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IT is always refreshing to see marks of distinction conferred upon deserving men, apart from political considerations. We have, therefore, the greater pleasure in noting the fact that that Her Majesty has been pleased to make Hon. James R. Gowan, formerly judge of the County Court of Simcoe, a C.M.G., in recognition, doubtless, of his long and valuable services to his country as a jurist, both on the bench and in his place in the Senate of Canada.

IT is pleasant to notice that on the few occasions when the best men of our Bar are brought into contact with those who occupy a similar position across the water, they lose nothing by comparison. Whatever may be the opinion as to the political views of the late Treasurer of the Law Society, a matter in which this journal has no interest, there can be no question that there are few to compare with him, either in mental grasp or facility of expression; whilst, from all we can judge, the eminent counsel who was happily selected to represent the Canadian Government in the Behring Sea arbitration has not disappointed the expectations of his many friends, but, on the contrary, if reports be true, has not been the least useful of those who have had the interests of this country in charge.

AN exchange gives some statistics as to the profession in England which may be of some interest. Thirty years ago there were about 4,000 barristers in England, while now there are nearly 9,000. The writer remarks that it must make not a few ambitious

young men pause when they find the Order of the Coif double its members in thirty years. The first "law list" was published in 1785. The "King's Council" were twenty, and the whole Bar of England but 420. At the beginning of Her Majesty's reign the Q.C.'s numbered seventy, and the Bar had, with astonishing rapidity, grown to over 2,000. In 1861 there were 4,000 wigs and gowns and 125 "silks." In another ten years the latter class had become 180 strong, and the rank and file of the long robe totalled 5,800. Now there are 220 Queen's Counsel, and the members of the four Inns of Court could be mustered at about 10,000 strong. And yet the cry is "Still they come!"

THE above reminds us that the condition of affairs in our own Province is far from promising for those who hope to make a living at the law. The profession is much congested and business has fallen away to nothing, and still the candidates for judicial and legal honour pour in. In Toronto, with a population of less than 200,000, we have over six hundred practising lawyers: that is to say, one lawyer in every 330 of the population, men, women, and children. In the Province the condition of affairs is not much better. To take the legal charge of a population of about 2,100,000, we have a Society composed of 1600 lawyers; that is to say, nearly one lawyer to every 1300 persons, scattered over a wide expanse of territory, and including Indians, Italians, and tramps. And we must remember how largely the business which should be done by the profession is cut into by a vast army of irresponsible agents, camp followers, and pirates of every sort and description; eating up, like locusts, every green thing.

These figures should serve to open the eyes of some of the "ambitious young men" of the country, who, leaving their native soil, flock to the city to obtain a high-class education, and after long years of study, and the spending of a small fortune, receive a certificate legalizing them to enter the ranks of an already overcrowded profession, and giving them the privilege of starving as a "gentleman one, etc.," instead of living more or less in ease and comfort as a farmer. Whilst we might have pleasure in admitting that all the young men of this country are capable of shining as legal luminaries, we would still remind our young friends that they must leave some of

their number as clients from whom to draw the sustaining fee, for even genius requires some sustenance; and if all become lawyers, what are we to do for clients? Yes, young friends, whilst we acknowledge your learning and acumen and your fitness for judicial preferment, we must remind you that unfortunately the country is already overcrowded with men just as clever and pushing as yourselves who are now vainly struggling for the wherewithal to pay even their yearly fees to the Society, to say nothing of that which is necessary to sustain life even on the most economical basis.

APPEALS IN MATTERS OF PRACTICE.

The proposal made by the English judges to prohibit appeals from Divisional Courts on questions of practice and procedure is a far-reaching and, we think, an undesirable proposal. A glance at only the last number of the Law Reports is sufficient to show the very doubtful propriety of this step.

But for the Court of Appeal's decision in *Witted* v. *Galbraith*, (1893) 1 Q.B. 577, a Divisional Court would have opened the door to a most palpable abuse of the provisions of the Rule from which our Con. Rule 271 *(g)* is derived; and a plaintiff by adding a bogus defendant within the jurisdiction might, in almost any case, have made that a ground for adding as defendants parties residing without the jurisdiction. But for the decision of the Court of Appeal in *Holmes* v. *Millage*, (1893) 1 Q.B. 551, a Divisional Court would have established that all a debtor's future earnings might be waylaid by the appointment of a receiver at the suit of his creditor, and the debtor and his family practically deprived of all means of support.

These are only two instances out of one number of the Law Reports; if need be, hundreds of cases could be cited to illustrate the folly of the scheme. The fact is that questions of practice very often involve very important questions of right, and it would be unfortunate if a Divisional Court should be the final court for determining all such questions without distinction. At the same time, a wise selection of cases in which appeals should be allowed in questions of practice and procedure is clearly needed.

THE SUCCESSION DUTY ACT, 1892.

(Continued.)

Another question for future decision is, what is intended to be embraced by the words, "All property situate within this Province," as used in the 4th section? The word "property" here refers to the actual property itself, when and as devised, bequeathed or succeeded to. With reference to property passing by will or intestacy, s-s. 4 of s. 18 of the Surrogate Courts Act, which provides that "Probate or letters of administration, by whatever court granted, shall, unless revoked, have effect *over the property of the deceased in all parts of Ontario*," may act as a guide to the discovery of what property is intended to fall within this clause.

It is submitted that only such property of the deceased as would fall under the control of an executor or administrator by virtue of such probate or letters of administration would come within the meaning of the words under discussion. Thus, for example, if the deceased died leaving money on deposit in a bank in Manitoba, such deposit would not form a part of the estate within the meaning of our Act, since the executor or administrator would not be entitled to collect the money by virtue of the letters granted to him in Ontario.

In the same way, if the deceased died holding a mortgage upon land in Manitoba, it would form no part of the estate for the purpose of this Act. But debentures of a foreign corporation would form part of the estate, in the same manner as foreign bank notes or foreign coin in possession of the deceased at his death. Negotiable securities of all kinds, even if made by parties residing out of the Province, would seem to be a part of the estate. The stock of a foreign corporation, if this test can be relied upon, would not come within the terms of the Act. But what would be included within the words, "Any interest in or income from property situate within this Province" voluntarily transferred in contemplation of death, or to take effect in possession after death, cannot exactly be decided by the same test, although probably only the same class of property is intended. The actual property itself is referred to, and not the mere evidences of property. It would appear as though our wealthy citizens might be partial to foreign investments in future. Another interesting question is, what would be

considered "a voluntary transfer made in contemplation of death," within the 4th section? Does the section mean to refer only to transfers made in contemplation of the near approach of death, as in the case of a *donatio mortis causa*, or is it comprehensive enough to include a policy of life insurance? The question is too large to be considered at length in this article. The words, however, under discussion, while they would appear to include a *donatio mortis causa*, in which the transfer is not complete until after death, would seem to bear a wider construction, and to refer also to cases where the transfer is completed before death. It may be straining their meaning to contend that they would include an insurance on the life of the deceased, although in order to effect such insurance he has certainly transferred his property from time to time (by payment of premiums), in contemplation of his death. The English Act specially provides that no policy of insurance shall be liably to succession duty.

