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THE general impression has been that Con. Rules 1089 and 1092 practically amended R.S.O., c. 66, so as to abolish the writ of attachment in actions against absconding debtors, and substituted for it an order of attachment. But a reference to 52 Vic. c. 11, Form A. enacted in the last session of the Ontario Legislature, seems to indicate that it is the intention of the legislature to continue the writ of attachment. It is unfortnnate that the Rules and the Statutes are not consistent on this point. The confusion doubtless arises from forgetfulness on the part of our legislature of the changes made by the Rules in the former practice. More careful supervision of legislation, with a view to consistency and clearness, seems a necessity.

THE progress made in other portions of the globe where the English common law forms the basis upon which legislation has been built up, must furnish ground for instructive and profitable reflection. The codification and improvement of law in India, treated of in this number by Mr. Remfrey, a Calcutta solicitor, gives striking evidence of the progress made in that distant part of the empire. In many of the improvements effected in India we see the repetition there of changes which have been made here, but in some particulars the deviations from the English law and practice have been much more radical in India than in Ontario. Some of these departures will doubtless not be regarded by our readers as improvements, others, we think, must commend themselves to everybody. We commend to the consideration of our legislators the mode adopted in India of preventing lack of unanimity on the part of the jury from having its usual harmful consequences.

IT daily becomes more and more apparent that something must be done in the direction of providing another Junior Judge for the County of York. The Division Court business for the City of Toronto has now assumed such immense proportions and is increasing with such rapidity that it is difficult for the present most efficient and industrious Junior Judge to keep the work under. At each of the present monthly sittings the docket is of such size that the Court never lasts less than three days, and frequently five days. The result of this is an unnecessary and great waste of time to litigants, solicitors and witnesses, who have to

hang about the court waiting for what is, generally speaking, some trivial matter. The true remedy for this would be the appointment of a City Judge who would devote his time exclusively to city courts, holding daily sessions. We may refer to this matter again. It is a crying evil, not merely in overworking public servants, but more especially in reference to the enormous expense and interference with business which every month takes place. It has been estimated that it means to the laboring classes, mechanics and small business men a loss in the aggregate of something like seven thousand working days in the year. This would be saved by having daily sittings. This is the main reason why we call attention to this matter. It is not because the work is in arrear; we are only surprised that it is not. We here say nothing of the duties of the junior Judge in assisting at the Sessions and County Court, during which he has either to obtain the services of some deputy or leave the business of these Courts to his senior, who has his hands quite full. This again involves a delay in these Courts and a very large increase in fees to witnesses, Court officials and jurymen.

ON THE CODIFICATION AND IMPROVEMENT OF LAW IN INDIA.

It is generally admitted that the India of to-day is "a fine country, with a grand future before it," and her rapid material development is beginning to be more fully recognized abroad. Hence we find Manchester spinners sending out a deputation to enquire into her cotton industries: commissioners coming from Japan to study the workings of her chambers of commerce, and the German Chancellor himself sending out an official of the Berlin Foreign Office to study the administrative and economic life of India, our commercial laws, our systems of land tenure, railway policy and administration, external trade, and so on. Bearing this in mind, and remembering that India is advancing all along the line, I think it may interest the readers of this journal if they have placed before them a "cameo" depicting India's improved laws.

In order that the growth of Anglo-Indian law may be perceived, let us glance for a moment at the origin of legislation here.

British law was first introduced into India by the 13th Geo. I., by which the Mayor's Court at Calcutta was established. Prior to this, Englishmen had brought with them only as much of the English law as was applicable to their situation and to the condition of the young settlement: *Advocate-General* v. *Rauli Sumonoye*. The above-mentioned charter was a beneficial one. It neither expressly nor by implication extended to India the Alien laws, Mortmain Act, or any law of forfeiture not then prevalent here: *Est. General Martin*. On the contrary it was especially designed to attract "foreigners" or strangers to this new colony, by providing for a strict and equal distribution of justice. In our silent struggle for supremacy it had its desired effect. Clive having cleared his way, Englishmen gradually began, by the aid of doctoring and diplomacy, to occupy this vast continent. As matters settled down, and the standard of civilization was raised, legislation became desirable, and Regulations of the Bengal

Code were accordingly passed, dealing with the pressing needs of these times. In due course, and in 1834, the Regulations began to be replaced yearly by numerous Acts of the Supreme Legislative Council, affecting different districts or tracts of country in various ways. These enactments were amended and partially repealed, as occasion required, and we thus acquired a rather various assortment of laws.

To come to the present times. Since Her Majesty took over the reins of government from the horrible East India Company, the attention of our legislators has been chiefly directed to the crystallizing of uniform laws having force throughout the whole Indian Empire. The work of codification (suggested, it is said, by Lord Macaulay) commenced with the Penal Code, contemplated many years before, but only introduced by Sir Barnes Peacock in 1860. But with what result? Scarcely a vestige remains of Acts of the Supreme Council previous to 1871. Instead of being obliged to have recourse to countless perplexing and confusing, not to say contradictory, decisions, requiring long study, we now have succinct codes adapted to the peculiar requirements of, and easily understood by, the lay community. Amongst these may be mentioned the following enactments: Indian Penal Code, Indian Succession Act, Indian Evidence Act, and Indian Contract Act (all passed in 1872); Specific Relief Act, Registration Act, and Limitation Act (all passed in 1877); Negotiable Instruments' Act, Joint Stock Company's Act, Transfer of Property Act, Criminal Procedure Code (all passed in 1882), and Landlord and Tenant Act.

Besides putting a stop to suttee and slavery, causing a decided check to infanticide and thuggee, and legalizing the marriage of Hindoo widows, many anomalies deplored in other countries have been swept away or beneficially modified. Let me instance a few which, to British and Canadian lawyers, may seem somewhat strange.

Subject to the obligation to register transfers of land valued at over 100 rupees, no distinction exists between the mode of transfer *inter vivos* in realty and personalty. All estates, both movable and immovable (European and native), devolve in the same channel and on one description of representative, namely, the executor or administrator, and thus we get rid of the useless distinction between the transfer or devolution of realty and personalty which renders English and American systems of law so intricate.

Executors, as persons supposed to have been selected by the testator himself, have full and uncontrolled power to dispose of not only the personal but also the real estates of their testators. So have the administrators of Europeans. The administrators of natives' estates are, after 1st May next, 1889, to be in no way hampered as regards disposal of movables, such as Government securities and shares or outstandings, but it has not been deemed desirable to invest them with disposing power over immovable property, save with the leave of the Court.

Here in India no derivative executorship is recognized in connection with wills or codicils executed, or grants obtained, since the beginning of 1860.

Nor is this all. In India, sealed deeds do not import consideration; simple contracts and documents under seal (known as specialties) stand on the same

footing, and are equally effective. No longer limitation is vouchsafed to the one than to the other.

By the Indian Contract Act the application in India of the historical Statute of Frauds is abolished. Furthermore, as regards Bailments, degrees of care are not defined or recognized, the one rule of ordinary prudence being applied.

Further, the English doctrine to the effect that acceptance of a security for a lesser sum cannot be pleaded in satisfaction of a similar security for a larger sum, has been abrogated; consequently a resident of this country may "pay part in lieu of all," without being harrassed by the thought that he may afterwards be sued for the remainder. Those familiar with the doctrine laid down in the leading English case, *Cumber* v. *Wane*, will appreciate this alteration.

Bengal is said to resemble continental countries "in the absence of any laws of primogeniture and entail, in the clear and indefeasible titles to land, and in the extreme cheapness and facility of its mortgage and sale": Annals of Rural Bengal, by Sir W. W. Hunter. An exception may, however, be mentioned, namely, that in the families of some of the ruling chiefs, primogeniture does prevail, and in some parts of Southern India females succeed in preference to males.

Many of your readers have doubtless heard that in India change of religion now-a-days works no forfeiture of rights, but they may not be aware that according to Act XXI., of 1860, the latter advantage applies to Hindoo converts to Christianity, but not to the Mahommedan faith.

To turn now to the effect, amongst all classes domiciled in India, other than Hindoo, Mahommedans and Buddhists, of marriage on the property of husband and wife. The Indian Succession Act provides that "no person is by marriage to acquire any interest in the property of the person whom he or she marries, or become incapable of doing any act in respect to his or her own property which he or she could have done if unmarried": S. 4, Act X., of 1865. This drastic law, which came into force on 1st January, 1866, naturally made important changes in the common law rights, liabilities and disabilities arising out of the relation of husband and wife, in the case of persons to whom English law had theretofore been applied. As regards property, it abolished by implication the doctrine of unity of persons between husband and wife.

Another apparent variance from English law is, that anything a child may have received from an intestate in his lifetime by way of advancement, is not deducted from its share or brought into "hotchpot."

Our Succession Act also wisely excludes the home rule which enables an executor to pay any creditor, even himself, preferentially to another, by enacting that after the liquidation of funeral and administration charges, and three months' wages due to domestic servants, laborers, or artizans, all debts, however secured, shall be paid rateably. *Ibid*, s. 282.

By another Act no executor or administrator, save an administrator-general, is justified in charging any commission for administering any East India estate.

Even where a legacy is bequeathed to a person named as an executor, he cannot obtain it unless he proves the will or otherwise manifests an intention to act as executor.

In illustration of the desire to encourage the circulation of coin in this hoarding country, I may remark that accumulations of income for one year after a testator's death alone are recognized by our law.

It is interesting that the old rule under which a person changed his domicile by coming to India, unless he was in the service of Government, is abolished, and special modes are laid down for acquiring an Indian domicile.

It may here be mentioned that the provision contained in s. 283 of the Succession Act, that if the domicile of the deceased was not in India the application of his immovable property to the payment of his debts is to be regulated by the law of the country in which he was domiciled, is about to be abrogated by the Probate and Administration Bill now before the Legislative Council. In future all Indian assets are to be distributed, so far as payment of debt is concerned, according to the law of India.

By a clause in the before cited Succession Act, no one having a nephew or niece or nearer relative has power to bequeath property to religious or charitable uses unless the will has not only been executed a year before the testator's death, but within six months of its execution deposited in an office indicated for that purpose. The object of this is to guard against death-bed bequests to charitable uses by persons having near relations.

It is also satisfactory to find that those entitled to trust funds, etc., any portion of which happens to be in the Presidency towns, can have their property placed in charge of the Official Trustee or Administrator-General—officers of Government—and that in the interior of the country, called the "mofussil," the "Court of Wards" often takes over charge of, and superintends to the best advantage, the estates of the infant landed proprietors or married minors. Moreover, a district Judge has power to nominate guardians of the property and persons of minors, and, by the new Bengal Tenancy Act, he is empowered to appoint a common manager when the co-owners cannot amicably agree to collect their rent jointly.

Useful land improvement Acts also exist, under which the Government makes advances to cultivators and others.

Except in regard to persons of whom a guardian has been appointed by a Court, the age of majority of persons of every race, domiciled here, is attained throughout India at 18, instead of 21.

The civil law administered in India, in matters not provided for by native law or custom, is the broad and grand rule of "justice, equity, and good conscience." Personal laws are applied in matters of inheritance, succession and adoption.

Throughout the country the procedure in suits is regulated by a comprehensive civil procedure code of 652 sections, in substitution for eleven enactments containing over a thousand unrepealed sections. It is divided into ten parts, namely, (1) Suits in general, (2) Incidental proceedings, (3) Suits in particular cases, (4) Provisional remedies, (5) Special proceedings, (6) Appeals, (7) Reference to and Revision by the High Court, (8) Reviews of judgment, (9) Special Rules relating to the chartered High Courts, (10) Certain miscellaneous matters.

