that he did not think that there was such an express trust as would come within the meaning of the Trustee Relief Act.

In *Roberts* v. *Ball*, which was not cited in the case before my learned Brother, there was not any express trust, but at any rate in the case in Grant an interpleader Bill was clearly right. In the case before me there could be no interpleader suit, for there are no parties to interplead and the petition alleges a trust.

I think the case is within the Trustee Relief Act. As to the petitioners being released and discharged it will be expressed to be from liability in respect of the money paid into court. I do not decide of course whether it is the proper sum or not.

Order granted.

Norval v. Canada Southern Railway Co.

Appeal—Costs—R. S. O. cap. 38, secs. 27, 28.

When the objection is taken that an appeal is frivolous and no reasons for appeal are given, the Court will examine the pleadings to see if the appeal is frivolous. The appellants must pay the costs of an application to stay execution.

[Proudfoot, V. C., Feb. 10, 1879.

In this matter the appellants had given the statutory notice, and taken all necessary steps for appeal within the proper time, but the reasons for appeal had not been served. A motion for an order staying execution under Appeal Act (R.S.O. c. 38, secs. 27, 28) and Order 8, was then made before the Referee, but at the request of the plaintiff it was enlarged before a judge.

On the above date,

Symons moved for the order, the security having been perfected and allowed.

Boyd, Q.C., contra, objected to the stay of execution on the ground that the appeal was frivolous, under R.S.O.. c. 38, sec. 28. The matter was in fact *res judicata*, as the pleadings shewed. On the question of costs he cited *Lady Mary Topham* v. *Duke of Portland*, 1 De G. J. S. 603.

Symons in reply : The reasons of appeal not having been served, the answer must be taken to contain the reasons, and they are sufficient. Appellants have taken all steps within time and *bona fide*.

Proudfoot, V.C., held he would have to take the answer as containing the grounds of appeal, and they certainly were not frivolous. The appellants must go to appeal next month if possible, and if the appeal was not heard then a further application might be made. Appellants to pay the costs of this application.

McTaggart v. Merrill.

In the report of this case contained in the last number of this Journal, the head-note should rather have been : " The Court has power to grant leave to serve notice of motion for decree by publication, though contrary to English practice." The fact that a previous order of revivor had been served by publication had no bearing on the matter.

COUNTY COURT OF WENTWORTH.

(Reported by John F. Monck, *Esq., Barrister-at-Law.)*

Re Richard P. Street.

Insolvency—Valuation of security—Application to reduce refused.

Two secured creditors duly proved their claim, valuing their security ; and the assignee elected to allow them to retain such security.

Upon the application of those creditors, after such election, for leave to withdraw their proof and reduce the value placed on their security, and prove against the estate for the sum by which it should be reduced, on the ground that the valuation was excessive, and had been made inadvertently,

Held, that they were bound by the value stated in their affidavit of claim.

[Hamilton, Dec. 21, 1878.

This was a petition by two creditors of the estate of Richard P. Street, an Insolvent, for leave to withdraw proof made by such creditors against the said estate, under a mortgage of real estate, and praying to be allowed to reduce the value placed on the security of such real estate by $200.

Papps, for the petitioners.

Parkes, for the assignee.

The facts are fully set out in the judgment of the learned Judge given below :

SINCLAIR, Co. J.—In this case, insolvency took place on the 17th of August, 1878, in virtue of an attachment issued that day against the insolvent. On the 3rd of September following, the petitioners, being two ladies, residing in the Village of York, in the County of Haldimand, who had a mortgage on certain real estate of the insolvent's, filed their claim against the estate, and placed a value of $1,200 on their security, under the 84th and 86th sections of the Insolvent Act.

No negotiations took place between the assignee and these secured creditors, about the retention of the security by them, until the 15th of November last, when their solicitor wrote to the assignee to know what he intended to do in respect of their claim.