With reference to voluntary transfers made or intended to take effect in possession or enjoyment after death, these will be more easily identified, as they will be almost always evidenced by writing, even in cases of transfers of personal property. It might be contended that this clause also would include a policy on the life of the deceased.

It will be noted that the "transfers" mentioned in the 4th section must be voluntary transfers, that is, transfers without valuable consideration," and it is presumed that it will rest with the Treasurer in each case to prove that there was, in fact, no consideration for such transfer. In this respect our Act differs from either the New York or Pennsylvania statutes. In neither of them is it necessary that such transfers should be "voluntary"; both Acts including transfers by "bargain or sale." From this it would appear that the framer of our Act intended to confine the meaning of a "succession" within much narrower bounds than either the English or American Statutes. It was evidently in his mind to limit the payment of duty to property devolving by will or intestacy, but anticipating attempts to elude the statute by settlements *inter vivos*, he introduced from the New York Act, as has been pointed out in an earlier part of this article, the clauses referring to transfers made in the lifetime of the deceased, with the important difference, however, that such transfers, in order to be liable to duty, must be "voluntary."

It would seem that parties claiming under such "voluntary transfers" take subject to a lien for unpaid duty, under the 12th section, which lien still attaches, even in the hands of an innocent third party, without notice. Take, for instance, the case of a voluntary transfer of stock by the deceased made in contemplation of death, falling under the 4th section. Any party dealing with such voluntary transferee would be put upon enquiry as to whether or not the stock would be subject to duty; and, if he neglected such enquiry, he would take subject to the lien for duty.

The case of a voluntary transfer, made in contemplation of death, has already arisen in the County of Wentworth, so, no doubt, some of these difficulties will be made plain before long.

To this 4th section there are five subsections, fixing the percentage of duty chargeable, which it may be convenient, for easy reference, to summarize as follows:

Where aggregate value of property exceeds	And passes, as in section 4, to or for the benefit of	So much thereof as so passes shall be subject to a duty of
(1) $100,000	The father, mother, husband, wife, child, grandchild, daughter-in-law or son-in-law.	$2.50 for every $100 of the value.
(2) $200,000	(Same as 1.)	$5 for every $100 of of the value.
(3) $ 10,000	Grandfather, or grandmother, or any other lineal ancestor of deceased (except father or mother), or to any brother or sister of deceased, or to any descendants of such brother or sister, or to a brother or sister of the father or mother of the deceased, or to any descendants of such last-mentioned brother or sister.	$5 for every $100 of the value.
(4) $ 10,000	Any person in any other degree of collateral consanguinity to the deceased than as above, or any stranger in blood to the deceased.	10 per cent. on the value.

Suppose the aggregate value of the estate is $150,000, of which, say, $50,000 passes to parties mentioned in subsection 1, there will be a duty of two and a half per cent. payable on this $50,000; and if the second $50,000 passes to parties named in subsection 3, there will be five per cent. duty on same; and if the third $50,000 passes to parties named in subsection 4, ten per cent. duty is chargeable.

There are several apparent anomalies arising under this scale of duties. For instance, a son receiving $20,000 from a father worth $150,000 pays only the same sum to the Treasury as a son who receives $10,000 from a father worth $200,000; the principle on which the Act is based being that the legacy is taxed according to the value of the estate, not of the bequest.

The New York Act imposes a duty of five per cent. upon transfers of property of the value of $500 and over, except when made to certain relatives of deceased, and in case of transfers to such relatives one per cent. if the estate consists of personal property of the value of $10,000 or more. The Pennsylvania statute taxes "all estates" over $250 passing to all parties, except to certain relatives, at five per cent. of the "clear value of such estates."

By the instructions for enforcing the Act issued by the Treasurer to the several Surrogate Registrars, the words "aggregate value," wherever they occur, are to be construed as meaning the aggregate value of the property after payment of all debts and expenses of administration, in the same manner as the word "value" is used in the Act.

The following case arose in Ottawa. C.D. died leaving an estate in Ontario valued at $9,000, and an estate in Quebec of $5,000, and all the property passed to a nephew. The Treasury did not insist on the payment of duty on the property in Ontario, holding that the Quebec estate could not be added, so as to bring the whole within the Act.

No duty is payable under section 3 of the Act in the following cases:

(1) Where the value of the property does not exceed $10,000 after deducting debts and administration expenses.

(2) On property given, devised, or bequeathed for religious, charitable, or educational purposes.

(3) On property passing to parties mentioned in subsection 1 of section 4, where the value does not exceed $100,000.

(4) Where the bequest, devise, or gift does not exceed $200, although the value of the property exceeds $10,000.

By whom, when, and how is it to be decided whether the "aggregate value" of an estate does or does not exceed the amount mentioned in the 1st and 3rd subsections? On all these three points the Act seems to be somewhat indefinite.

It appears to be the practice for the Surrogate Registrars to

send to the office of the Provincial Treasurer, as soon as a petition for probate or letters of administration is filed in his office, a notice that an estate is passing through his hands on which duty may be payable, thus giving the Treasurer an early opportunity to make enquiries, and, if necessary, to employ a solicitor to look after the interests of the Crown. The petition and affidavits to lead grant, and the usual schedule of assets, setting forth the value of all the property of the deceased, "which he in any way died possessed of or entitled to," are then laid before the Surrogate Judge. It is his duty not to issue letters to the party applying therefor until he is satisfied that the estate is one, "in respect of which no succession duty is payable" (see subsection 2 of section 5), or until such party has made and filed with the Surrogate Registrar a sworn itemized inventory and valuation of all the property of the deceased, and a list of the persons to whom the same will pass under the will or intestacy, and their relationship to the deceased; and, further, until such party deliver to the Surrogate Registrar a bond to cover "any duty to which the property coming into the hands of such executor or administrator may be found liable."

If the Surrogate Judge is doubtful whether or not the estate will fall within the Act, it would appear to be his duty to insist on the filing of the schedule and list mentioned, and the delivery of the bond, before he issues letters of administration or probate. He can only form an opinion on this point from the evidence before him (viz., the schedule of assets). If, therefore, the assets of an estate amounted to, say, $11,000, and the property devolved upon a stranger, it is presumed he would decide that *prima facie* the estate would fall under the provisions of the Act, and would refuse probate until the delivery of the bond; but if the estate amounted to, say, $9,000, probate would not be refused.