A defendant may be sued in any court within whose jurisdiction the cause of action arose, or within which he resides, or carries on business, or works for gain. Now-a-days no person, be he prince or peasant, is exempted from the jurisdiction of one or other of the civil courts. Even the Government may be sued in the ordinary way, instead of by petition of right, the Secretary of State for India being made the defendant.

The various steps in a suit in India are somewhat similar to those under the far-famed Judicature Acts. For instance, oral evidence may be supplemented and facts proved by affidavit, by leave of the Court. In civil suits pending before foreign tribunals, witnesses may be examined by interrogations, or *viva voce*, under commission issued by or to any of the High (late "Supreme") Courts of Judicature at Calcutta, Bombay and Madras, etc. Interrogatories may be administered to elucidate facts preparatory to a hearing. In exceptional cases injunctions are awarded by Mofussil Courts. One of the High Court Judges lately severely criticized this power thus:—"A jurisdiction originally belonging only to a Superior Court possessed of legal knowledge and experience is now imposed on a Mofussil Court, which shares with its victims the cruelty of inflicting such powers."

Verified lists of documents are ordered and inspection granted to both sides, after filing of written statement (answer), and subpœnas to witnesses follow in due course: Further information on Indian procedure will be found in R. Bellchamber's Practice of the Civil Courts.

In any suit for money in which the plaintiff is a woman, the Court may at any stage make an order for security for costs, if satisfied "that such plaintiff does not possess any sufficient *immovable* property within British India, independent of the property in suit." It need scarcely be added that my eulogy of India's law does not extend to such a strongly worded section. Whatever may be its true construction, any such power of smothering a just claim is rough on ladies, Europeans and natives alike. To counterbalance this in a measure, no woman can be incarcerated for debt. Even with regard to males, imprisonment under civil process is practically abolished as regards honest debtors.

As regards witnesses, all persons (including husband and wife) capable of giving rational answers to questions put to them are competent to testify for themselves or others in both civil and criminal proceedings. All lawyers are aware that a person may, however, be competent without being compellable, but the rare instances in which the law will not permit a witness to testify, if he be willing, are in the Indian Evidence Act succinctly defined.

According to our Evidence Act the Judge is empowered, in both civil and criminal proceedings, to enquire to the utmost into the truth by putting any questions he pleases in any form to any witness or to the parties about any fact relevant or irrelevant to the matters before him, and he may, of his own motion, order the production of any document or thing.

India is a free country; it has a free press, and its legal codes "secure to all Her Majesty's subjects, without distinction of race or creed, equality before the law": Last speech of Lord Dufferin in Calcutta. The natives of India, of

whom Hindoos and Mahommedans form the bulk, are extremely fond of litigation, and the legal barometer rises as the weather gets warm. Every native considers it the correct thing to have a law suit in full swing. In fact some think it unconstitutional that the luxury of litigation should be curtailed, as is intentionally done by the Specific Relief Act, which prevents a person suing in respect of any subject he has contracted to refer to arbitration. Fortunately, however, this is a plea which may be effectually waived, as was (unintentionally, of course) done in a late railway case in the old country.

The statute of limitations has not as yet been touched on. Under this head it may be observed that various Acts prescribing the time within which actions can be brought, applications made, and appeals filed, are focussed by Act xv., of 1879. For the convenience of Canadian readers the Indian Limitation Act may thus be summarized:

One year is allowed for actions of tort.

Three years for actions on contracts, simple or otherwise (unregistered), including suits for rent. A customer need, therefore, only preserve receipted bills for three years, instead, as at home, for double that time.

On registered documents, as also on foreign judgments, a six years' limitation is given.

All suits for the recovery of immovable property are in time if instituted within twelve years, and to redeem a mortgage of immovable property sixty years is allowed.

It is noteworthy that the periods prescribed by this Act suffice to extinguish all remedy by suit, save (*a*) in cases of trust or fraud (*b*) where an acknowledgment has been obtained in writing recognizing the claim as of right before expiration of the prescribed period, or (*c*) where the defendant has been for any part of the time absent from India. Lastly, decrees of the High Court can be executed any time within twelve years—but decrees of other courts not less than three years—unless kept alive by execution or notice through the court.

Incidentally it may be remarked that hard and fast rules prevail, by which all courts in India are bound to take cognizance of limitation questions, whether raised by the defendant or not.

Appeals lie to the District Judge, and from thence to the High Courts, and in cases involving over $1,000, across seas to Her Majesty in Council.

Nor has the economic community been forgotten, seeing that our Statute Book also includes Acts regulating Joint Stock Companies generally, and railways, factories, tramways, telegraphs, telephones, shipping and inland navigation in particular.

The United Kingdom standard yard has now become the one legal standard measure of length, in furtherance of the desire for uniformity of weights and measures.

India has in addition the benefit of a law regulating Literary and Scientific Societies, modelled on the lines of the English statute. Authors and inventors are also recognized, for we have a Copyright Act, practically extending English law into the interior. And one of the latest additions to our legal port-

folio is an Inventions and Designs Act, regarding the working of which see the writer's hand-book on Patents, Trade Marks, etc., in India, Ceylon, China, etc.

A "Code of Torts" is also on the legislative anvil.

Time will not suffice at present to dwell on our "Evidence Act" and "Transfer of Property Act," or on various other useful enactments, but we may fairly congratulate ourselves on possessing as fine a body of carefully codified civil laws as any country under the sun.

Now to turn to the criminal laws of British India. These have been consolidated, as witness our Penal and Criminal Procedure Codes, both monuments of legal lore.

It would take far more space than is available to enumerate the various amendments introduced by these codes in Indian criminal law and procedure. Such improvements are well worth attention by lawyers and lawgivers elsewhere. The substantive and adjective laws of India will, I understand, be found carefully collected in two volumes called the "Anglo-Indian Codes," edited by the late Mr. Whitley Stokes, D.C.L., and lately published at the Clarendon Press, Oxford.

Is it not strange that in the British Isles a breach of the seventh Commandment can only be redressed by a civil suit? Why call it *crim. con.?* Here in India this violation of the decalogue is treated in a far severer fashion. By the Penal Code it is declared to be a heinous offence, punishable with five years' rigorous imprisonment. In that respect, also, the West can be taught a lesson by the East. There are, however, not wanting so-called social reformers who utterly fail to appreciate the imperial proportions of our magnificent legal Taj (a "poem in marble" at Agra). Scarcely has the scaffolding been removed from our splendid edifice when they out with their penknives and begin to extract a precious inlaid stone, and to compare it, unfairly, with one taken from that well-built structure, the English Law Amendment Act. Such people need only be reminded of their unveiled zenana customs, and of those sacred usages which render exact accord between English and Indian laws impossible. But I am travelling beyond our codes.

To return. Not only in the Presidency towns but throughout the Mofussil there are government officials (solicitors or pleaders) who act as public prosecutors.

In all civil cases the Judge alone has to decide questions involving both law and fact, whereas in criminal trials he is assisted either by a jury or assessors who decide, or express their opinions on questions of fact, including the meaning of technical terms. This difference in the mode of trial between civil and criminal proceedings is, it will be seen, very marked. It avoids the travesty of justice portrayed by Dickens in *Bardell* v. *Pickwick:* The Pickwick Papers.

An accused person is not to be induced by threat or otherwise to make disclosures, and is not to be subjected to cross examination. Power is given the Court to put questions to him, without previous warning, and at any stage of an enquiry or trial, with a view to explaining any circumstances bearing on

the evidence against him. No oath is administered to the accused, and he is not bound to answer. The Court and the Jury (if any) may nevertheless draw such inferences from his answers or refusal as they think just.

In order to prevent technical objections and the splitting of split hairs, the Court may alter the charge at any time before the verdict of the Jury is returned or the opinions of the assessors are expressed. Amendments must, of course, be explained to the accused, and the trial may thereupon be proceeded with, if not likely to prejudice either side.

As indicating some of the difficulties India magistrates have to encounter, I may, in passing, refer to a curious criminal case I was engaged in a few years ago near Calcutta. A Hindoo was maliciously charged with the murder of his daughter, Kaminee. The *corpus delicti* was not forthcoming. Equal, however, to any emergency, a native policeman produced "some poor fellow's skull" as that of the murdered girl! Another member of the same fraternity, animated by a laudable spirit of rivalry, brought forward a second and smaller skull. It was seriously argued that the girl's skull must be either the one skull or the other. Fortunately for the father, the girl herself arrived in the Magistrate's Court at this critical juncture. On being questioned she told a plaintive tale to the effect that she had been wooed by a Parawala (village policeman). He, finding her father obdurate, had one night secretly sent her up the country by rail, promising to follow. In answer to further questions, the girl declared that neither of the two skulls on the bench was *her* skull. Tableau! The father was, of course, honorably acquitted, and the wicked swain properly punished.

In the High Court, "special" or "common" juries of nine persons assist at every criminal session. Trials before the Court of Sessions at the head station of each district, take place either with a jury (consisting of an uneven number of men, not being less than three or more than nine) or by aid of assessors.

Challenges without grounds are allowed in the High Court as to eight jurors on the part of the Crown and to a like number by the person charged. Besides this in all Sessions cases, objections are allowable "for cause" on various grounds, such as that the juror is under 25 or over 60 years of age; presumed partiality; holding office in or under the Court; being entrusted with police duties, or any other circumstance assigned which, in the opinion of the Court, renders him improper as a juror.

In criminal trials the presiding Judge, at the close of the evidence, after both sides' pleaders have been heard, sums up to the jury the principal points in evidence, explaining how they bear for or against the accused, and, without expressing any opinion, renders them every assistance in coming to a right conclusion.

Nowhere in India is unanimity of the jury required. On the contrary, in Presidency towns, if six out of nine jurors agree, and the Judge concurs, he delivers judgment in accordance with such opinion. In the Court of Sessions the verdict of the majority of the jury prevails when the Judge agrees, but if he disagrees with the jury, or the majority of them, power is given him to refer the whole case to the High Court, which possesses large power of revision. Such a

reference renders country cliques and combinations harmless. The Revising Court will not set aside the verdict of a jury unless patently wrong and perverse, or induced by error in the summing up. On an appeal, the High Court may, instead of quashing or reducing a sentence, enhance it. Our High Court Judges, although arrayed in robes during the criminal sessions, never wear wigs; nor do the counsel; and why? A barrister friend suggests that Indian Judges don't wear wigs simply because a seat on the bench during the hot season would prove to be too trying a situation.

But this article must be trying the reader's patience. Feeling exhausted, some one may exclaim, as did an Indian District Judge one sultry day in June: "I feel faint, give me another *authority*."

The subject of the codification and improvement of law in India is naturally far too extensive to admit of exhaustive treatment in a few pages, and it remains for your readers to say whether the above remarks do not demonstrate that in the domain of well-considered law reform India is abreast with, if not ahead of, Britain, and other countries following directly in her wake.

In conclusion, if it be true that "it is upon the law and government that the prosperity and morality, the power and intelligence of a nation depend," British India may be congratulated on its legislative system. Although her laws are not faultless, her legal machinery works smoothly, and may in the near future furnish food for aspiring jurists in other progressive countries.

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Calcutta, April 3rd, 1889.

COMMENTS ON CURRENT ENGLISH DECISIONS.