On the following day the assignee wrote to the solicitor of these petitioners that he would allow them to retain their security. Application was subsequently made to the assignee to allow these creditors to amend their claim by placing the value of their security at $1,000, instead of $1,200. The assignee, conceiving he had no power to allow this to be done, refused their request.

The present petition was, therefore, filed for the purpose of allowing these two secured creditors to reduce the value of their security by $200, and thereby enabling them to prove against the insolvent's estate beyond the value placed on the security for so much additional. It is urged on their behalf, and as a reason why this application should be granted, that the insolvent invested the money represented by their mortgage security for them ; that they trusted to his good faith in the matter ; that he caused to be prepared on their behalf the proof of claim and the specified value of their security, and caused the same to be filed ; and represented to them about that time that he had had the mortgaged premises valued, and that they were not worth more than $1,200, the amount at which the value of the security was placed.

These creditors either did not take any means to ascertain the correctness of the value placed on the security for them by the insolvent, or, if they did ascertain its incorrectness, took no means to correct their proof of claim, or the value placed upon such security, until after the assignee's letter of the 16th of November, 1878, intimating that he elected allowing them to retain their security.

It does not appear that the insolvent, acting on their behalf, was not perfectly conversant with the state and value of the property when he filed their proof of claim, or that they caused any enquiry to be made as to the correctness of his representations.

Lately, however, and, as I gather from the affidavits, *since* the assignee refused to take the property on behalf of the estate, these creditors have ascertained that their security, instead of being worth $1,200, is not worth more than $1,000. It is urged on their behalf, in support of this application, that they should not be bound by the estimate of value formed by the insolvent for them, and that in any case, as a mistake has been made as to the value, they should be allowed to amend it.

In the first place, I cannot see why, if they entrusted the valuation of their security and their proof of claim to the insolvent, they should not be bound by his actions in the same way as any other principal is bound by the acts of his agent acting within the scope of his delegated authority.

It may be that they were unfortunate in engaging or allowing the insolvent to so act

on their behalf in this matter, but with such considerations we have no concern in this proceeding. But there was from the 3rd of September until the 17th of November for the purpose of making enquiry. During that time nothing was done on their behalf except some negotiations with the assignee about his taking the property covered by the security. Probably the assignee unduly delayed deciding upon what he should do, but that would only entitle the petitioners meantime to apply to amend or withdraw their proof of claim and valuation of security, or to compel the assignee to perform his duty.

When the petitioners' solicitor wrote to the assignee on the 15th of November, all parties considered the negotiations as then pending, and neither one should now be allowed to say anything to the contrary: see *Hickman* v. *Haynes*, L. R. 10 C. P. 598. For upwards of two months these creditors had personally, or through an agent other than the insolvent, the opportunity of ascertaining the value of their security; yet they do not appear to have taken the first step in that direction until the assignee refused to take the property. In ex parte *Downes*, 18 Vesey, 290, a mortgagee, on making a low valuation of the estate and electing to give up his mortgage, was admitted to prove, under a Commission of Bankruptcy, against the mortgagor. The estate was afterwards sold by the assignees for a much larger sum. The mortgagee presented a petition, praying to be at liberty to withdraw his proof and have the benefit of the mortgage. Lord Eldon said it was dangerous to allow a mortgagee to retract his election after having had the benefit of his proof, and dismissed the petition.