It will be seen that, in a great many cases, the Judge can merely guess whether or not the amount of the estate will be large enough to bring it within the provisions of the Act. For instance, in the examples above given, he has before him no evidence of the amount of the debts of the deceased, which might reduce the "aggregate value" of the estate below the amount prescribed by the Act: or the stranger legatees or devisees appearing to take under the will might have predeceased the testator, and their legacies have lapsed, so that the estate would thus escape.

It is presumed that, before allowing letters to issue, the Judge, in his discretion, may demand further evidence on any of these points; and if, after the production of the additional evidence, he is still in doubt, then it would appear to be his duty to insist on the filing of the bond. The Judge can only form a *prima facie* opinion from the evidence before him, as it will be rarely possible to produce absolute and conclusive proof at the time the letters are applied for to show that the estate is one "in respect of which no succession duty is payable."

It is evidently not the intention of the Act that the question of the liability or non-liability of the estate to duty should be finally settled at this time, although it is submitted that it is open to the Provincial Treasurer, or to any other party interested to tender to the Judge proof that the estate does or does not fall under the Act, with the view of insisting on or resisting the delivery of the bond, and in this way it would seem that a final decision on the question might be forced. It would seldom, however, be to the advantage of the party applying for Letters to refuse to file the bond required, as by so doing the whole estate would be tied up until the question in dispute had been settled. As soon as the bond and proofs are filed with the Surrogate Registrar, probate can no longer be refused, under the 5th section. It then rests with the Provincial Treasurer, to whom the bond and proof are immediately sent, to take such further steps for the collection of the duty as he may consider necessary, if in his opinion any be payable. The delivery of the bond is not an admission to the Crown that any duty attaches. It may be noted also that the bond is only given to secure "any duty to which the property coming to the hands of such executor or administrator may be found liable." Hence, it would appear that the executor or administrator has nothing to do with the payment of duty upon property voluntarily transferred by deed, grant, or gift, and falling under the 4th section. It is submitted that in such a case the Judge could not (under section 5) refuse to issue Letters or insist on security being given, even if he had notice, from the party applying therefor, that the deceased had made such voluntary transfers of his property. The Act makes no provision for the giving of security by any person, except the party applying for Letters, and he can only be made responsible for duty upon the property coming into his hands. The only means provided for the collec-

tion of duty upon such voluntarily transferred property would therefore appear to be under the 18th section, which will be mentioned hereafter.

The Act further seems to be deficient in not providing a means for settling authoritatively in every case whether duty is payable or not. In an ordinary case, where all the property of the deceased is disposed of by will or descends by intestacy (no voluntary transfers under the Act having been made), it is submitted that it cannot be definitely decided whether duty attaches or not until the executor or administrator has passed his accounts before the Surrogate Judge (which must now be done within eighteen months, the time fixed for payment of duty): because until the accounts have been passed, it is impossible to arrive at the "aggregate value" of the estate. The debts and administration expenses have to be deducted from the assets, and these include the executors' or administrators' commission for managing the estate, the amount of which is not fixed until then. The Judge's order, after auditing and passing the accounts, showing the balance in the hands of the executor or administrator for distribution, would seem to provide a judicial decision of the "aggregate value" of the estate, on which such executor or administrator might act in paying or withholding duty. It is said to be the practice in some counties to allow a supplemental account to be filed, after six months from the granting of Letters, to diminish or increase the estate, but this appears to lack finality: and it is submitted that the accounts as filed for auditing should give all the information necessary to determine whether or not the amount of such an estate is sufficient to bring it within the Act.

In all doubtful cases no duty should, therefore, be paid to the Treasurer until the Surrogate Judge has fixed by his order what is the "aggregate value" of the estate. As has been mentioned above, the only proofs of the amount of the estate furnished to the Treasurer in the first instance are an itemized inventory and valuation of the property of the deceased. In an ordinary case it would appear that the only further evidence of the amount of the estate, with which the Treasurer need be supplied, would be a duplicate of the Judge's order after passing the accounts, and it is submitted that this should be accepted by him as proof of the "aggregate value" of such an estate.

But where any of the property of the deceased has been voluntarily transferred in his lifetime so as to fall under the provisions of the 4th section, the value of the same must be added to the amount so fixed by the Judge's order, and the total thus obtained will determine whether the estate, from its amount, is liable to duty or not. The Act seems to rely on the vigilance of the Treasurer to discover property so transferred, as it does not appear to be the statutory duty of the executor or administrator, or of any one claiming under such a transfer, to notify him thereof.

By the 6th section, where the Treasurer is not satisfied with the valuation of the property by the executor or administrator, he may instruct the Surrogate Registrar to issue an order directing the Sheriff of the county to make a valuation and appraise the property. This section appears to refer only to property devolving by will or intestacy, as do also sections 7, 8, 9, and 11. The subsequent proceedings are then shortly as follows: The Sheriff forthwith notifies the executor or administrator, and the other parties named in the order, of the time and place which he may have chosen for the appointment, a seven days' notice to all parties being considered sufficient. Then in the presence of the persons notified he shall appraise the property at its fair market value, and report thereon, and also upon such other facts as are referred to in the order, to the Surrogate Registrar in writing.

The New York Act authorizes the appraiser to compel the attendance of witnesses to assist him in fixing the value, but the Sheriff under our Act can rely upon no such assistance. The intention seems to be that he shall value the property to the best of his own judgment, in the presence of the interested parties: and it does not appear that he is bound to accept evidence submitted by any of the parties present at the appointment, although, of course, he might accept such evidence if he thought proper to do so. The Sheriff's report is then filed in the office of the Surrogate Registrar, and the Registrar immediately proceeds to assess the "then cash value" of the different interests devolving, and to fix the duty thereon. And just here he is met with a difficulty, which has already been pointed out. Suppose, for instance, he has to place a value upon the following interests, viz.: A testator bequeaths certain property to his son for life, subject to an annuity in favour of his mother, and from and after the son's

death to a "stranger" absolutely. The Registrar, on referring to the 8th section, finds it his duty to "forthwith assess and fix the then cash value of all" such estates, calling in the Inspector of Insurance, should he think it necessary to do so, having first by registered letter notified "such parties as by the rules of the High Court would be entitled to notice in respect of the like interest in an analogous proceeding." His duty would appear to be simple until the 11th section is brought under his notice. Then he finds that the tax upon the "stranger's" interest in the above example "shall be assessed upon the value of the same at the time the right of possession accrues" to him and not upon the value when it devolved, subject to the mother's annuity and son's life interest, as the 8th section clearly provides. This is a plain contradiction, and can only be accounted for by the fact that this 8th section is taken from the 13th section of the New York Act, while the 11th section is almost a literal copy of the first portion of the 3rd section of the Pennsylvania Act. It must be pointed out, however, that the 11th section only refers to a "devise, descent, or bequest of property." Hence, if the testator in the above example had voluntarily transferred the property mentioned to himself for life, and then in the manner referred to, the 11th section would not have applied.