THE Law Reports for April comprise 22 Q.B.D., pp. 393-536; 14 P.D., pp. 41-50; and 40 Chy.D., pp. 385-519.

PRACTICE—PENAL ACTION—DISCOVERY—ACTION FOR TREBLE DAMAGES FOR POUND BREACH, ETC., UNDER 2 W. M., SESS. 1 C. 5. S. 4.

In *Jones* v. *Jones*, 22 Q.B.D., 425, a Divisional Court, composed of Lord Coleridge, C.J., and Hawkins, J., decided that an action for pound breach and rescue of chattels distrained for tithe rent charge, in which the plaintiff claims treble damages under 2 W. & M., sess. 1, c. 5. s. 4, is a penal action, and the plaintiff, therefore, is not entitled to an affidavit of documents.

PRACTICE—EQUITABLE EXECUTION—RECEIVER—MILITARY OFFICER—RETIRED PAY—COMMUTATION OF RETIRED PAY.

In *Crowe* v. *Price*, 22 Q.B.D., 429, an application was made for the appointment of a receiver by way of equitable execution of a sum of money belonging to the judgment debtor, who was a retired military officer, standing in the bankruptcy estates' account of the Bank of England to his credit, on the annulment of his bankruptcy; and which consisted partly of a sum paid to the trustee out of the retired pay of the judgment debtor, and partly of a sum paid to the trustee

by the Government in respect of the commutation of part of his retired pay. It was held by Lord Coleridge, C.J., and Hawkins, J., that the creditor was entitled to the appointment of a receiver in respect of the commutation money, but not in respect of the retired pay; and the decision was affirmed by the Court of Appeal (Lord Esher, M.R., and Bowen and Fry, L.JJ.) as regards the retired pay; no question being raised on the appeal as to the other money.

MANDAMUS—PREROGATIVE WRIT—RAILWAY COMPANY TRANSFER OF SHARES—REFUSAL TO REGISTER—REMEDY BY ACTION.

The Queen v. *Lambourn Valley Ry. Co.*, 22 Q.B.D. 463, was an application for a prerogative writ of mandamus, on behalf of a shareholder of the defendant railway company, to compel the company to register a transfer of shares which the applicant had made to an insolvent person, in order to avoid liability for future calls. The company refused to register the transfer. A rule *nisi* having been granted, it was, after argument, discharged by Pollock, B. and Manisty, J., on the ground that the prosecutor had another specific and sufficient remedy, viz.: by action of mandamus, and, therefore, the prerogative writ ought not to issue.

BUILDING SOCIETY—SUBSCRIPTION SHARES—WITHDRAWAL—WINDING UP—CONTRIBUTORY.

In re the Sheffield and South Yorkshire Building Society, 22 Q.B.D. 470, a Divisional Court (Cave and Charles, JJ.) decided a question affecting the liability of shareholders in Building Societies, which it may be useful to notice. By the Building Societies' Act, 1874 (37, 38 Vict. c. 42), s. 14, the liability of any member of any society under the Act in respect of any shares upon which no advance has been made is limited to the amount actually paid, or in arrear, on such shares. By s. 16, the rules of every Building Society are to set forth the terms upon which shares may be withdrawn. Members of a Building Society incorporated under the Act, who had investing shares payable by monthly subscriptions, and upon which no advance had been made, gave due notice of withdrawal and received the estimated amount of their shares under the rules of the Society before the shares were fully paid up or matured. Within a year afterwards the Society was ordered to be wound up, and the Judge of the County Court, on the application of the creditors, made an order declaring that the holders of such shares not matured at the commencement of the winding up, notwithstanding withdrawal, were liable to contribute to the assets of the Society to the extent to which their shares should be deemed to be in arrear at the commencement of the winding up; and that the extent to which such shares should be deemed to be in arrear was the amount of subscription which became payable prior to the winding up, with interest and fines. But it was held that this order was wrong, and that on the withdrawal of the shares pursuant to the rules of the Society, the holders thereof ceased to be members of the Society, and no amount was in arrear, and that they were not liable at law, or in equity, to contribute to its debts within the meaning of s. 200 of the Company's Act.

INSURANCE, MARINE—WARRANTY—"IRON," "STEEL."

In *Hart* v. *the Standard Marine Insurance Co.*, 22 Q.B.D. 499, the Court of Appeal (Lord Esher M.R., Bowen and Fry, L.JJ.), affirming the decision of

Mathew, J., held that a policy of insurance on a ship which contained a clause "warranted no iron, or ore, or phosphate cargo, exceeding the net registered tonnage," was forfeited by shipping a quantity of steel in excess of the net registered tonnage.

INSURANCE AGAINST INJURY—"EFFECTS OF INJURY CAUSED" BY ACCIDENT—DEATH FROM OTHER CAUSES, HASTENED BY ACCIDENT—POWER OF ARBITRATOR TO STATE SPECIAL CASE UNDER C.L.P. ACT, 1854, S. 5 (R.S.O. C. 53, S. 35).

Isitt v. *Railway Passengers' Assurance Co.*, 22 Q.B.D. 504, was an action upon an accident policy granted by the defendants against "death from the effects of injury caused by accident." The assured fell and dislocated his shoulder. He was at once put to bed, and died in less than a month from the date of the accident, having been all the time confined to his bedroom. In a case stated in a reference under the defendant's Special Act, the arbitrator found that the assured died from pneumonia, caused by cold, that he would not have died as, and when, he did, but for the accident; that as a consequence of the accident he was rendered restless, unable to wear his clothing, weak and unusually susceptible to cold, and that his catching cold, and death, were both due to the condition of health to which he had been reduced by the accident. Huddleston, B., and Wills, J., under these circumstances were unanimously of opinion that the death of the assured was due "to the effects of injury caused by accident," within the meaning of the policy. The Act providing for the reference to arbitration of clauses arising under the policy, also provided that the submission might be made a rule of Court, and the Court was of opinion that the umpire in the reference had power to state a special case for the opinion of the Court under the C.L.P. Act, 1854, s. 5 (see R.S.O. c. 53, s. 35). Huddleston, B., says at p. 511, "The question of law is, then, whether or not, as a matter of law, the chain of circumstances ought to be taken as 'effects' under this insurance. Construing, as I do, the terms of the insurance as meaning that the injury must be immediately caused by the accident, but that the death need not be immediately caused by the injury, I answer this question in the affirmative. I think the circumstances which followed were, in the contemplation of law, 'effects' of the injury."

PRACTICE—COSTS—JOINT DEFENDANTS IN ACTION OF TORT—DEFENDANT SEVERING IN PLEADING—LIABILITY OF DEFENDANTS FOR COSTS OF SEPARATE PLEADING.

In *Stumm* v. *Dixon*, 22 Q.B.D. 529, the Court of Appeal (Lord Esher, M.R., and Fry, L.J.) were divided in opinion on a question of practice. The action was one of tort against two defendants, who had severed in their defence; the plaintiff recovered judgment against both, with costs, and the question arose whether both defendants were liable to all the costs of the action. The Divisional Court held (see *ante*, p. 145) that the defendant who delivered a separate defence was alone liable to the plaintiff for the costs so occasioned, and that the other defendant was not liable for the costs. And in this opinion Lord Esher concurred, but Fry, L.J., was of the opinion that both defendants were jointly and severally liable for all the costs. Lord Esher considered it against natural justice to hold otherwise, and the only authority on the point, *Wilson* v. *Foore*,

cited in Buller's "Nisi Prius," 7th ed., p. 335, he considered "unsatisfactory," and wrong in principle, and he refused to follow it. Fry, L.J., on the other hand, considered that where an action is tried by a jury, under the rules the costs are to follow the event, unless the Judge or the Court "shall for good cause otherwise order." The plaintiff consequently has a right to costs against both defendants, and it is for the Court or Judge, and not the Master, to modify the effect of the rule. At p. 536 he says "In my opinion the effect of the rule which has been laid down by the Master of the Rolls would be to vest in the Master a discretion which, by virtue of the rule, belongs only to the Judge."

PROBATE—WILL—EXECUTION IN THE FORM OF A DEED—ATTESTING WITNESS UNABLE TO RECOLLECT EXECUTION.

In *the goods of Colyer*, 14 P.D. 48, probate was granted of a will executed in the form of a deed, notwithstanding that the witnesses, though proving their signatures and that of the testator, were unable to swear positively as to the circumstances of its execution.

PROBATE—WILL—PARTIAL, OR TOTAL REVOCATION.

In *Treloor* v. *Lean*, 14 P.D. 49, the facts were that the testator, after duly executing his will, which was in five sheets, each of which was signed by himself and initialled by the attesting witnesses, took out three sheets and substituted three new ones, which he signed, but which are not attested. He did not alter the date of the will nor did he re-sign it, nor was it re-attested. Butt, J., held that the will was not entitled to probate, and with the consent of the parties, pronounced for an intestacy.

VENDOR AND PURCHASER—POWER OF SALE—COMPANY—SALE BY MORTGAGEE TO COMPANY IN WHICH HE IS A SHAREHOLDER.

Farrar v. *Farrars*, 40 Chy.D. 395, was an action brought by a mortgagor to set aside a sale made by the mortgagee under the power contained in the mortgage, on the ground that the sale had been made to a Company in which the mortgagee was a shareholder. It was held by Chitty, J., and affirmed by the Court of Appeal (Cotton, Lindley and Bowen, L.JJ.), that the sale could not be set aside merely on the ground of the relationship between the mortgagee and the purchasers, but that the existence of that relationship, which was known to the purchasers, created such a conflict of interest and duty as to throw upon the purchasers the burden of upholding the sale, and that the Company had discharged themselves of this burden by showing that the mortgagee had taken all reasonable pains to secure a purchaser at the best price, and that the price given was not at the time inadequate, though more might have been obtained by postponing the sale. Lindley, L.J., who delivered the judgment of the Court of Appeal, says at p. 409: "A sale by a person to a corporation of which he is a member is not, either in form or in substance, a sale by a person to himself. To hold that it is would be to ignore the principle which lies at the root of the legal idea of a corporate body, and that idea is that the corporate body is distinct from the persons composing it. A sale by a member of a corporation to the corporation

itself is in every sense a sale valid in equity as well as at law. There is no authority for saying that such a sale is not warranted by such a power." But while saying this, he proceeds to point out that such a sale may be void on the ground of fraud, or for being made at an under value, or under such circumstances as to throw upon the purchasers the onus of proving its validity. Further on he says, at p. 415: "Although a sale by a mortgagee to a company, promoted by himself, of which he is the solicitor, and in which he has shares, is one which the company must prove to have been *bona fide* and at a price which the mortgagees could properly sell, yet if such proves to be the fact, there is no rule of law which compels the Court to set aside the sale."

COPYRIGHT—NEWSPAPER—ARTICLES COMPOSED AT THE JOINT EXPENSE OF PROPRIETORS OF SEVERAL NEWSPAPERS—IMPERIAL COPYRIGHT ACT (5 & 6 VICT., C. 4, 5, SS. 18, 19).