In the case of *ex parte Spicer*, 12 L. T. N. S. 55, it was held that a second mortgagee having elected to prove, and having proved his debt, was not entitled to have his proof expunged, as having been made through inadvertence, and to claim the balance of the purchase-money of the mortgaged premises in the hands of the trustees, and to receive the dividends upon the balance. Mr. Commissioner Goulburn says, "he cannot now, in common sense or in right, withdraw from the position [that is the proof claim and valuation of security] by alleging that it was done through inadvertence, and thus retrace his steps and go back to his former position as second mortgagee." Again, at page 56, he says, "It appears to me there is no pretence whatever for this demand. and that it would be perverting the whole object and purpose of this Statute if I were to allow any one to play fast and loose in this way, to prove first and then to come afterwards, when he finds that he might get more as second mortgagee, and say the proof was inadvertence." See also *Re Hurst*, 31 U. C. R. 116; *in re Hoare*, L. R. 18 Eq. 705. But it appears to me that this case can be put on a broader ground than this. Where, as here, without fraud on the part of the assignee, a second creditor makes proof of his claim, and places a value on his security, and invites the other creditors to pay him off at his own valuation and ten per centum additional on his security being accepted, it appears to me much like a statutory contract between the parties; so on the other hand, if the assignee declines to take the security, it should impose on the creditor a corresponding obligation to retain his security at the value he has placed upon it. A proposal on the one hand, and accepted or refused on the other, should have some legal effect. It should not, in the words of the high legal authority just quoted, allow either party to "play fast and loose." There may be circumstances in which it would be proper to allow such an application as this, but a very different case should be made out. If the assignee should be a party to a fraud (and I use the word in its broadest sense) on a secured creditor, or there should be a case clearly established of mutual mistake, which it would be contrary to every principle of justice to ignore, then I think the inherent jurisdiction of the Court could be invoked; but this case presents no such features. It does not appear that he who was acting for the petitioners, in making their proof and placing a value on the security, was not as well able to form an opinion as those who have since valued it. He may have been more san-

guine, and, perhaps, saw elements of value which those who have since seen it have been unable to discover. It would be difficult to say which was right.

If the property had increased in value and become of consequence to the assignee, the valuation here made would probably have satisfied those creditors, and when deficiency takes place (if it has here) then they should, on the other hand, be bound by the value which they deliberately placed on it. I can see nothing more in this case than an offer made in hopes of its being accepted, and when refused, an attempt made to get rid of its consequences. See the remarks of Bacon, C. J., at page 491 of 3 Chan. D., in the case of *In re Balbirnie, ex parte Jameson.*

The strictness with which the Courts have acted in refusing an amendment of a solicitor's bill of costs after it has become the subject of taxation affords not an inapt analogy to the case in hand, *Loveridge* v. *Botham*, 1 B. & P. 49 ; *Davis* v. *Dysart* (Earl), 25 L. J. Chan. 122, affirmed in appeal 25 L. J. Chan. 322, *In re Heather*, L. R. 5 Chan. 694. For these reasons I think the petition must be dismissed, but, as I am not satisfied that the assignee was as expeditious as he might have been in advising the petitioners' solicitor of his refusal to accept the security, and because the point is, under the Act, comparatively new, I don't think this a case for costs.

Petition dismissed, without costs.

UNITED STATES REPORTS.

SUPREME COURT OF OHIO.

Harner v. Dipple.

Contract by infant.

An undertaking by an infant as surety for the stay of execution is not void, but only voidable, and when ratified by him after arriving at maturity, becomes a valid and enforceable contract.

[*American Law Register, Nov.* 1878.

Motion for leave to file a petition in error to the District Court of Clarke County.

The original action was brought by Dipple against Harner, on an undertaking for stay of execution, executed by the defendant during his minority. It appears that the defendant arrived at his majority before the period of stay expired, and that after the expiration of the stay he acknowledged his liability, and promised the plaintiff, to whom the undertaking was made, to pay the amount of the judgment stayed. Upon this state of facts judgment was rendered for the plaintiff in the Court of Common Pleas, which judgment was afterwards affirmed by the District Court.

To reverse these judgments leave was now asked to file a petition in error.