If the Surrogate Registrar has not been successful in satisfying all parties, "any person dissatisfied," either with the appraisement or assessment, may appeal to the Surrogate Judge within thirty days after the making *and filing* of such assessment. There does not appear to be any provision made for filing the assessment when it has been made. It is presumed, however, that the intention is that it should be filed immediately after it is made in the office of the Surrogate Registrar, and by him at once transmitted to the Provincial Treasurer, at whose instance and for whose satisfaction (section 6) the assessment was made.

Upon this appeal jurisdiction is given to the Surrogate Judge to determine all questions of valuation, and of the liabilities of the appraised estate to duty. The party appealing has therefore the right not only to show that the valuation of the property devolving on him is erroneous, but also that no duty whatever attaches.

It will be noted that the proceedings under sections 6, 7, 8, 9, and 11 can only be commenced by the Provincial Treasurer, and

refer simply to cases where he is not satisfied with the value of the property sworn to. It may well be that a legatee or devisee is equally dissatisfied with such sworn valuation of his property, but no such remedy is open to him. In his case the sworn valuation put in by the executor or administrator could only be revised under the 18th section referred to hereafter.

No such defect or omission is to be found in either the New York or Pennsylvania statutes. In the former it is provided that "the Surrogate, upon the application of *any interested party*, shall appoint a competent person as appraiser," etc.; while in the latter "The Registrar of Wills shall appoint an appraiser as often as and whenever occasion may require."

The remaining sections of the Act deal principally with the time for payment of the duties prescribed and with the modes of enforcing the same.

Such "duties shall," by the 12th section, "be and remain a lien upon the property in respect to which they are payable until the same is paid." The effects of this clause will not be so much feared by persons dealing with property devolving by will or intestacy as by those purchasing from parties claiming under voluntary transfers falling within the 4th section. In the former case the executor, administrator, or trustee, having the property in charge shall not hand it over to the party entitled thereto until the duty has been paid (section 14). But in the latter case, even an innocent purchaser for value without notice would take, subject to the lien for unpaid duty, as before mentioned. The tax may be paid at the death of the deceased, although there is no obligation to pay it for eighteen months thereafter, and no interest is chargeable during that time. But if payment be neglected for a longer period, then interest is to be charged from the death of the deceased. The Surrogate Judge may extend the time for payment of such duty where it appears that payment, as prescribed by the Act, "is impossible owing to some cause over which the person liable has no control." Power is also given to executors, administrators, and trustees to sell so much of the property of the deceased as may be necessary to pay "said duty." But it is submitted that this would give them no power to sell any of the property coming into their hands in order to satisfy the duty upon property voluntarily transferred, and falling under the provisions of the 4th section, with which they can have nothing o do.

As has been said before, the duty need not be paid until the expiration of eighteen months from death. If it is not then paid, the Surrogate Judge shall (apparently on the application of any person interested, including the Provincial Treasurer, or any one on his behalf) make an order directing the persons interested in the property liable to duty to appear before him and show cause why said duty should not be paid. (Section 18.) It is submitted that under this section it is open to the persons named in the order to allege any cause why the duty should not be paid.

The Lieutenant-Governor in Council has issued regulations whereby the fees payable under the 20th section shall be the same as those payable in contentious matters under the Surrogate Courts Act.

This completes a hurried and imperfect review of the Act. It is a piece of legislation which is entirely new to this Province, but which, having found its way into our statute books, has, doubtless, come to stay, and will in future receive attention both from the courts and from the Legislature. At present, therefore, the task of the reviewer is like that of the explorer: if he do but give a rough chart of the country, for the guidance of those to follow him, his explorations may not be deemed useless.

R. A. BAYLY.

London, Ont.

Notes and Selections.

ADVERTISING LAWYERS.—The following unique advertisement is found on page 187 of Hubell's Legal Directory (Appendix) for 1893. For obvious reasons we omit the name: "——, Attorney, Oklahoma City, Oklahoma. Twenty-five years' experience. Collected thousands of dollars, and never failed to remit within forty-eight hours. *Never drink or gamble.* Plenty of property to pay all liabilities. *Insolvencies* and *transfers to defraud creditors a specialty.*" (The italics are ours.) For a comprehensive advertisement, well adapted to the "environment," we never saw its equal. The last statement is possibly a trifle ambiguous, but in the large and breezy new west "everything goes."—*American Law Review.*

CHANGING GRADE OF STREET.—It has been held by the Ohio Supreme Court, in the case of *Columbus Gas Light & Coke Co.* v. *City of Columbus*, that a gas company laying its pipes in the streets of a city, under a grant from the city, in conformity with an established grade, does so subject to the right of the city to change the grade of the street whenever the necessities of the public require it; and in the absence of wantonness or negligence on the part of the city, the company cannot maintain an action for damages occasioned by the necessity of taking up and relaying its pipes in order to accommodate them to the new grade.—*Albany Law Journal.*

AFFIDAVITS BY TELEPHONE.—The *Michigan Law Journal* asks: "Can an affidavit be legally sworn to over a telephone? We do not know that any court has yet been called upon to answer this question. But it is only a question of time when the point may be raised. To our certain knowledge, the practice prevails to some extent. It is, to say the least, questionable whether the subscribing notary can legally say the affiant 'personally appeared,' in the real meaning of the jurat. It is extremely doubtful whether an affidavit or verification so made would be held sufficient if put to a legal test." We think the *Journal* is quite correct in its doubts. The rule is that the officer and affiant must be face to face. This is substantially held in *Case* v. *People*, 76 N.Y. 242. Case was president of a life insurance company, and was accustomed to sign reports required by law to be verified, and send them by a messenger to a neighbouring notary, who, without seeing him or swearing him, affixed his signature to the certificate. This was held not to be a valid affidavit of which perjury could be predicated. Of course in the case supposed there is the form of administering the oath, which did not exist in the case cited; but how can an oath be intelligently administered unless the affiant is personally present? No one would contend that the transaction could be made binding by letter through the mail, and yet that would be as authoritative as a telephonic communication. How can a legal officer get jurisdiction of a person who is not present before him? There are many things done in this "hustling" age which will not "hold water," and this thing is one of them.—*Albany Law Journal.*

THE *Law Journal* (England) refers to a statement that the judges have under consideration a plan for dealing with the reporting of proceedings in Chambers, and them proceeds to comment on the subject as follows :—"This information will be received with mingled feelings by busy practitioners. The accumulation of reported decisions is so great that it is more than doubtful if reports of Chamber proceedings would be really beneficial. Chamber practice is of such a rough-and-tumble character that it scarcely lends itself to the recording pen of the reporter, while the wordy and frequently noisy conflicts between counsel, with which we are familiar in these largely informal tribunals, would be often protracted to a length which is really horrible to contemplate if the disputants had at their disposal a few volumes of these projected reports."