Trade Auxiliary Co. v. *Middlesborough*, 40 Chy.D. 425, was an action for the infringement of a copyright. The plaintiffs were the three several proprietors of three several periodicals, and they had jointly employed a person to compile for them lists of registered bills of sale and deeds of arrangement, on the terms that the copyright was to belong to the plaintiffs. The three periodicals were registered under the Copyright Act. The compilation of the lists required skill, and involved a good deal of labor and expense. The defendant association copied and circulated among their own members so much of these lists as related to their own neighborhood, which was a very small part of the whole. The Court of Appeal (Cotton, Lindley and Lopes, L.JJ.), affirming Chitty, J, decided that the 18th section of the Statute was not to be construed as confining the copyright of a proprietor of a newspaper to articles composed on the terms that the copyright should belong to, and be paid for by, him alone, but that each of the plaintiffs had an interest in the copyright, and, having registered his periodical, had a right to sue to restrain the infringement, and that the defendants could not escape liability on the ground that they had only copied a small portion of the lists: See also *Cate* v. *Devon*, 40 Chy.D. 500. This Statute, we may remark, is one of the few Imperial Statutes in force in Canada, *proprio vigore*.

TRUSTEE—DISCLAIMER BY CONDUCT—LEGAL ESTATE.

In re Birchall, Birchall v. *Ashton*, 40 Chy.D. 436, was an action for the appointment of new trustees in place of a deceased trustee and the defendant, who, it was alleged, had by his conduct disclaimed the trusts. Bristowe, V.C., before whom the action was tried, found that the defendant had by his conduct disclaimed the trust, and directed a reference to appoint new trustees, and ordered the defendant, at the expense of the trust estate, to execute a proper conveyance of the trust estate to the new trustees. On appeal by the defendant, the Court of Appeal (Cotton, Lindley and Lopes, L.JJ.) refused to disturb the finding of Bristowe, V.C., as regarded the fact of the disclaimer, but having found that there had been a disclaimer of the trust, they held that he was wrong in directing the disclaiming trustee to convey, and they, therefore, struck out that part of his order. Cotton, L.J., says at p. 439: "I should be sorry that it should be

thought that a trustee could disclaim the office of trustee, and nevertheless take the legal estate."

MORTGAGE—SOLICITOR AND CLIENT—EXPECTANT HEIR—BONUS—COLLATERAL ADVANTAGE—CHAMPERTY—REDEMPTION.

James v. *Kerr*, 40 Chy.D. 449, was an action for redemption. The plaintiff being in poor circumstances, was defendant in a probate action, in which he claimed a share of certain real estate as co-heir of the deceased. He borrowed money from the defendant, who was a solicitor, to enable him to conduct his defence, and executed a mortgage on his interest in the land in question, whereby he covenanted to employ a particular solicitor in the action, and if he was successful to pay the defendant £225 "by way of bonus," and charged the estate with the payment of the sum advanced and interest at 5% and the £225 bonus. The plaintiff succeeded in his claim in the probate action. It was held by Kay, J., that the mortgagee was entitled to redeem on payment only of the sum actually advanced, with interest, and that he was not bound to pay the £225; that the mortgage was tainted with champerty, and the bonus was a collateral advantage which the mortgagee could not legally stipulate for, and that the transaction was voidable as an undue advantage obtained from the plaintiff under the pressure of distress. At p. 460 he says: "I believe, with Lord Romilly, that the rule that a mortgagee should not be allowed to stipulate for any collateral advantage beyond his principal and interest did not depend on the laws against usury. The rule was entirely independent of the rate of interest charged. There seems less reason than ever for allowing it, now that persons may agree upon any rate of interest they please."

HUSBAND AND WIFE—SEPARATE PROPERTY OF WIFE—GIFT BY WIFE TO HUSBAND—CAPITAL—INCOME.

In re Flamank Wood v. *Cook*, 40 Chy.D. 461, was a claim by a widow to rank as a creditor against her deceased husband's estate. It appeared that she was entitled to a sum of money for her separate use under a will. A mortgage for a larger sum held in trust for the testatrix was in 1867 transferred by the claimant and another person, as executors of the trustee, to the husband of the claimant, he paying out of his own money the difference between the amount due on the mortgage and the amount due to his wife. In 1869 the husband sold the mortgaged property and received the purchase money, and his wife and the other executor of the original mortgagee, as such executors, concurred in the conveyance to the purchaser. The husband applied the purchase money to his own use. The husband and wife lived together in amity until the husband's death in 1885, and no proceedings were ever taken by the wife in respect of the money so received, nor did she receive any income in respect thereof. By his will, made in 1860, the husband gave his wife a life interest in his property. She now claimed to rank as a creditor on his estate for the sum received in 1867, with subsequent interest. She denied that she ever gave him authority to receive the money, and there was evidence that she objected to his receiving it, and she did not appear to have had any separate advice in the matter. Under these circumstances

it was held by Kay, J., that the onus lay on those claiming under the husband to prove a gift of the capital sum from the wife to the husband, and that they had failed to do so, and therefore the widow's claim as a creditor must be allowed; but as to the interest which had accrued during the lifetime of her husband, he disallowed the claim as to that.

INTEREST ON COSTS PAYABLE OUT OF AN ESTATE.

In re Marsden's Estate, Withington v. *Neumann*, 40 Chy.D. 475, Chitty, J., held that where, in an administration action, costs have been directed to be taxed, and paid by the trustees out of a testator's estate, with a direction for the division of the fund after such payment amongst the persons beneficially interested, interest is not, in the absence of special direction, payable on the costs. See *Archer* v. *Severn*, *ante* vol. 24, p. 617.

CHAMPERTY—MAINTENANCE—TRUSTEE IN BANKRUPTCY—ASSIGNMENT OF SUBJECT MATTER OF ACTION.

Guy v. *Churchill*, 40 Chy.D. 481. This was a motion to discharge an order of course to continue proceedings, obtained under the following circumstances: Pending the action the plaintiff became bankrupt, and the trustee in bankruptcy being unwilling to assume the risk of carrying on the action, assigned the cause of action to a creditor in trust for himself and certain other creditors of the bankrupt, on the terms that anything that might be recovered (after deducting actual disbursements) was to be divided in four parts, three of which were to belong to the assignee and one to the assignor. The assignee having obtained an order to continue the proceedings in his own name, the defendants moved to set it aside on the ground that the assignment was champertous: but it was held by Chitty, J., that the principle of the decision in *Stear* v. *Lawson*, 15 Chy.D. 426, applied, and that the fact that some of the creditors were to carry on the action at their own risk and expense, and to take a larger share of the fruits of the action than they otherwise would have done, did not bring the case within the law against champerty and maintenance, and that the transaction was one permitted by the bankruptcy laws: but apart from the bankruptcy law and the relationship of the parties, the assignment would be void for champerty. At p. 488 he says: "Maintenance is called the genus of an offence, of which champerty is a species"; and at p. 489: "Champerty is but a form of maintenance, though it be maintenance aggravated by an agreement to have part of the thing in dispute. . . . Maintenance when spoken of in the books means unlawful maintenance. But the maintenance of the suit of another is lawful when the persons maintaining have an interest in the thing in variance. For instance, where a *chose in action* is vested in a trustee, the beneficiaries may, by providing a fund for the expenses of the action, and by other means, not in themselves unlawful, assist in maintaining the suit."

SOLICITOR—COSTS—TAXATION AFTER TWELVE MONTHS AFTER PAYMENT OF BILL—THIRD PARTIES—COSTS IMPROPERLY PAID TO SOLICITOR OUT OF TRUST ESTATE.

In re Jackson, 40 Chy.D. 495, was an application by third parties interested in an estate to have the bill of costs of a solicitor who had been employed by

the administratrix, and whose bill had been paid by her out of the estate, referred to taxation. It was suggested that the bill contained items not properly chargeable against the capital of the trust estate, and that the solicitor knew that he was being paid out of the capital, and had notice of the breach of trust at the time he received payment. More than twelve months had elapsed since payment, and the application was therefore refused. See *Wilson* v. *Beatty*, 9 App.R. 149.

COPYRIGHT—INJUNCTION—PERIODICAL.

In *Cate* v. *Devon*, 40 Chy. D. 500, it was held by North, J., that it is not necessary that the name of the proprietor in the title of the paper should be registered under the Newspaper Libel and Registration Act, 1881, in order to entitle the proprietor to sue to restrain an infringement of copyright matter appearing in such paper.

REPAIRS—TENANT FOR LIFE—EXPENDITURE OF TRUST MONEY—JURISDICTION.

The only remaining case to be noted is *Conway* v. *Fenton*, 40 Chy.D. 512, in which Kekewich, J., held that where land and money were vested in trustees of a settlement for the benefit of a husband and wife for their lives, and after their death for their children, the Court had original jurisdiction to sanction the expenditure of part of the money in repairing buildings on the land which were so much out of repair as to make the land untenantable. *Sed vide Re Smith's Trusts*, 4 O.R. 518.

Notes on Exchanges and Legal Scrap Book.

SIR CHARLES RUSSELL, Q.C., M.P.—"To few men under the age of fifty has it been given to attain the success of Mr. Charles Russell, who now stands by general consent at the head of the unofficial Bar. In the full vigor of life, with a large and lucrative practice, it is not to be wondered at that he has refused a judgeship, reserving himself for yet higher honors, or at all events deferring his acceptance of the *otium cum dignitate* of the Bench. The record of his contests and triumphs is familiar to everyone who reads the reports; and in every case it may fairly be said, whatever an advocate could honorably do for his clients Mr. Russell has done." So spoke *Pump Court* in its first issue—now many years ago. Since that time we have seen him add triumph to triumph, until he has achieved the crowning glory of his career in the masterly conduct of the case for the Parnellite members before the commission, and in the brilliant address he has just delivered, wherein indeed we saw learning made lovely with eloquence. Since that time he became Attorney-General in Mr. Gladstone's last administration, and during the short time he held that office was universally acknowledged to have borne his honors well. Sir Charles commenced life as an

articled clerk to a Dundalk solicitor, but speedily found that the lower branch of the profession of the law would not give him the scope he required for the exercise of his powers and the aims of his ambition. He therefore boldly abandoned the path on which he had entered when his prospects of success were already assured, and commenced, *de novo*, as a student of the Honorable Society of Lincoln's Inn. In 1859 he was called to the Bar, and connecting himself with the Northern Circuit, soon established his reputation as a sound lawyer, an acute cross-examiner, and eloquent advocate. In Liverpool, especially, his abilities were promptly recognized; and in the Court of Passage, as well as Sessions and Assizes, his briefs were numerous and important. The late Edwin James, Q.C., Mr. Justice Brett, and Lord Justice Holker were amongst the men with whom he had to compete, and his reputation steadily grew, both among his professional brethern and with clients, so that his succession to Sir John Holker as leader of the Northern Circuit was acquiesced in by universal consent.

What Sir Charles Russell is in court is well known, and we need not dwell on the steady incisiveness with which he extracts the truth from an unwilling witness, or the clear precision with which he places the salient points of a complicated case before a jury. Out of court, he is a charming companion, witty in conversation, and an appreciative listener in his turn. He takes an interest in sport of every kind, and thoroughly enjoys the turf. So well is he appreciated in the sporting world, that when the celebrated question about the identity of Bend Or was raised, briefs for both plaintiff and defendant were sent for his acceptance, and now in every sporting case both sides hope to be first to retain his services. In a rubber at whist, at picquet, and, in fact, in nearly every game, he is able to excel by means of the same mental qualities of coolness, readiness, and decision which account for his success in more weighty matters. The Anti-Tocacco Society may be interested to learn that Sir Charles Russell is remarkable as one of the few thorough-going snuff-takers of the day, and appears to enjoy intensely the stimulating pinch.