Spencer & Arthur, for the motion, cited : 1 Parsons on Contracts, 295 ; *Keane* v. *Boycott*, 2 H. Blackst. 511 ; Reeves' Domestic Relations, 378 n. ; 2 Kent's Com. 236 ; 1 Mason, 32 ; Bingham on Infancy, 23 ; Swan's Treatise 601-2 ; *Baker* v. *Lovitt*, 6 Mass. 78 ; *Oliver* v. *Hondlet*, 13 Id. 237 ; *Whitney* v. *Dutch*. 14 Id. 457 ; *Boston Bank* v. *Chamberlain*, 15 Id. 220 ; *Chandler* v. *McKinney*, 6 Mich. 217 ; *Dunton* v. *Brown*, 31 Id. 182 ; 11 S. & R. 305 ; Tyler on Inf. and Cor. 42, 48 ; 54 Penna. St. 380 ; Story on Contracts, sect. 57 ; 10 Ohio, 127 ; 8 East, 331.

Keifer & White, contra, cited : Swain's Treatise, 601 ; *Tucker* v. *Moreland*, 10 Pet. 59 ; 1 Am. Lead. Ca. (5th ed.) 299, 300, 304, 306 ; *Cole* v. *Pennoyer*, 14 Ill. 160 ; *Curtin* v. *Patton*, 11 S. & R. 305, 310 ; *Hinley* v. *Margaritz*, 3 Barr. 428 ; *Patchin* v. *Cromach*, 13 Vt. 330 ; Tyler on Inf. 56-7 ; Bing. on Inf. 43, 44 ; *Vaughn* v. *Darr*, 20 Ark. 600 ; *Shropshire* v. *Burns*, 46 Ala. 108 ; *Williams* v. *Moore*, 11 M. & W. 256 ; 1 Pars. on Con. (6th ed.) *328, 329 and note b ; *Thornton* v. *Illingworth*, 9 Eng. C. L. 256 ; *Gibbs* v. *Morrill*, 3 Taunt. 307 ; *Mason* v. *Denison*, 15 Wend. 71 ; *Conroe* v. *Birdsall*, 1 Johns. Cases, 127 ; *Ayers* v. *Hewitt*, 19 Me. 281 ; *Arnold* v. *Richmond Iron Works*, 1 Gray, 434 ; 2 Kent, 235, 247 ; *Roof* v. *Stafford*, 7 Cowen, 185 ; *Slocum* v. *Harker*, 13 Barb. 537 ; 3 Burr. 1804 ; *Fonda* v. *Van Horne*, 15 Wend. 631 ; *Fetrow* v. *Wiseman*, 40 Ind. 148 ; *Kline* v. *Beebe*, 6 Conn. 494 ; *Owen* v. *Long*, 112 Mass. 403.

The opinion of the Court was delivered by

McIlvane, J.—The question made is, was the undertaking sued on absolutely void, or

only voidable. If void, it was not subject to ratification; if voidable merely, it may be enforced after ratification.

Having considered this question upon principle, as well as upon authority, we are constrained to hold that the undertaking was voidable only, and that after ratification it became a valid and binding engagement.

In disposing of this case, we make no note of those principles which control cases where an infant, by reason of immaturity and natural incapacity, is, in fact, unable to assent to the terms of an alleged contract. When this undertaking was executed it contained every element of a valid contract, save only, that the party was under twenty-one years of age.

Except for necessaries, the law grants to infants immunity from liability on their contracts. This immunity is intended for their protection against imposition and imprudence, and is continued after majority as a mere personal privilege. This privilege of immunity, after majority, is not given because of the actual or supposed incapacity of an infant to enter into contracts intelligently and prudently. If actual incapacity existed, the privilege of infancy would not be needed for the purpose of defence. And it is contrary to our knowledge of human nature, that all infants are incapable of intelligently and prudently entering into engagements assuming burdens. It is a matter of favour intended as a shield and compensation for the want of that greater wisdom and prudence which time and experience usually teach.

But, whatever may have been the natural capacity of the infant, whenever he arrives at majority, a time fixed by an arbitrary rule, which, in the nature of things, can not affect the personal capabilities of its subject, the law presumes that he has acquired all the wisdom and prudence necessary for the proper management of his affairs; hence, the law imposes upon him full responsibility for all his acts and contracts.