THE LENGTH OF THE CHANCELLOR'S FOOT.—There is a story told of a law student at his final examination being asked a question as to when a court of equity would interfere by injunction, and of his making answer, "Where the conduct of the defendant is such as to shock the conscience of the Lord Chancellor," who then was Lord Westbury, about the sensitiveness of whose moral organ doubts had begun to be whispered. The naïve reply of the student may excite a smile ; yet more is to be said in support of it than might at first appear. For the equity remedy by injunction is not one *ex debito justitiæ*, but one entirely in the discretion of the court ; and, when we once get into the region of discretion, the only guide we have is the knowledge of the mental and moral constitution—moral quite as much as mental—of the particular Chancery judge from whom an injunction is sought. The tender conscience of one might be roused by conduct on the part of a defendant which would not even ruffle the equanimity of another. And when we have done with the judge of first instance, we have still to reckon with the idiosyncrasies of the members of the Court of Appeal.—*Law Journal.*

THE EXCLUSION OF PARTIES AND EXPERTS FROM COURT.—In the case of *Trevaskis* v. *Brunsden*, which belonged to the familiar category of "running down" actions, Mr. Justice Gran-

tham has this week given a ruling, and pronounced an *obiter dictum*, to which the attention of the legal profession ought to be directed. His lordship ordered the parties—who, it should be observed, were to be called on their own behalf—out of court till their evidence had been given, and also indicated that on some future occasion he might, following the practice which prevails in Scotland, exclude medical experts from court while their scientific brethren were in the witness box. It cannot be denied that the course adopted, and also the course suggested by Mr. Justice Grantham in this case, constitute a somewhat startling innovation upon the established rules of English procedure. There can be no doubt that the old rule permitting parties to be present was framed at a time when parties were not competent witnesses, and we can readily conceive of cases in which their exclusion would be distinctly conducive to the discovery of truth. The discretionary power which Mr. Justice Grantham exercised in the case of *Trevaskis* v. *Brunsden* is, however, one that ought to be employed with the strictest caution. To deprive a party to a suit of his right to make suggestions to his legal advisers, as the trial develops, is a course that ought never, except in the interests of a higher right, to be adopted. The only convenience that would result from the exclusion of medical experts from court while their colleagues were giving evidence would be the impossibility of confining the examination-in-chief of merely "corroborating" witnesses to a simple expression of agreement with the testimony of those that had gone before them. But this advantage would be of little moment compared to the compensating advantage which Mr. Justice Grantham's proposal would secure by giving to expert evidence an independent character which under the present *regime* it does not, and cannot, possess.—*Law Journal.*

SUNDAY OBSERVANCE.—The *American Law Review* has an ingenious article by Mr. William E. Carter, on "Chief Justice Maxwell upon the Sunday Question," in which he argues that people nowadays are under no obligation to observe Sunday because God's injunction on the subject was addressed to the Jews alone. That being so, probably for the same reason we are under no obligation to refrain from murder, theft, perjury, adultery, etc. The learned writer informs us that Calvin played

at bowls on Sunday. We don't blame him. Under his belief in election, it made no difference what he did on Sunday. It is interesting to be informed of this amiable trait in the austere theologian who burned a gentleman who differed from him. Mr. Carter also infers that we can afford to dispense with Sunday because "the whole Christian world * * * managed to do without it very nicely down to within about three hundred years," and "the civilization which produced Shakespeare and Bacon did so without the help of the Puritan Sunday." *Ergo*, we should return to the "civilization" of three centuries ago when Bacon believed in witchcraft and took bribes? As for his unfortunate reference to Shakespeare, we turn him over to the tender mercies of Mr. Donnelly. Again, he urges we can do without Sunday because the Chinese, who never heard of it, "exist in health and strength." Let Mr. Carter not trust himself in California, after this argument in favour of the equality of the Chinese with our race. And if his argument about "health and strength" is sound, let us economize in our tables, and live on rats and rice! In spite of this array of arguments, we shall continue to believe that a reasonable observance of one day in seven for rest has been and always will be an attendant upon an enhancing civilization.—*Albany Law Journal.*

SIR JAMES HANNEN.—The following extracts form a sketch of this distinguished jurist, taken from the *Green Bag*, will not be out of place at this time when, the sittings of the Behring Sea arbitration still occupy so much attention: "The Right Hon. Sir James Hannen, President of the Probate, Divorce, and Admiralty Division of the High Court of Justice, and sometime President of the Parnell Commission, was born in 1821, was educated at St. Paul's School and afterwards at the University of Heidelberg, became a student of the Middle Temple, and was called to the Bar in 1848. In 1853 the hour of opportunity that cometh to every man overtook him. The interminable Canadian fisheries' disputes between England and America had reached a crisis. The proximate cause of quarrel was the alleged encroachment upon British fishing-grounds by vessels belonging to the United States; and the English Colonial Secretary, Sir John Pakington, in a circular addressed to the colonial governors concerned, had used foolish language, to which Mr. Webster, the

American Secretary of State, had unfortunately and unwisely replied. Less trivial circumstances have ere now plunged nations into the horrors of war. But the relations between Great Britain and America, though strained, were happily not ruptured. A Mixed Commission to adjudicate upon the matter generally, and upon the outstanding claims in particular, was appointed; and the *Gazette* for November 16, 1853, announced the nomination of James Hannen, Esquire, as agent for Great Britain before the commissioners. The Mixed Commission sat in London from 1853 to 1854 or 1855; it settled the immediate difficulties between England and the United States, and it brought at the same time to Sir James Hannen both reputation and practice. Cases of a sensational character Hannen never received, and could not have conducted with success. But heavy arbitrations, solid mercantile questions, difficult points of law sought out his chambers instinctively, and departed thence settled and solved. In the course of time he became Treasury 'devil.' In modern legal nomenclature, the 'devil' has no Satanic significance. In its generic character, it is a term applied to a junior barrister who digests cases, and occasionally holds briefs, for an overburdened senior. These services are not always paid for—at least directly. But the devil gains experience—at the cost of his leader's clients—establishes a claim to his employer's good offices in the future, and eventually forms a connection of his own. The Treasury devil is the highest species of this important order of beings. He is the junior counsel to the government, is briefed in all heavy Crown cases, enjoys, besides, a lucrative private practice, and has a reversionary right to puisne judgeship, without being expected either to take part in politics or to become a Queen's Counsel. Lord Justice Bowen, Mr. Justice Mathew, and Mr. Justice A. L. Smith are types of this class. During his tenure of office of Treasury devil, Sir James Hannen was called upon to take part in several important cases—the trial of Franz Müller for the murder of Mr. Briggs, the strange action raised by the *soi-disant* Princess Olive, and the prosecution of the Manchester 'martyrs.' He was also engaged in the great Matlock will case, when Lord Chief Justice Cockburn was almost persuaded to believe in expert testimony by the remarkable evidence of the lithograper, Charles Chabot (1816-1882). In 1865 Sir James Hannen made an unsuccessful attempt in the Liberal interest to oust Mr. Stephen Cave,