As a member of Parliament, since his election for Dundalk, in 1880, up to now, when he represents South Hackney, Sir Charles has won the ear of the House of Commons to a remarkable degree for a lawyer, and, as an Irish Liberal, even when he declined altogether the leadership of Mr. Parnell, he exercised an important influence in the course of Mr. Gladstone's measures of conciliation for Ireland. He has always advocated with earnestness and moderation the cause of his countrymen, and his tact has often gained what the obstructive system of some of his colleagues had almost lost. It must now be written of him that, with his political chief, Mr. Gladstone, he has at length unreservedly accepted the leadership of Mr. Parnell. Sir Charles, like all really great men, is always kindly and generous in his treatment of promising juniors, and is highly popular on his circuit. No man could be found more thoroughly representative of his profession. It is now some fifteen years since Sir Charles took silk, but he seems as sprightly now as the first day he was called within the Bar, and, like Mr. Gladstone, age seems only to ripen his intellect without impairing his vigor. —*Pump Court.*

INFANTS' LIABILITY IN TORT AND CONTRACT.—Infancy has in the eyes of the law many privileges, but the decision of Mr. Justice Kay in *Re Seager, Seeley* v., *Briggs* establishes a limit for them. There an infant misappropriated money, which he had received on behalf of his master's employers. On being accused, he admitted the truth of the allegation, and when he attained his majority signed a memorandum acknowledging that he owed the amount stated and costs, promising to pay within a week, and charging a certain sum of money, to which he had become entitled under a will, with payment thereof. He also authorized the trustees to pay the sum to his master, and the latter took out a summons for payment. The 1st section of the Infants' Relief Act, 1874, makes all contracts entered into by infants for repayment of money lent or to be lent or for goods supplied or to be supplied (except necessaries), void, and the 2nd section provides "that no action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age." It would have been stretching the meaning of this section, if the memorandum, signed after the infant came of age, had been held a ratification, and Mr. Justice Kay declined so to decide; and further holding that the charge was given to prevent an action in tort being brought against the boy, who was liable *ex delicto* not *ex contractu*, allowed the summons with costs. To determine, then, whether the Act applies, the crucial test would seem to be, does the alleged liability arise from a contract or a tort? If it arises from any contract, then no ratification will be of any use: *Ex parte Kibble; Re Onslow*, 32 L. T. Rep. N.S. 138: 10 Ch. App. 373. Indeed, so far-reaching is this rule that a person will not be held liable for a breach of promise of marriage made in infancy, and subsequently ratified (*Coxhead* v. *Mullis*, 39 L. T. Rep. N.S. 349: 3 C.P. Div. 439), unless there is evidence that what subsequently took place was intended as a new promise and not a ratification of the former one (*Northcote* v. *Doughty*, 4 C.P. Div. 385; *Ditcham* v. *Worrall*, 43 L. T. Rep. N.S. 286; 5 C.P. Div. 410); and "it is not enough to give evidence of language, which is equally consistent with ratification of the old promise as with a fresh promise:" per Mr. Justice Charles, in *Holmes* v. *Brierly*, 58 L. T. Rep. N.S. 70. So strict is the rule that an infant cannot contract, that he was not bound at law if he induced the other party to enter into the contract by a fraudulent representation that he was of age: Simpson on the Law of Infants, p. 79. The doctrine of equity, however, which, since the Judicature Acts, presumably applies to all the divisions of the High Court, is that not even an infant can take advantage of his own fraud: *Ib.*; and Kerr on Fraud and Mistake, 2nd edit. p. 122. This is in reality hardly an exception to the rule, but rather an example of the crucial test, as the infant is not strictly made liable because he has contracted, but on account of the wrong his conduct has inflicted on the other party: Pollock on the Principles of Contract, 3rd edit. p. 75. If the other party is not deceived by the infant's false representation, then, as no wrong is done to that person, the privilege of infancy remains: *Nelson* v. *Stocker*, 33 L T. Rep. N.S. 277; 4 DeG & J. 458.—*Law Times.*

DIARY FOR MAY.

1. Wed.....St. Philip and St. James.
2. Thur.....Admission of graduates and matriculants. J. A. Boyd 4th Chan. 1881.
3. Fri.....Mr. Justice Henry, died 3rd May, 1888.
4. Sat.....Last Day for filing papers and fees for final examination.
5. Sun.....*Second Sunday after Easter.*
6. Mon.....Supreme Court of Canada sits. 1st Intermediate Exam. Lord Brougham died 1868, aet. 90.
9. Thur.....2nd Intermediate Examination.
12. Sun.....*Third Sunday after Easter.*
14. Tue.....Court of Appeal sits. Gen. Sess. and Co. Ct. Sitt. for trial in York begin. Solicitors' Examination.
15. Wed.....Barristers' Examination.
19. Sun.....*Fourth Sunday after Easter.*
20. Mon.....Easter term commences. High Court Justice Sittings begin.
21. Tue.....Confederation proclaimed 1867. Lord Lyndhurst born 1772.
24. Fri.....Queen Victoria Born 1819.
26. Sun.....*Rogation Sunday.*
27. Mon.....Habeas Corpus Act passed 1679.
28. Tue.....Battle of Fort George 1813.
30. Thur.....Ascension Day.

Early Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

COURT OF APPEAL.

MACLENNAN *v.* GRAY.

Registry laws—Priorities—Unregistered mortgage—Dower.

R. G. and J. G. being the owners subject to the dower of their mother R., and an annuity in her favour, of certain lands, mortgaged them to one C., to secure advances made by him to them. R. knew of the mortgage and was asked, but refused, to execute it. Subsequently R. G. and J. G. mortgaged the lands to the plaintiffs to secure advances made by them. R. released all her claims for the purpose of this mortgage, but received no benefit from the advances. This mortgage was taken by the plaintiffs without any notice of the mortgage to C., and was registered before it, and gained priority over it. Under this mortgage the lands were sold, and after payment of the claim of the plaintiffs a surplus remained, which R. claimed in priority to C.

Held, reversing the decision of BOYD C., (reported 16 O.R. 321), that she was not entitled to priority. The priority gained by the plaintiffs by force of the Registry Act did not enure to her benefit, as she was not a purchaser or mortgagee, nor did that priority enure to her benefit as surety by virtue of the doctrine of subrogation because that doctrine could not be invoked to defeat the honest claims and superior equities of third persons.

H. J. Scott, Q.C., for the appellant.

F. E. Kingsford, for the respondent.

THE ONTARIO LOAN AND DEBENTURE CO. *v.* HOBBS.

Mortgage — Re-demise clause — Landlord and tenant — Right to distrain.

On the 31st day of May, 1883, one D. mortgaged to the plaintiffs certain lands to secure the sum of $20,000 then advanced by them to him. The advances were repayable as follows: $500 on the 1st day of December, 1883; $500 in each of the months of June and December in each of the four following years; and $13,500 on the 1st day of June, 1888; together with interest at the rate of seven per centum per annum from the 1st day of June, 1883, to be paid half-yearly on the 1st days of June and December in each year. The mortgage was made in pursuance of the Act respecting Short Forms of Mortgages, and contained the following clause, described in the margin as "Re-demise clause":

"And the mortgagees lease to the mortgagor the said lands from the date hereof until the date herein provided for the last payment of any of the moneys hereby secured undisturbed by the mortgagees or their assigns, he (the mortgagor) paying therefor in every year during the said term on each and every of the days in the above proviso for redemption appointed for payment of the moneys hereby secured, such rent or sums as equal in amount the amount payable on such days, respectively, according to the said proviso, without any reduction. And it is agreed that such payments when so made shall respectively be taken and be in all respects in satisfaction of the moneys so then payable according to the said proviso."

The mortgage did not contain any statutory distress clause, or the statutory clause providing for possession by the mortgagor until default, or any attornment clause, and it was not executed by the mortgagees. At the time it was given, D. was himself in occupation of several of the properties comprised in it, of the

annual rental value of $1,200, while the other properties comprised in it were in the occupation of tenants of D., and were producing an annual rental of about $2,000. After the execution of the mortgage, the properties continued to be occupied in the same manner by D., or his tenants, and payments under the mortgage were duly made by D. In 1887 the goods of D. on one of the properties comprised in the mortgage and occupied by him were seized under executions against him and sold, and the plaintiffs claimed as landlords that the proceeds of the sale should be applied first in payment of the amount due to them for the upaid instalments of principal and interest of June and December, 1886.

Held, reversing the decision of the Divisional Court of the Queen's Bench Division (reported 15 O.R. 440), that this claim was well founded, the relation of landlord and tenant having been validly created between the parties, and the execution creditors in the absence of fraud not being entitled to complain.

Moss, Q.C., and *A. O. Jeffery*, for the appellants.

W. R. Meredith, Q.C., for the respondents.

RYAN *v.* CLARKSON.

Assignment for the benefit of creditors—Costs of creditor having execution in sheriff's hands—R.S.O., c. 124, s. 9.

Held, BURTON J.A., dissenting, affirming the judgment of ARMOUR, C.J., that under R.S.O., c. 124, s. 9, the costs for which an execution creditor has a lien, are the costs not of the execution only, but all the usual costs which could be recovered from the debtor under an execution.

Foy, Q.C., for the appellant.

Idington, Q.C. for the respondent.

LEMAY *v.* MACRAE.

Arbitration and award—Motion to set aside award—Admissions of arbitrator as to grounds upon which he proceeded—Draft award setting out grounds.

Held, affirming the judgment of ARMOUR, C. J., reported 16 O. R., 307, that where the action and all matters of account and counter claim therein, and all matters in difference between the parties were by consent referred to the arbitration and final end and determination of a named person, and no provision was made for an appeal, his award, valid on its face, could not be attacked because of alleged errors in the principle upon which he proceeded, this principle being disclosed in a draft award not delivered with, or forming any part of, the formal award, and in conversations after the making of the award between the arbitrator and one of the solicitors for the attacking party. There being no misconduct or mistake of jurisdiction shown, the Court could not interfere.

East & West India Co. v. *Kirk*, 12 A.C., 738, considered.

Robinson, Q.C., and *A. Ferguson* for the appellant.

Delamere and *F. H. Keefer* for the respondents.

FERGUSON *v.* KENNEY.

Voluntary conveyance—Right of creditor to attack on ground of continuous indebtedness of grantor to him on current account.

The defendant made a voluntary conveyance to his wife of certain real estate owned by him. Without this real estate, his liabilities, among which was a debt to the plaintiffs of about $1,500, exceeded his liabilities. He continued to deal largely with the plaintiffs down to the time of his failure some years afterwards, the balance then due them being about $2,300, but much more than $1,500 having been in the meantime paid to them.

Held, that in the case of a continuous dealing and account where the customer goes on paying with one hand on general account and purchasing fresh goods with the other hand to an equal or larger amount, with a constantly increasing balance against him, the creditor is from the commencement of such dealing, so long as his ultimate balance remains unpaid, in a position to attack an alleged voluntary conveyance.

Decision of BOYD, C. affirmed.

Moss, Q.C., and *A. C. Galt* for the appellants.

Geo. Kerr, jun., and *Duggan* for the respondents.

IN THE MATTER OF THE CENTRAL BANK OF CANADA—BAINES' CASE.

Banks and banking—Winding-up Act—Subscription for shares—Transfer of shares—Shareholders within one month of suspension—R.S.C., c. 120, ss. 20, 70, 77.