In this new relation, it becomes his moral duty, and for its discharge he is invested with legal capacity to affirm and perform, or to disavow, at his election, all his previous contracts of imperfect obligation. Contracts for necessaries are of perfect obligation, and, therefore, he cannot disaffirm them. Contracts founded on illegal considerations are of no obligation, and therefore, may not be affirmed.

The appointment of an agent or attorney to make contracts is, perhaps, inconsistent and repugnant to the privilege of infancy, for the reason, among others that might be named, that it is imparting a power which the principal does not possess; that of performing valid acts. But, outside of these exceptions, which are based on special grounds, we see no reason why the power should be denied, to ratify any contract which, as an adult, he might originally make. The power of disaffirmance being co-extensive, it is all that is needed for his protection.

If, in the case before us, the ratification had been made by payment, instead of a promise to pay, its binding effect would not be doubted. Why, therefore, should not the promise to pay be binding also? There is no question about consideration. The consideration which supported the original promise is sufficient to support the ratifying promise. The only contention here is, that the original promise was void by reason of infancy, not from want of consideration. If, therefore, actual performance by payment would have been binding, so should the promise to perform; and this, too, without regard to the fact whether or not the infantile contract was beneficial or prejudicial. The principles of jurisprudence are not violated by the performance of a contract prejudicial to the party. Indeed, a person, *sui juris*, is as strongly obligated by his contracts prejudicial as by those beneficial to himself; and the same principle should apply where a person, *sui juris*, ratifies and confirms his contract of infancy.

The plaintiff in error, however, relies chiefly on the authority of decided cases, and claims the settled law to be that all contracts of an infant prejudicial to him are absolutely void, and that a contract of suretyship is of that class.

In Swan's late treatise, among contracts of infants which have been decided to be void, is mentioned that of suretyship; but the author, in speaking of the state of the authorities, pithily and truthfully remarks:

"What contracts of an infant are void, and what are merely voidable, nobody knows."

Keene v. *Boycott*, 2 H. Blackst. 511, decided in 1795, appears to be a leading case. The contract of an infant was held in that case to be voidable only; but in the opinion of Chief Justice EYRE a rule was stated wherein certain of such contracts are said to be void. The rule was thus stated: "When the court can pronounce the contract to be for the benefit of the infant, as for necessaries, it is good; when to his prejudice, it is void; and where the contract is of an uncertain nature as to benefit or prejudice, it is voidable only at the election of an infant." This rule, modified so as to declare that a contract *necessarily* prejudicial to the infant is void, has been adopted in many later cases, both in England and in this country. But the current of more recent decisions repudiates the distinction between void and voidable contracts on account of their beneficial or prejudicial nature, and holds them all to be voidable merely; and the more recent decisions of courts still adhering to the distinction, hold some contracts voidable only, which were before held to be void. Thus, in *Owen* v. *Loag*, 112 Mass. 403, a surety contract was held to be voidable only, for the reason that such contract, as a matter of law, cannot be said to be necessarily prejudicial to the surety. Also, an account stated is held to be voidable only; *Williams* v. *Moor*, 11 M. & W. 255. Also, a conveyance by lease and release: *Zouch* v. *Parsons*, 3 Burr, 1794.

The following cases are to the effect that an infant's contract of suretyship is merely voidable, and may be ratified. They also show, with more or less force and directness, that the distinction between void and voidable contracts of infants, on the ground of benefit or prejudice, is not sound: *Curton* v. *Potton*, 11 S. & R. 305; *Hinely* v. *Margaritz*, 3 Barr. 428; *Gatchin* v. *Cromach*, 13 Ver. 330; *Vaughn* v. *Darr*, 20 Ark. 600; *Shropshire* v. *Burns*, 46 Ala. 108; *Williams* v. *Moor*, 11 M. & W. 256; *Fetrow* v. *Wiseman*, 40 Ind. 148; *Fonda* v. *Vanhorne*, 15 Wend. 631; *Scott* v. *Buchanan*, 2 Humph. 468; *Cole* v. *Pennoyer*, 14 Ill. 158; *Cummings* v. *Powell*, 8 Texas, 80; 1 J. J. Marshall, 236; *Mustard* v. *Wohford's Heirs*, 15 Gratt, 329.