the Tory M.P. for New Shoreham. But his politics were impotent to destroy his privilege as Treasury devil; and in 1868, on the death of Sir William Shee—less known as a judge than as the advocate that offended Palmer—Hannen received simultaneously the vacant justiceship and the honour of knighthood. He was made Judge-ordinary of the Court of Probate, in succession to Lord Penzance, in 1872, and three years later was raised to his present position — the Presidentship of the newly-constituted 'Probate, Divorce, and Admiralty Division.'

Sir James Hannen's conduct of the Parnell Commission is probably the episode in his public career that posterity will remember most vividly. In the stormy debates that preceded the appointment of the commissioners, when the qualifications and impartiality of his colleagues were bitterly questioned or denied, no shadow of doubt was cast on the perfect competency and integrity of the President. His demeanour at the great inquest amply justified this forbearance. Determined that his court should not become a cockpit for party railleries or a parade ground for the exhibition of sensational but irrelevant evidence before the galleries, Sir James Hannen kept the work of the commission strictly within the lines prescribed by statute, and made Sir Richard Webster and Sir Charles Russell alike feel the pressure of his guiding hand. The Report is before the world, and speaks for itself; but the few sentences with which Sir James Hannen closed the public labours of the commission are not so well known, and are yet eminently worthy to be recorded. When Sir Henry James concluded his elaborate address, the President said, in tones that are indelibly impressed upon the memories of his audience: 'And now I have to congratulate the counsel who are still before us on the completion of their arduous task, and to thank them, and those others to whom such thanks are due, for the untiring industry and conspicuous ability which they have placed at our service, and for the great assistance we have derived from their labours. Our labours, however, are not concluded. We must bear our burden yet a little longer. But one hope supports us. Conscious that throughout this great inquest we have sought only the truth, we trust that we shall be guided to find it, and set it forth plainly in the sight of all men.'

As a judge, Sir James Hannen possesses in union and harmony the three indispensable judicial qualities of patience,

dignity, and knowledge. He can listen to an argument without interrupting it. He permits no liberties to be taken with the decorum of his court, and no withholding of the respect that is his due. Any effort to mislead him is foredoomed to failure.

All that remains to be said of this great judge and lawyer can be stated in a few words: he is practically a vegetarian in diet, and no amusing or doubtful anecdotes are linked to his name."

Correspondence.

RIGHTS AND REMEDIES IN A FORECLOSURE ACTION.

To the Editor of THE CANADA LAW JOURNAL:

SIR,—I have read with interest the article in your issue of May 16th on the above subject, but I cannot say that I agree with the conclusions reached by the writer. He seems to rely too strongly on *Campbell* v. *Robinson*, 27 Grant 634. This case has little or no authority to support it. *Chamley* v. *Lord Dunsany*, 2 Sc. & L. 708, only goes this length: that, "when a case is made out between defendants by *evidence arising from pleadings and proofs between plaintiff and defendants*, a court of equity is entitled to make a decree between the co-defendants." It is laid down in Daniell's Chancery Practice that, "as a general rule, the court only makes a decree between co-defendants when the plaintiff is entitled to relief, but cannot obtain relief unless such a decree is made; and when it makes such a decree, it only does so at the *hearing on further consideration*," etc., etc. Accordingly, in *Fletcher* v. *Green*, 33 Beav. 573, contribution between trustees, co-defendants, was refused on the ground that such relief could not be granted in the original suit. You might think me too presumptuous in thus criticizing *Campbell* v. *Robinson;* but its authority has been very much weakened, if not expressly overruled, by the Supreme Court in *Williams* v. *Balfour*, in 18 S.C.—a case which Mr. Galt does not appear to have noticed. Whatever, therefore, the law as to such a case *ought to be*, I am strongly of opinion that the Court of Appeal was right in their decision in *Walker* v. *Dickson*, 20 A.R. 96, as to what the law and practice are now.

Nor can I see any serious disadvantages as likely to arise. Why should a second and a third defendant be dragged before the court by the plaintiff merely because by possibility No. 1 may want to ask for some relief against No. 2, and No. 2 against No. 3? Three suits settled in one, you say? But, then, the two extra disputes may be settled between the parties without suits; and, if not, complexity and multifariousness in a suit may be as great an evil as a multiplicity of suits. Nor can I agree with the somewhat sarcastic remarks of the writer of the article as to the new form of mortgage taken by Milburn. Surely he has heard of the court holding that a deed absolute in form was only a mortgage; and I see no reason why Milburn, in the case under review, should not have been permitted to show by oral testimony that he had not really assumed the plaintiff's mortgage, and had not impliedly undertaken with Rogers, or any one else, to pay it off, but had merely taken the conveyance as security from Collins. Upon this being shown, Rogers would be entitled to no indemnity from Milburn, and the only proper decree against him would be for foreclosure on default of payment.

That a decree should have been made containing a personal order against the *three* defendants for payment of plaintiff's claim and costs seems extraordinary in the face of *Real Estate* v. *Molesworth*, 3 Man. R. 116; *Nicholls* v. *Watson*, 23 Gr. 606; and *Clarkson* v. *Scott*, 25 Gr. 373; there being no privity of contract between the plaintiff and any defendant except the mortgagor.

GEORGE PATTERSON.

Winnipeg, May 29th, 1893.

REORGANIZATION OF OUR LAW COURTS.

To the Editor of THE CANADA LAW JOURNAL:

In the April number of the *Law Quarterly Review* of 1892, an article written by Thomas Snow, entitled "The Reform of Legal Administration; an Unauthorized Programme," proposes, among other things, the constitution of a final Court of Appeal which could be reached at once from the judgment in the first instance, and the abolition of Divisional Courts.