One B. subscribed for twenty-five shares of the capital stock of the Central Bank of Canada, but did not at the time of subscription nor within thirty days thereafter make any payment thereon. About eight months later, however, payment was made by D. to the Bank, and the Bank accepted payment from him, of twenty per cent. of the amount subscribed, and subsequently dividend cheques were issued by the Bank in favor of B., were endorsed by him, and were paid.

Held, MACLENNAN, J.A., dissenting, affirming the decision of BOYD C. (reported 15 O. R.295), that, the original signature remaining unobliterated, the subscription was revived and became complete as soon as payment was made, and no fresh signature was necessary.

Per MACLENNAN, J.A. The payment not having been made within the prescribed time, the original subscription was void, but the subsequent payment accepted by the Bank, and the endorsement by B. of the dividend cheques, operated as a new subscription.

No special directions as to the transfer of shares had been formally adopted by the directors, but the transfer book had been prepared and adapted to the system of marginal transfer. One C. transferred certain shares in blank, subject, by marginal note, initialled by C., to the order of a broker and subject to a subsequent marginal note, initialed by the broker to the order of B. B. signed an acceptance of the shares immediately under the transfer in blank signed by C., and was entered in the books of the Bank as the holder of the shares, the intermediate transfers to and from the broker being omitted. The transfer to B. and the acceptance by him took place within a month of the time of the suspension of the Bank.

Held, affirming the decision of BOYD, C., that this transfer and acceptance were a sufficient compliance with, or at least not in any way a violation of, the statutable provisions, and that B. became the legal holder of the shares and was liable as a contributory.

Sections 70 and 77 of the Act must be read together and make liable as contributories all those who hold shares at the time of the suspension of the Bank, or who have held shares at any time within one month before.

A. C. Galt, for the appellant.

W. R. Meredith, Q.C., for the respondents.

MOLSON'S BANK *v.* HALTER.

Assignment for benefit of creditors—Mortgage to secure moneys used by trustee in breach of trust—Trust estate not a creditor—Intent to prefer—Having the effect of preferring—R. S. O., cap. 124, sec. 2.

The defendant W., who was executor under the will of one J., made in favour of himself and the defendant H., who was his co-executor under the will, a mortgage to secure the repayment of trust moneys improperly used by W., in breach of trust. W. was at the time this mortgage was given and continued to be in insolvent circumstances, but had made no assignment for the benefit of his creditors. The plaintiffs, execution creditors of W., attacked the mortgage.

Held, that no assignment having been made, an execution creditor might attack the security and take advantage of section 2 of the Act.

Held, also, that neither H., nor H. and W., as executors, were in the strict sense of the word creditors of W., and that the mortgage therefore could not be set aside as having been given with intent to prefer, or as having the effect of preferring, one creditor to another.

Held, also, OSLER, J. A., dissenting, that the words "or which has such effect" relate only to the immediately preceding clause, dealing with the preference of one creditor over others, and this mortgage not being a preference of one creditor over others, and not being made with intent to defeat, delay or prejudice creditors, could not be set aside.

Per BURTON, J. A.—These words apply only to a preference of one creditor over another, and even then only when there is an actual intent to prefer.

Per OSLER, J. A.—These words apply to the whole of the antecedent part of the section, embracing as well conveyances made with intent to defeat, delay, or prejudice as those made

with intent to prefer only; and any conveyance or transfer by an insolvent (with the exceptions specially mentioned in section 3) which has the effect of defeating, delaying, prejudicing, or preferring creditors, whatever may have been the intent with which it is made, is within the statute.

Judgment of MACMAHON, J., affirmed on other grounds.

W. H. Boulby for the appellants.

W. Nesbitt and *A. W. Aytoun-Finlay* for the respondents.

LINTON *v.* THE IMPERIAL HOTEL CO.

Landlord and tenant—Lease with proviso for determination in case of assignment for creditors—Right reserved to distrain after such assignment—Amount for which distress may be made. 50 *Vict., cap.* 23, *(O.)*

B., by lease dated 28th November, 1887, was lessee of certain premises at a yearly rental of $370, payable quarterly in advance, the lease containing a provision that if the lessee should make any assignment for the benefit of his creditors, the then current year's rent should immediately become due and payable, and might be distrained for, but that in other respects the term should immediately become forfeited and at an end. It was also agreed that the Act, 50 Vict., cap. 23, should not apply to the lease. B. paid $100 on account of rent on the 7th July, 1888, and on the 16th July, 1888, made an assignment to the plaintiff for the benefit of his creditors, and the plaintiff went into possession of the premises. On the 24th July, 1888, the defendants distrained, and were paid $270 by the plaintiff as assignee.

Held, that the lease did not become void, because of the assignment, but only voidable, that the right to claim the accelerated rent depended not upon the lessor's election to forfeit the term, but upon the fact of the lessee having made an assignment for the benefit of his creditors; that the clause was divisible and that the lessors might distrain for the rent as they had not elected to forfeit the term, the distress itself not being such an election to forfeit.

Judgment of the County Court of Wentworth varied.

W. Nesbitt and *W. M. Douglas* for the appellant.

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

BLACKLEY *v.* MCCABE.

Negotiable instrument—Cheque—Presentment—Accord and Satisfaction.

On the 26th June P. and M. exchanged cheques for the sum of $575, for the accommodation of P., the cheque of P. being drawn on a bank in Hamilton, and the cheque of M. being drawn on F. and L., private bankers in Toronto. It was agreed that the former cheque should not be presented before the 1st July, and it was alleged by P., but denied by M., that a similar restriction applied to the latter cheque. F. and L. suspended payment and closed their doors about noon on the 27th of June, having a large balance in their hands at the credit of M. His cheque was never presented for payment. M. on the 27th of June issued a writ against F. and L. to recover the balance in their hands, the amount of the cheque being included. The cheque of P. was presented and paid.

Held, assuming that there was no agreement to postpone presentment, P. had the whole of the 27th June to present M.'s cheque, and that although the suspension of the bankers would not in itself excuse non-presentment, yet this suspension and the bringing of the action by M., which operated as a countermand of payment, would; and that therefore M. became immediately liable to P. on his cheque.

Some time after the suspension of F. and L. and after some negotiations between P. and M. as to payment of M.'s cheque, P. signed a memorandum drawn up by M. in the following form: "Please take judgment when you think best against F. and L.—to include the amount of your cheque for $575 to me—upon the understanding that the same is to be paid me out of the first proceeds of such judgment. You are to exercise your best discretion in the matter."

M. then went on with his action and entered judgment, but nothing was recovered.

Held, that this memorandum did not necessarily import an abandonment of P.'s claim upon the cheque, and the acceptance of a new and substituted mode of obtaining payment,

and did not operate as an accord and satisfaction.

Decision of the Queen's Bench Division affirmed.

Robinson, Q.C., and *Bigelow* for the appellant.

Osler, Q.C., for the respondent.

IN THE MATTER OF ROBERTSON AND THE MUNICIPAL COUNCIL OF THE TOWNSHIP OF NORTH EASTHOPE.

Municipal corporations — Drainage by-law— Petitioners for—R.S.O., c. 194, ss. 292, 293, and 569.

A petition of landowners under 46 Vict. c. 18, s. 570 (R.S.O., c. 184, s. 569), for the construction of drainage works, must include a majority of all the persons found by the engineer to be benefited by the proposed works, and not merely a majority of the persons mentioned in the petition itself.

Unless the petition is signed by such majority the Council have no jurisdiction, and a by-law founded on a petition not signed by such majority is void, and cannot be upheld, even though valid on its face.

If the petition is not signed by such majority the opponents of the by-law are not restricted to the mode of objection given by ss. 292 and 293 of the Act of 1883 (R.S.O., c. 184, ss. 291 and 292), but are entitled to attack the validity of the by-law on this ground, by application to quash, even after an unsuccessful appeal to the Council.

Where a Council know that the majority have not signed, though no evidence to prove this fact is given by the opponents of the by-law, it is just as much their duty not to pass the by-law as if its insufficiency had been proved after the most elaborate investigation at the instance of persons opposed to it, and they have no right to impose upon the opponents of the by-law as a term for refusing to pass it, and any condition as to payment of expenses theretofore incurred.

The decision of STREET, J. (reported 15 O.R. 423) reversed.

Lash, Q.C., and *J. E Harding*, for the appellants.

Idington, Q.C. for the respondents.

HIGH COURT OF JUSTICE FOR ONTARIO.

Queen's Bench Division.

Divisional Court.] [March 7.

LEWIS *v.* BRADY.

Assessment and taxes — Distress for taxes— Legal assessment—Delivery of roll to collector—Appointment of collector —Declaration of office—Demand of taxes—R.S.O., c. 193, ss. 12, 120, 132, 133.

The defendant, as collector of taxes of a village for the year 1886, on the 9th January, 1888, seized goods of the plaintiff as a distress for taxes assessed against the plaintiff upon the assessment roll for 1886. The plaintiff brought this action of replevin to recover the goods so seized.

(1) *Held*, upon the evidence, that it was not shewn that the plaintiff was not duly and legally assessed for the taxes in respect of which the distress was made.

(2) S. 120 of the Assessment Act, R.S.O., c. 193, provides that the clerk shall deliver the roll to the collector on or before the 1st day of October, or such other day as may be prescribed by a by-law of the local municipality; but no by-law was passed, and the roll for 1886 was not delivered by the clerk to the defendant until about the 1st of January, 1887.

Held, that the provisions of s. 120 were directory, and not imperative; and the omission to deliver the roll within the prescribed time had not the effect of preventing the collector from proceeding to collect the taxes mentioned in the roll as soon as it was delivered to him, or of rendering such proceedings invalid.

(3) S. 132 of the Act provides that every collector shall return his roll to the treasurer on or before 14th December in each year, or such day in the next year not later than 1st February, as the council may appoint; and s. 133 provides that in case the collector fails to collect the taxes by the day appointed, the council may by resolution authorize the collector or some other person in his stead to continue the levy and collection. On 12th December, 1886 (before

the roll was delivered to the collector), the council passed a resolution that the collector proceed at once to collect the taxes for 1886; on 7th March, 1887, another resolution instructing P. Brady (the defendant) to enforce the payment of the uncollected taxes at once; on 14th November, 1887, a resolution that P. Brady, collector, be instructed to have the roll for 1886 returned by the 24th inst.; and on 17th January, 1888 (after the distress and before the replevy), a resolution that the time for the collection of the unpaid taxes for 1886 be extended until the 15th February, 1888, and that P. Brady be authorized to collect until that date. The roll for 1886 remained in the hands of the defendant from the time of the delivery of it to him until after the distress and replevy.

Held, that the defendant was either the collector within the meaning of s. 132 when he made the distress, and having the roll still in his hands unreturned was authorized to make it, following *Newberry* v *Stephens*, 16 U.C.R., 65; or he was a person authorized as collector, or in the stead of the collector, by the resolution of the council to continue the levy and collection under s. 133, which provides no limit of time in such case; and in either case the distress by him was valid.

(4) By the by-law providing for the assessment and levying of rates for 1885 passed by the council on 11th December, 1885, the defendant was appointed collector to collect the rates for 1885.

On the 23rd December, 1886, the defendant entered into a bond with sureties as collector to the corporation of the village, which recited that he had been appointed collector; and on the same day a resolution was passed by the council that the bonds of P. B. as collector be accepted, as presented to the council; but no other appointment of the defendant as collector was proved, and the defendant swore that he did not think he made any declaration of office for any year.