In Massachusetts, where the doctrine was approved that the acts of an infant are void, which not only apparently but necessarily operate to his prejudice (*Oliver* v. *Clop*, 13 Mass. 237), it was afterwards said by Chief Justice PARKER, in *Whitney* v. *Dutch*, 14 Mass. 457: "Perhaps it may be assumed as a principle, that all simple contracts by infants, which are not founded on an illegal consideration, are strictly not void, but only voidable, and may be made good by ratification. They remain a legal *substratum* for a future assent, until avoided by the infant; and if, instead of avoiding, he confirm them when he has legal capacity to make a contract, they are in all respects, like contracts made by adults." And in 1840 (*Reed* v. *Bachelder*, 1 Metc. 559), Chief Justice SHAW said: "The question, what acts of an infant are voidable and what void, is not very definitely settled by the authorities, but in general it may be said that the tendency of modern decisions is to consider them as voidable, and thus leave the infant to affirm or disaffirm them when he comes of age, as his own views of his interest may lead him to elect."

So that, Mr. Parsons, in his work on Contracts, vol. 1, p. 294, 6th ed., says: "The better opinion, however, as may be gathered from the later cases cited in our notes, seems to be that an infant's contracts are, none of them, or nearly none, absolutely void; that is, so far void that he cannot ratify them after he arrives at the age of legal majority."

In 1 American Leading Cases, 300, 5th ed., it is said: "The numerous decisions which have been had in this country justify the settlement of the following definite rule as one that is subject to no exceptions. The only contract binding on an infant is the implied contract for necessaries. The only act which he is under a legal disability to perform is the appointment of an attorney. All other acts and contracts, executed or executory, are voidable or confirmable by him at his election," on arriving at majority. This rule has been quoted and approved 58 n 1 i. 14 Illt. and 15 Gratt. 329, and we think it embodies the better reason.

In the light of principle, therefore, as well as by the weight of the later authorities, the whole question should be thus resolved: The privilege of infancy is accorded for the protection of the infant from injury resulting from imposition by others or his own indiscretion. The object is fully accomplished by conferring on him the power to avoid his contracts, or, in other words, by giving him immunity from liability, until such contracts are ratified by himself after arriving at full age. And, again, that an adult, labouring under no disability, may perform his unexecuted contracts of infancy, whether they be beneficial or prejudicial to him, and that he will be bound by such performance, we think is a proposition too plain to be doubted. If, therefore, with full knowledge of the facts, he ratifies and affirms them, being moved thereto by his own sense of right and duty, he should in law, as in morals, be bound to their performance.

Motion overruled.

REVIEWS.

A Manual of the Law of Landlord and Tenant. By Horace Smith, B.A., of the Inner Temple, and Horace Spooner Soden, M. A., of the Middle Temple, Barristers-at-Law. Second Edition. London: Davis & Son, 57 Carey St., Lincoln's Inn. R. Carswell, Toronto, 1878.

The first edition of this work was published in 1871, and was very favourably received by the profession in England, though but little known in this country. The ground plan was drawn out originally by Mr. Cave, Q. C., but, as he was unable to finish it, Messrs. Smith and Soden took it in hand and presented a very useful treatise, which takes its place between the large and expensive treatise of Woodfall (now appearing in a slightly abridged form in its eleventh edition, by Mr. Sely) and the sketchy lectures of Mr. J. W. Smith. The present volume is even a greater success than the previous one, much matter has been added, a part re-written, and a number of forms given, some of which are new to us and will be found of use in this country. We strongly recommend this compact and practical work to the notice of our readers.