The desirability of simplifying our present very cumbersome and expensive system of obtaining a final disposition of a case is a

consummation most devoutly to be wished for by every interested person. For this purpose the writer would suggest to the readers of your journal a scheme for the reorganization of our courts, which is in no sense intended to be complete, but must necessarily, from lack of space, be very imperfect in its details. It is as follows:

A final Court of Appeal for the Province to consist of nine judges—the present members of the Court of Appeal, the Chief Justices of the Queen's Bench Division and the Common Pleas Division, the Chancellor, with two senior Puisne Judges—divided into three divisions: First Division: Chief Justice Hagarty, Chief Justice Galt, Mr. Justice Maclennan. Second Division: The Chancellor, Mr. Justice Burton, Mr. Justice Rose. Third Division: Chief Justice Armour, Mr. Justice Osler, Mr. Justice Ferguson.

Each division to sit for five days, once every three weeks, thus providing for a continuous sittings of the Court of Appeal until the list of cases is disposed of. The present Divisional Courts to be abolished. In addition to the work done by the present Court of Appeal, all work done by Divisional Courts to be added and all appeals heard direct from the judge or jury in the first instance, as well as all interlocutory appeals from a judge in court or in chambers.

A judge to sit in court and in chambers as at present, and having the same jurisdiction.

All appeals to be set down within thirty days after judgment is delivered. The giving of security for costs to be abolished except in cases where the amount involved is over $4000. The printing of appeal books to be abolished also, except where amount is over $4000. The present practice of appeals from County Courts to be followed where amount involved is not over the above-mentioned sum.

In all cases where the amount is over $4000, appeal books to be printed, security to be given, and the cases set down for argument before the Full Court, to consist of seven judges—the present Court of Appeal, the two Chief Justices, and the Chancellor. Special sittings of the court to be held when necessary.

Judges of any of the appeal divisions on special application to have the power to direct cases of special importance, or where there is a conflict between two divisions to be heard before the

Full Court, and in such cases the practice of printing appeal books and giving security to be observed, as at present.

The remaining five judges to sit continuously or as often as convenient for the trial of actions through the country. One judge to be stationed permanently at Ottawa, and one at London, who, in addition to circuit work, would hold single court and chambers at these points, thus leaving three judges to go on circuit from Toronto at such intervening points as should be arranged.

These five judges, being relieved from all term and chamber work (except chambers and single court at Ottawa and London, which work would not be heavy), could easily try all cases through the country at sittings to be held at much shorter intervals than at present.

All the justices of the Court of Appeal to alternately take court and chamber work at Toronto, as might be arranged.

I have thus gone briefly over my proposed scheme for the reorganization of our present system of law courts, and I commend it to the thoughtful consideration of the profession, with the hope that it may result in minimizing the amount of work done by our judges, and shortening the delays which now exist in obtaining a final disposition of cases, so far as our Province is concerned.

JOHN MACGREGOR.

DIARY FOR JUNE.

1. Thursday....Chy. Div. H.C.J. sits. Corpus Christi. First Parliament in Toronto, 1797.
2. Friday.....Convocation meets.
3. Saturday....Easter Term ends.
4. Sunday.....*1st Sunday after Trinity.* Lord Eldon born, 1751.
6. Tuesday.....Sir John A. Macdonald died, 1891.
8. Thursday....First Parliament at Ottawa, 1866.
11. Sunday.....*2nd Sunday after Trinity.* Lord Stanley Gov.-Gen., 1888.
12. Monday.....County Court sittings for motions in York.
13. Tuesday.....County Court sittings for trial, except in York.
15. Thursday....Magna Charta signed, 1215.
18. Sunday.....*3rd Sunday after Trinity.*
20. Tuesday.....Accession of Queen Victoria.
21. Wednesday..Proclamation of Queen Victoria. Longest day.
25. Sunday.....*4th Sunday after Trinity.* Sir M. C. Cameron died, 1887.
27. Tuesday.....Convocation meets.
28. Wednesday..Coronation of Queen Victoria, 1838.

Notes of Canadian Cases.

SUPREME COURT OF CANADA.

Ontario.] [May 1.

CITY OF TORONTO *v.* GILLESPIE.

Municipal corporation—Local improvement—Notice to ratepayers—By-law—Variance from notice.

The corporation of Toronto wishing to construct, as a local improvement, a stone roadway on one of the streets of the city gave notice to the owners of the properties thereby, as required by s. 622 (2) of the Municipal Act, of such intended improvement, in which notice the proposed work was the construction of a macadam roadway on Bloor street, etc., and the payment of the cost was to be made by special assessment on the properties benefited, payable in five and twenty equal annual payments. By the by-law passed for its construction, the work was described as "a macadam and granite sett roadway and stone curbing," and the cost was to be paid in five years. On an application to quash the by-law, it was not shown that the work as described in the by-law was identical with that mentioned in the notice.

Held, affirming the decision of the Court of Appeal (19 A.R. 713), that the by-law was invalid on account of the said variances from the notice, and it was properly quashed.

Appeal dismissed with costs.

Biggar, Q.C., for the appellants.

Aylesworth, Q.C., for the respondent.

Ontario.]

STEPHENS *v.* GORDON.

Agreement, construction of—Way—Timber—Removal of, necessary.

The plaintiff was the owner of a farm of about a mile in breadth and five-sixths of a mile in length. About two-thirds of the farm was heavily wooded, and the rest of it was cleared and cultivated. The defendant became the purchaser of the trees and timber upon the land under an agreement which provided, among other things, that the purchaser should have "full liberty to enter into and upon the said lands for the purpose of removing the trees and timber at such times and in such manner as he may think proper," but reserved to the plaintiff the full enjoyment of the land, "save and in so far as may be necessary for the cutting and removing of the trees and timber." To have removed the timber through the wooded land at the time it was removed would have involved an expenditure which would have probably amounted to a sacrifice of the greater portion of the timber.

Held, affirming the judgment of the court below, that the defendants had a right to remove the timber by the most direct and available route, provided they acted in good faith and not unreasonably, and the reservation in favour of the plaintiff did not minimize or modify the defendant's right under the general grant of the trees to remove the trees across the cleared land; GWYNNE, J., dissenting.

Appeal dismissed with costs.

M. Wilson, Q.C., for the appellant.

D. McCarthy, Q.C., for the respondent.

Quebec.]

WILLIAMS *v.* IRVINE.

Right of appeal—54 & 55 Vict., c. 25—Construction of.

By s. 3, c. 25, of 54 & 55 Vict., an appeal is given to the Supreme Court Canada from the judgment of the Superior Court in Review (P.Q.), "where, and so long as no appeal lies from the judgment of that court, when it confirms the judgment rendered in the court appealed from, which, by the law of the Province of Quebec, is appealable to the Judicial Committee of the Privy Council."