Held, that the effect of the defendant's not having made and subscribed the declaration required by s. 271 of the Municipal Act, R.S.O., c. 184, was not to make his acts void; and having been duly appointed by by-law collector, he held office until removed by the council, even if what was done by the council on the 23rd December, 1886, did not constitute a good apointment.

(5) *Held*, that the appointment in December, 1887, of another person to collect the rates for 1887 had not the effect of removing the defendant from office; for it was an appointment for that year only, and by s. 12 of the Assessment Act the council might appoint such number of collectors as they might think necessary; but even if it had that effect, the roll for 1886 had not been returned by the defendant, and the resolution of the 17th January, 1888, authorized him to continue the collection under s. 133, and legalized the distress then made.

(6) It was proved that the defendant on the 11th January, 1887, duly demanded the taxes distrained for.

Held, that this demand was sufficient to warrant the distress, and the fact that the defendant several times afterwards demanded the same taxes did not affect the validity of the first demand, which was the only one required.

R. M. Meredith, for the plaintiff.

S. H. Blake, Q.C., for the defendant.

Divisional Court.] [March 7.

LANG *v.* SLINGERLAND.

Bail—Discharge—Action on recognizance—Surrender of principal—Notice of surrender—Exoneretur—Bail relieved on terms—Amount of recovery against bail—Rules 1062, 1064, 1085.

The defendants were special bail for one S., upon a recognizance in an action by plaintiff against S.

The proceedings in the original action were begun and carried on in the County of Middlesex, and the condition of the recognizance was that S. would, if condemned, satisfy, etc., or render himself to the custody of the sheriff of Middlesex, or the cognizers, the present defendants, would do so for him. The defendants on the 7th February 1888, rendered S. to the sheriff of Norfolk, S. being found in that county, and obtained from the sheriff a certificate of such render, but obtained no order for the entry of an exoneretur. The writ of summons in this action upon the recognizance was served on the defendants on the 10th of April, 1888, and on the 16th of April, 1888, the defendants served on the plaintiff a notice of the render of S. to the sheriff of Norfolk.

R.S.O., 1877, c. 50, s. 40 (now Rule 1062), provides for the render of the defendant to the sheriff of the county in which the action against such defendant has been brought; and s. 42 of the same Act (now Rule 1064) provides that special bail may surrender their principal to the sheriff of the county in which the principal is resident or found, and that, upon proof of due notice to the plaintiff of the surrender, and production of the sheriff's certificate thereof, a Judge shall order an exoneretur to be entered on the bail-piece, and thereupon the bail shall be discharged,

Held, that the bail were not entitled to be discharged, and that the plaintiff was entitled to bring this action upon the recognizance, because no exoneretur had been entered upon it, notwithstanding the notice of render; but that, the substantial duty of rendering the principal having been performed, the defendants should be relieved upon terms.

The Court ordered that upon the defendants filling an order for an exoneretur within two weeks, and paying the cost of the action within ten days after taxation, the judgment for the plaintiff should be set aside and all other proceedings stayed; otherwise judgment to be entered for the plaintiff with costs.

Held, also, that under Rule 89 of T.T., 1856, (now Rule 1085) the liability of bail is limited to the amount of their recognizance; and the plaintiff having recovered in the original action the whole sum sworn to in the affidavit of debt, his recovery against the bail should not in any event be more than that sum.

Gibbons, for the plaintiff.

Watson, for the defendants.

PEARSON *v.* MULHOLLAND.

*Title to land—Description—False demonstration—Exception void for uncertainty—Operation of release—"Remise, release and quit claim"—Operation of as grant or bargain and sale—*14 & 15 *Vict., c.* 7, *s.* 2*—Possessory title.*

L. in conveying land to S. described it as being composed of the southerly half of Lot 17, in the 4th concession of King, giving it the metes and bounds of the east half. The only part of Lot 17 which L. had was that conveyed to him by B. as a part of Lot 17, giving it the metes and bounds of the east half the same as in the deed to S.; and the same quantity was conveyed in both deeds.

Held, that the metes and bounds given in the deed to S. correctly described the lands intended to be conveyed, and the words "southerly half" were controlled by them.

A sheriff's deed of lands sold at a tax sale described them as "forty-five acres of the south half of Lot 17 in the 4th concession" of King; and the deed to S. before mentioned contained an exception "save and excepting out of the same forty-five acres sold for taxes."

Held, that the exception was void for uncertainty; and a subsequent release of lands purchased at the tax sale by the sheriff's vendee to S. had sufficient to operate upon and was effectual as a release.

By indenture of Bargain and Sale made in 1856 between L. and K., in consideration of $4,000 (the receipt whereof was thereby acknowledged), did remise, release and quit claim unto K., his heirs and assigns, the south half, &c., to have and to hold, &c.

Held, that since 14 & 15 *Vict., c.* 7, *s.* 2, the words "remise, release, and quit claim" may operate as a grant; and either before or since that enactment they would operate as a bargain and sale.

Acre v. Livingstone, 24 U.C.R. 282, not followed.

Held, also, upon the evidence, that the defendant had no such possession of the land in question as would extinguish the title of the true owner.

E. D. Armour, for plaintiff.

Merritt, for defendant.

Chancery Division.

ROBERTSON, J.] [January 9.

NICHOL *et al v.* ALLENBY.

Injunction—Right to maintain action—Owner of undivided share in land—Purchaser at sale under void partition proceedings—Simple contract creditors—Mortgage of undivided share—Power of Local Master—Lands in two counties.

In an action for an injunction brought by (1) the owner of two undivided third parts of cer-

tain lands, (2) the purchaser at a sale of the lands under an order made by a Local Master for the partition or sale of lands in two different counties, and (3) a simple contract creditor of the owner of the other undivided third part of the lands, against a mortgagee of the latter's undivided third to restrain the mortgagee from proceeding with a foreclosure action. It was *Held*, that if the lands sought to be affected by the order for partition or sale of the local master lie in more than one county, the jurisdiction of the local master does not attach, and, following *Queen* v. *Smith*, 7 P.R. 429, the master having no jurisdiction to make the order for partition or sale, all proceedings under it were null and void.

Held, also, that the owner of the two undivided third shares of the land had no right to redeem the mortgage of the other undivided third share.

Held, also, that a simple contract creditor had no right to redeem.

Query. Whether a mortgagee of an undivided share in the lands should not be made a party to partition proceedings?

John Hoskin, Q.C., and *W. Nesbitt*, for plaintiffs.

Bain, Q.C., for the defendant.

BOYD, C.] [March 27.

HALL *v.* FORTYE.

Assignment for creditors—Consent of creditors—Ratification subsequent.

Under R.S.O., c. 124. Although an assignment may not have been made in the first instance with the assent of creditors, yet if the creditors subsequently ratify and consent to it, it becomes as valid and effectual as though the assent was prior to or concurrent with the assignment.

Hoyles, for plaintiff.

Shepley, for defendant.

Practice.

FERGUSON, J.] [April 23.

UNION BANK *v.* STARRS.

Evidence—Depositions in examination for discovery before statement of defence—Office of company—Rule 506.

Before delivery of his statement of defence, one of the defendants obtained an order to examine an officer of the plaintiffs for discovery, and examined him thereunder.

Held, that such defendant could under Rule 506 read the depositions so taken as evidence at the trial of the action.

W. R. Meredith, Q.C., for the plaintiffs.

Aylesworth, for the defendant O'Gara.

MACLENNAN, J. A.] [April 25.

ROLANDS *v.* CANADA SOUTHERN R.W. CO.

Appeal—To Supreme Court of Canada—Judgment of Court of Appeal upon appeal from Divisional Court refusing new trial—Notice of appeal—R.S.C., c. 135, ss., 24 (d.), 41—Extension of time—Circumstances of case.

The defendants appealed to the Court of Appeal from an order of a Divisional Court discharging an order *nisi* to enter judgment for the defendants or for a new trial, on the ground, among others, that the trial judge should have withdrawn the case from the jury or should have directed them otherwise than he did. The Court of Appeal dismissed the defendants' appeal, and the defendants sought to appeal from such dismissal to the Supreme Court of Canada.

Held, that the judgment of the Court of Appeal, came within s. 24 (d) of the Supreme and Exchequer Courts' Act, R.S.C., c. 135, as "a judgment upon a motion for a new trial upon the ground that the Judge had not ruled according to law"; and that the proposed appeal was governed by the necessity for the notice of appeal within twenty days prescribed by s. 41 of the Act. The judgment of the Court of Appeal was delivered on the 5th of March, 1889. On the 16th March the solicitors for the defendants wrote to their clients suggesting an appeal, but they received no instructions until the 2nd April, and took no step till the 3rd April. No explanation was offered of the delay or neglect except the production of a telegram to the solicitors from an officer of the defendants', giving instructions to appeal, and suggesting that the matter had been overlooked by another officer.

The Judges in the Divisional Court and Court of Appeal were unanimous in deciding against the defendants.

Held, that under these circumstances the time for giving the required notice should not be extended.

Gordon v. *Great Western R.W. Co.*, 6 P.R. 300; *Sievewright* v. *Lews*, 9 P.R. 201; *Lewis* v. *Talbot Street Gravel Road Co.*, 10 P.R. 15; *Langdon* v. *Robertson*, 12. P.R. 139, referred to.

R. M. Meredith, for the plaintiff.

D. W. Saunders, for the defendants.

Court of Appeal] [April 30.

COLE *v.* HALL.

Mechanics' liens—Parties—Priorities—Subsequent incumbrancers—Master's office—R.S.O. c. 116, ss. 25, 29.

The appellant's execution against lands was placed in the sheriff's hands shortly after the registration of a mechanic's lien by the plaintiff, who began his action to enforce such lien, and registered his *lis pendens* within the ninety days prescribed by s. 23 of the Mechanics' Lien Act, R.S.O., c. 126, but did not cause the appellant to be added as a party till the case had got into the Master's office, which was after the expiry of the ninety days.

The appellant contended that, as against him proceedings to realize the plaintiff's lien had not been instituted within the proper time, and therefore his execution had gained priority over the lien, and he was improperly added as a subsequent incumbrancer in the Master's office. S. 29 of the Act provides that the lien may be realized in the High Court according to the ordinary procedure of that Court.

Held, that the effect of ss. 23 and 29 is that the lien shall cease after ninety days unless in the meantime proceedings are instituted in the High Court, according to its ordinary procedure, to realize the claim; the practice or procedure of the Court is as much the law of the land as any other part of the law; and the making the appellant a party to the proceedings in the Master's office was a regular step in the action, authorized and prescribed by the practice and procedure of the Court for nearly forty years, of which the appellant could not complain, the action having been regularly commenced within the ninety days.

White v. *Beasley*, 2 Gr. 666; *Moffatt* v. *March*, 3 Gr. 163; and *Jackson* v. *Hammond*, 8 P.R. 157, referred to.

Juson v. *Gardiner*, 11 Gr. 23; *Shaw* v. *Cunningham*, 12 Gr. 101; *McDonald* v. *Wright*, 14 Gr. 284; and *Bank of Montreal* v. *Haffner*, 10 A.R. 597, distinguished.

Decision of FERGUSON, J., 12 P.R. 584, affirmed.

C. Millar, for the appellant.

Hoyles, for the respondent.

STREET, J.] [May 1.

REGINA *ex rel* WHYTE *v.* MCCLAY.

Municipal elections—Quo warranto proceeding—Reference to take evidence—Jurisdiction of County Judge—Jurisdiction of Master in Chambers to refer—R.S.O., c. 184, s. 212—Rule 30.