FLOTSAM AND JETSAM.

God save the Queen.—On the evening of Coronation day of Her present Majesty, the Benchers of Lincoln's Inn gave the Students a dinner; when a certain wag, in giving out a verse of the National Anthem, which he was solicited to lead in a solo, took the opportunity of stating a grievance as to the modicum of port allowed, as follows:

> "Happy and glorious
> Three half pints 'mong four of us.
> Heaven send no more of us.
> God save the Queen."

which was sung by the full chorus amid shouts of laughter and applause.

"Lien."—Lord Eldon always pronounced the word, as though it were "lion," and Sir Arthur Pigott pronounced it "lean." On this Jekyll wrote the following epigram:

> "Sir Arthur! Sir Arthur what do you mean,"
> By saying the Chancellor's "lion" is "lean."
> Do you think that his kitchen's so bad as all that
> That nothing within it will ever grow fat?"

Rolls and Butter.—Lord John Russell endeavoured to persuade Lord Langdale to resign the permanent Mastership of the Rolls, for the uncertain position of Lord Chancellor; and paid the learned Lord very high compliments upon his talents and acquirements. "It is useless talking, my Lord" said Langdale, "so long as I enjoy the *Rolls*, I care nothing for your butter."

A County Judge in England, who had received his appointment, more on account of his political creed than of his ability, was surprised to find that an assistant judge had been appointed to his court. A friend asked Lord Westbury the reason for his creating another judge. The Chancellor replied, "we were afraid of leaving Mr. A— any longer *alone in the dark.*"

Law Society of Upper Canada.

OSGOODE HALL,

MICHAELMAS TERM, 42ND VICTORIÆ.

During this Term, the following gentlemen were called to the Bar; namely :—

Frederick Pimlott Betts
(Who passed his examination in Trinity Term).
William Barton Northrup.
James Albert Manning Aikins.
Edmund Lindsay Dickinson.
Albert Jeffrey.
Walter Macdonald.
Duncan Denis Riordan.
William Henry Best.
Thomas Rollo Slaght.
Bartle Edward Bull.
John Ball Dow.
Robert Hodge.

And the following gentlemen were admitted as Students of the Law and Articled Clerks, namely :—

Graduates.

John Henry D. Munson.
Henry Nason.
William Johnston.
John Fravers Lewis.
Albert John Wedd McMichael.

Matriculants.

Edmund Bell.
George Kappelle.
Ferguson James Dunbar.
Edmund Sweet.
Frederick A. Munson.
Harry O. Morphy.
James C. Fraser.

Juniors.

Arthur Alexander Webb.
John Christopher Delaney.
Thomas Carr Short.
Albert Edward Barber.
W. Taylour English.
F. X. Murphy.
Thomas H. Stoddart.
John Workman Berryman.
Wilmot Churchill Livingston.
Alexander W. Ambrose.
Samuel Thomas Hamilton.
John Soper McKay.
Abner E. Decow.
Wm. John Code.
John Edward Moberly.
Edmund Weld.
John Edward Bullen.
Robert W. Witherspoon.
Chauncey G. Jarvis.
Isaac N. Monk.
Edward W. M. Flock.
John M. Best.
Alexander Darrach.
Wm. Fred D. Mercer.
Joseph Braun Fisher.

Articled Clerk.

Wm. Edwin Sheridan Knowles.

PRIMARY EXAMINATIONS FOR STUDENTS-AT-LAW AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

All other candidates for admission as articled clerks or students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects :—

Articled Clerks.

Ovid, Fasti, B. I., vv. 1–300; or,
Virgil, Æneid, B. II., vv. 1–317.
Arithmetic.
Euclid, Bb. I., II., and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography — North America and Europe.
Elements of Book-keeping.

Students-at-Law.

Classics.

1879 { Xenophon, Anabasis, B. II.
Homer, Iliad, B. VI.

1879 { Cæsar, Bellum Britannicum.
Cicero, Pro Archia.
Virgil, Eclog. I., IV., VI., VII., IX.
Ovid, Fasti, B. I., vv. 1–300.

1880 { Xenophon, Anabasis. B. II.
Homer, Iliad, B. IV.

1880 { Cicero, in Catilinam, II., III., and IV.
Virgil, Eclog., I., IV., VI., VII., IX.
Ovid, Fasti, B. I., vv. 1–300.

1881 { Xenophon, Anabasis, B. V.
Homer, Iliad, B. IV.

1881 { Cicero, in Catilinam, II., III., and IV.
Ovid, Fasti, B. I., vv. 1–300.
Virgil, Æneid, B. I., vv. 1–304.

Translation from English into Latin Prose.

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

MATHEMATICS.

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

ENGLISH.

A paper on English Grammar.

Composition.

Critical analysis of a selected poem :—

1879.—Paradise Lost, Bb. I. and II.

1880.—Elegy in a Country Churchyard and The Traveller.

1881.—Lady of the Lake, with special reference to Cantos V. and VI.

HISTORY AND GEOGRAPHY.

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

[Optional Subjects instead of Greek.

FRENCH.

A Paper on Grammar.

Translation from English into French Prose—

1878 and 1880 } Souvestre, Un philosophe sous les toits.

1879 and 1881 } Emile de Bonnechose, Lazare Hoche.

or GERMAN.

A Paper on Grammar.

Musaeus, Stumme Liebe.

1878 and 1880 } Schiller, Die Bürgschaft, der Taucher.

1879 and 1881 } Schiller { Der Gang nach dem Eisenhammer. Die Kraniche des Ibycus.

A student of any University in this Province who shall present a certificate of having passed, within four years of his application, an examination in the subjects above prescribed, shall be entitled to admission as a student-at-law or articled clerk (as the case may be), upon giving the prescribed notice and paying the prescribed fee.

INTERMEDIATE EXAMINATIONS.

The Subjects and Books for the First Intermediate Examination shall be:—Real Property, Williams; Equity, Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery (C. S. U. C. c. 12), C. S. U. C. caps. 42 and 44, and Amending Acts.

The Subjects and Books for the Second Intermediate Examination shall be as follows:—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law, C. S. U. C. c. 88, and Ontario Act 38 Vic, c. 16, Statutes of Canada, 29 Vic. c. 28, Administration of Justice Acts 1873 and 1874.

FINAL EXAMINATIONS.

FOR CALL.

Blackstone, Vol. I., containing the Introduction and the Rights of Persons, Smith on Contracts, Walkem on Wills, Taylor's Equity Jurisprudence, Stephen on Pleading, Lewis's Equity Pleading, Dart on Vendors and Purchasers, Best on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

FOR CALL, WITH HONOURS.

For Call, with Honours, in addition to the preceding:—Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Hawkins on Wills, Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

FOR CERTIFICATE OF FITNESS.

Leith's Blackstone, Taylor on Titles, Smith's Mercantile Law, Taylor's Equity Jurisprudence, Smith on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

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

SCHOLARSHIPS.

1st Year.—Stephen's Blackstone, Vol. I., Stephen on Pleading, Williams on Personal Property, Hayne's Outline of Equity, C. S. U. C. c. 12, C. S. U. C. c. 42, and Amending Acts.

2nd Year.—Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

3rd Year.—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Taylor's Equity Jurisprudence, Fisher on Mortgages, Vol. I. and chaps. 10, 11, and 12 of Vol. II.

4th Year.—Smith's Real and Personal Property, Harris's Criminal Law, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis's Equity Pleadings, Equity Pleading and Practice in this Province.

The Law Society Matriculation Examinations for the admission of students-at-law in the Junior Class and articled clerks will be held in January and November of each year *only*.