Section 212 of the Municipal Act, R.S.O., c. 184, has not been affected by the Consolidated Rules, and under it a reference may be directed to a County Court Judge to take evidence where in a *quo warranto* application, a violation of s. 209 or 210, is charged; and, as by Rule 30 the Master in Chambers has in *quo warranto* matters the jurisdiction of a Judge of the High Court, he has power to direct a reference under s. 212 to a County Court Judge.

Aylesworth, for the relater.

W. R. Meredith, Q.C., for the respondent.

MR. DALTON.] May 2.

ASHLEY *v.* BRENTON.

Discovery—Examination of plaintiff by defendant after interlocutory judgment—Rule 489.

After the plaintiff had signed interlocutory judgment against the defendant in an action of tort, the defendant sought to examine the plaintiff for discovery, the action being about to come on at the assizes for assessment of damages.

Rule 40 shews that the examination of a plaintiff by a defendant may take place at any time after such defendant has delivered his statement of defence.

Held, that the defendant could not examine the plaintiff.

D. Armour, for plaintiff.

C. J. Holman, for defendant.

BOYD, C.] [May 7

MCKAY *v.* MAGEE.

Costs—Scale of—Action to set aside the conveyance as fradulent—Judgment under $200—Other claims against judgment debtor—Creditors' Relief Act.

In an action by a judgment creditor seeking payment out of land alleged to have been conveyed away by the debtor in fraud of the plain-

tiff, the proceedings were not alleged to be taken on behalf of other creditors, and the plaintiff's judgment was less than $200. It appeared that there were three other claims, amounting in all to $36, owing by the judgment debtor. Before the trial of the action a settlement of the plaintiff's claim was effected for $75 and costs, and upon the taxation of these costs a question arose as to the scale.

Held, that the case was taken out of the provisions of the Creditors' Relief Act by the compromise between the plaintiff and defendant; and the plaintiff's claim being less than $200, the costs should be on the lower scale.

Forrest v. *Laycock*, 18 Gr. p. 622, followed.

Dominion Bank v. *Hefferman*, 11 P.R. 504, distinguished.

J. B. Clarke, for the plaintiff.

Middleton, for the defendant.

BOYD, C.] [May 7.

In re SOLICITORS.

Courts—Divisions of High Courts—Solicitor and client taxation—Proper officer to tax—R.S.O. c. 147, s. 32.

R.S.O., c. 147, s. 32, provides that a bill of costs may be referred for taxation to "the proper officer of any of the Courts in the county in which any of the business charged for was done."

Held, that "Courts" here does not mean "Divisions of the High Court:" and where the business charged for was done in the office of the local Registrar and Master at Belleville, the reference for taxation was properly made to the Deputy Clerk of the Crown at Belleville, both being officers of the same Court.

Hoyles, for the solicitors.

A. H. Marsh, for the clients.

BOYD, C.] [May 9.

In re HARDING.

Infants—Sale of land—Consent—Majority of infants—R.S.O., c. 137, s. 4.

Notwithstanding the provision of R.S.O. c. 137, s. 4, that an application for the sale of an infant's lands shall not be made without the consent of the infant, if he is of the age of fourteen years, the consent of a majority of infant land-owners may be sufficient; for by the Interpretation Act. R.S.O., c. 1, s. 8, ss. 24 and 34, words importing the singular number shall include more persons, and females as well as males, and where an act or thing is required to be done by more than two persons, a majority of them may do it.

And in this case, where they were three infants all over fourteen, and two of them consented to a sale of their lands, but the eldest had disappeared and could not be reached, an order was made dispensing with the consent of the one, the sale being evidently for the benefit of all the family.

H. E. Ridley, for the motion.

J. Hoskin, Q.C., for the infants.

Appointments to Office.

CORONER.

Waterloo.

J. H. Radford, M.D., of Galt, to be an Associate Coroner for the County of Waterloo.

POLICE MAGISTRATE.

North Riding of Essex.

Alex. Bartlett, of Windsor, to be Police Magistrate without salary for the North Riding of Essex, except the Township of Anderdon.

BAILIFF.

Parry Sound.

Jas. Coff, of Byng Inlet, to be a Bailiff of the First Division Court of the District of Parry Sound.

Frontenac.

Saml. Mitchell, of Plevna, to be Bailiff of the Sixth Division Court of the County of Frontenac.

Manitou'in.

J. C. Nelles, of Gore Bay, to be Bailiff of the Fourth Division Court of the District of Manitoulin, *vice* E. H. Jackson, resigned.

Law Society of Upper Canada.

CURRICULUM.

1. A Graduate in the Faculty of Arts, in any University in Her Majesty's Dominions empowered to grant such Degrees, shall be entitled to admission on the Books of the Society as a Student-at-law, upon conforming with clause four of this Curriculum, and presenting (in person) to Convocation his Diploma or proper Certificate of his having received his Degree, without further examination by the Society.

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

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

4. Every Candidate for admission as a Student-at-law or Articled Clerk, shall file with the Secretary, four weeks before the Term in which he intends to come up, a Notice (on prescribed form), signed by a Bencher and pay $1 fee; and on or before the first day of presentation or examination file with the Secretary a petition and a presentation signed by a Barrister (forms prescribed), and pay prescribed fee.

5. The Law Society Terms are as follows:—

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

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

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

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

6. The Primary Examinations for Students-at-law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity, and Michaelmas Terms.

7. Graduates and Matriculants of Universities will present their Diplomas and Certificates on the third Thursday before each Term at 11 a.m.

8. Graduates of Universities who have given due notice for Easter Term, but have not obtained their Diplomas in time for presentation on the proper day before Term, may, upon the production of their Diplomas and the payment of their fees, be admitted on the last Tuesday of June of the same year.

9. The First Intermediate Examination will begin on the second Tuesday before each Term, at 9 a.m. Oral on the Wednesday, at 2 p.m.

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

11. The Solicitors' Examination will begin on the Tuesday next before each Term, at 9 a.m. Oral on the Thursday, at 2.30 p.m.

12. The Barristers' Examination will begin on the Wednesday next before each Term, at 9 a.m. Oral on the Thursday, at 2.30 p.m.

13. Articles and assignments must not be sent to the Secretary of the Law Society, but must be filed with the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

14. Full term of five years, or, in the case of Graduates, of three years, under articles, must be served before Certificates of Fitness can be granted.

15. Service under Articles is effectual only after admission on the books of the society as student or articled clerk.

16. A Student-at-law is required to pass the First Intermediate Examination in his third year, and the Second Intermediate in his fourth year, unless a Graduate, in which case the

First shall be in his second year, and his Second in the first seven months of his third year.

17. An Articled Clerk is required to pass his First Intermediate Examination in the year next but two before his Final Examination, and his Second Intermediate Examination in the year next but one before his Final Examination, unless he has already passed these examinations during his Clerkship as a Student-at-law. One year must elapse between the First and Second Intermediate Examination, and one year between the Second Intermediate and Final Examination, except under special circumstances, such as continued illness or failure to pass the Examinations, when application to Convocation may be made by petition. Fee with petition, $2.

18. When the time of an Articled Clerk expires between the third Saturday before Term and the last day of the Term, he should prove his service by affidavit and certificate up to the day on which he makes his affidavit only, and file supplemental affidavits and certificates with the Secretary on the expiration of his term of service.

19. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive Certificates of Fitness, Examinations passed before or during Term shall be construed as passed at the actual date of the Examination, or as of the first day of Term, whichever shall be most favorable to the Student or Clerk, and all Students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

20. Candidates for call to the Bar must give notice signed by a Bencher, during the preceding Term. Candidates for Certificates of Fitness are not required to give such notice.

21. Candidates for Call or Certificate of Fitness are required to file with the Secretary their papers, and pay their fees, on or before the third Saturday before Term. Any Candidate failing to do so will be required to put in a special petition, and pay an additional fee of $2.

22. No information can be given as to marks obtained at Examinations.

23. A Teacher's Intermediate Certificate is not taken in lieu of Primary Examination.

24. All notices may be extended once, if request is received prior to day of examination.

25. Printed questions put to Candidates at previous examinations are not issued.

FEES.

Notice Fee	$ 1 00
Student's Admission Fee	50 00
Articled Clerk's Fee	40 00
Solicitor's Examination Fee	60 00
Barrister's Examination Fee	100 00
Intermediate Fee	1 00
Fee in Special Cases additional to the above	200 00
Fee for Petitions	2 00
Fee for Diplomas	2 00
Fee for Certificate of Admission	1 00
Fee for other Certificates	1 00

BOOKS AND SUBJECTS FOR EXAMINATIONS.

PRIMARY EXAMINATION CURRICULUM for 1889 and 1890.

Students-at-Law.

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

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

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

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

MATHEMATICS.

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

ENGLISH.

A paper on English Grammar.

Composition.

Critical reading of a selected Poem :

1889—Scott, Lay of the Last Minstrel.

1890—Byron, The Prisoner of Chillon ; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the

Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy and Asia Minor. Modern Geography—North America and Europe.

Optional subjects instead of Greek :—

FRENCH.

A Paper on Grammar.
Translation from English into French Prose.
1889—Lamartine, Christophe Colomb.
1890—Souvestre, Un Philosophe sous le toits.

or NATURAL PHILOSOPHY.

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

Articled Clerks.

In the years 1889, 1890, the same portions of Cicero, *or* Virgil, at the option of the candidate, as noted above for Students-at-law.
Arithmetic.
Euclid Bb. I. II. and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-keeping.

RULE *re* SERVICE OF ARTICLED CLERKS.

From and after the 7th day of September, 1885, no person then or thereafter bound by articles of clerkship to any solicitor, shall, during the term of clerkship mentioned in such articles, hold any office, or engage in any employment whatsoever, other than the employment of clerk to such solicitor, and his partner or partners (if any) and his Toronto agent, with the consent of such solicitors in the business, practice, or employment of a solicitor.

First Intermediate.

Williams on Real Property, Leith's edition ; Manual of Common Law ; Smith's Manual of Equity ; Anson on Contracts ; the Act respecting the Court of Chancery ; the Canadian Statutes relating to Bills of Exchange and Promissory Notes ; and Cap. 123 Revised Statutes of Ontario, 1887, and amending Acts.

Three Scholarships can be competed for in connection with this Intermediate by Candidates who obtain 75 per cent. of the maximum number of marks.

Second Intermediate.

Leith's Blackstone, 2nd edition ; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages, and Wills ; Snell's Equity ; Broom's Common Law ; Williams on Personal Property, O'Sullivan's Manual of Government in Canada, 2nd edition ; the Ontario Judicature Act ; R.S.O., 1887, cap. 44, the Consolidated Rules of Practice, 1888, the Revised Statutes of Ontario, 1887, chaps. 100, 110 143.

Three Scholarships can be competed for in connection with this Intermediate by Candidates who obtain 75 per cent. of the maximum number of marks.

For Certificate of Fitness.

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

For Call.

Blackstone, Vol. I., containing the Introduction and Rights of Persons ; Pollock on Contracts ; Story's Equity Jurisprudence ; Theobald on Wills ; Harris's Principles of Criminal Law ; Broom's Common Law, Books III. and IV. ; Dart on Vendors and Purchasers : Best on Evidence ; Byles on Bills, the Statute Law and Pleadings and Practice of the Courts.

Candidates for the Final Examination 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.

Michaelmas Term, 1888.