The judgment in this case was delivered by the Superior Court on the 17th November, 1891, and was affirmed unanimously by the Superior Court in Review on the 29th July, 1892, which latter judgment was, by the law of the Province of Quebec, appealable to the Judicial Committee. The statute 54 & 55 Vict., c. 29, was passed on the 30th September, 1891, but the plaintiff's action had been instituted on the 22nd November, 1890, and was standing for judgment before the Superior Court in the month of June, 1891, prior to the passing of 54 & 55 Vict., c. 25. On an appeal from the judgment of the Superior Court in Review to the Supreme Court of Canada, the respondent moved to quash the appeal for want of jurisdiction.

Held, per STRONG, C.J., and FOURNIER and SEDGEWICK, JJ., that the right of appeal given by 54 & 55 Vict., c. 25, does not extend to cases standing for

judgment in the Superior Court prior to the passing of the said Act. *Couture* v. *Bouchard* followed. TASCHEREAU and GWYNNE, JJ., dissenting.

FOURNIER, J.: That the estate is not applicable to cases already instituted or pending before the courts, no special words to that effect being used.

Appeal quashed with costs.

H. Abbott, Q.C., for the appellant.

St. Jean for the respondent.

Quebec.]

BROWN *v.* LECLERC.

Loading of steamer—Accident—Neglect of usual precaution—Liability of employer.

Where two stevedores are independently engaged in loading the same steamer, and, owing to the negligence of the employees of the one an employee of the other is injured, the former stevedore is liable in damages for such injury.

The want to observe a precaution usually taken in and about such work is evidence of negligence. GWYNNE, J., dissenting.

Appeal dismissed with costs.

Geoffrion, Q.C., for the appellant.

Bronin, Q.C., for the respondent.

Quebec.]

MARTINDALE *v.* POWERS.

Quality of plaintiff—General denegation—Art. 144, C.C.P.—Don mutuel—Property excluded, but acquired after marriage.

Held, (1) affirming the judgment of the court below, the quality assumed by the plaintiff in the writ and declaration is considered admitted, unless it be specially denied by the defendant. A *défense au fonds en fait* is not a special denial within the meaning of Art. 144, C.C.P.

(2) Where by the terms of a *don mutuel* by marriage contract a farm in the possession of one of the sons of the husband under a deed of donation was excluded from the *don mutuel*, and subsequently the farm in question became the absolute property of the father, the deed of donation having been resiliated for value, it was held that by reason of the resiliation the husband had acquired an independent title to the farm, and it thereby became charged for the amount due under the *don mutuel* by marriage contract, viz., $5,000, and that after the husband's death the wife (the respondent in this case) was entitled, until a proper inventory had been made of the deceased's estate, to retain possession of the farm. TASCHEREAU and GWYNNE, JJ., dissenting.

Appeal dismissed with costs.

Racicot, Q.C., and *Amyrauld* for the appellant.

Baker, Q.C., for the respondent.

CORBETT *v.* SMITH.

Nova Scotia.] [May 1.

Deed—Action to set aside—Undue influence—Evidence.

C., executrix under a will, brought an action to have a deed executed by testator some two months before the date of the will set aside and cancelled

for undue influence by the grantees, and incompetence of the grantor to execute it. C. alleged in her statement of claim that testator was 80 years old, and a man of childlike simplicity; that defendants, grantees under the deed, had kept him under their control, and several times assaulted him when he wished to leave their house; and that he had requested C. to live with him and take care of him until he died, which defendants would not permit her to do. The deed in question purported to be in consideration of grantees paying testator's debts and maintaining him for the rest of his life.

Held, affirming the decision of the Supreme Court of Nova Scotia, that the evidence showed that the deed was given for valuable consideration, and that undue influence was not established. C., therefore, could not maintain her action.

Appeal dismissed with costs.

King, Q.C., for the appellant.

Russell, Q.C., for the respondents.

British Columbia.] [May 1.

DAVIES *v.* MCMILLAN.

Sheriff—Action against—Trespass—Sale of goods by insolvent—Intent—Bona fides—Judgment on interpleader issue—Estoppel.

K., a trader in insolvent circumstances, sold all his stock-in-trade to D., who knew that two of K.'s creditors had recovered damages against him. The goods so sold were afterwards seized by the sheriff under executions issued on judgments recovered after the sale. On the trial of an interpleader issue in the County Court the jury found that K. had sold the goods with intent to prefer the creditors, who then had judgments, but that D. did not know of such intent. The County Court judge gave judgment against D., holding that the goods seized were not his goods, and that judgment was affirmed by the court *in banc*. D. afterwards brought an action against the sheriff for trespass in seizing the goods, and obtained a verdict, which was set aside by the court *in banc*, the majority of the judges holding that the County Court judgment was a complete bar to the action. On appeal to the Supreme Court of Canada,

Held, reversing the decision of the Supreme Court of British Columbia, that the evidence showed that D. purchased the goods from K. in good faith for his own benefit, and the statute against fraudulent preferences did not make the sale void.

Held, also, that the County Court judgment, being a decision of an inferior court of limited jurisdiction, could not operate as a bar in respect of a cause of action in the Supreme Court, and beyond the jurisdiction of the County Court to entertain.

Held, further, that if such judgment should be set up as a bar it should have been specially pleaded by way of estoppel, in which plea all the facts necessary to constitute the estoppel must have been set out in detail, and from the evidence in the case no such estoppel would have been established.

Appeal allowed with costs.

Moss, Q.C., for the appellant.

Robinson, Q.C., for the respondent.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE.

Queen's Bench Division.

FERGUSON, J.] [May 13.

STUART *v.* THOMSON.

Husband and wife—Ante-nuptial contract by letters—Post-nuptial conveyance of lands—Destruction of letters—Description of lands—Duty of husband—Intent to defeat creditors.

A young man, under 21, made an offer of marriage by letter to a young woman, and in the letter promised that, if she would have him, he would after the marriage give her all the property he had (meaning real property), describing it as "my farm in Osprey" and "my property in Elmvale." She accepted the offer unconditionally, also by letter, the marriage took place, and he afterwards conveyed the two properties to her. After the conveyances the parties, voluntarily and without any evil intent, destroyed the letters, believing that they had no longer any use for them.

Held, that the letters formed a pre-nuptial contract, enforcible in spite of their destruction, upon satisfactory evidence of their contents being given.

Gilchrist v. *Herbert*, 20 W.R. 348, followed.

Held, also, that the description of the properties in the man's letter was sufficient.

Held, lastly, that there was a duty on the part of the husband to convey to his wife, which negatived the existence of an intent to defeat creditors.

W. C. McKay and *R. D. Gunn* for the plaintiffs.

John Birnie for the defendants.

Div'l Court.] [May 19.

SEGSWORTH *v.* ANDERSON.

Assignments and preferences—Assignment for benefit of creditors under R.S.O., c. 124—Purchase of insolvent estate from assignee—Arrangement between purchaser and certain creditors—Payment of claims in full—Liability to account—Parties.

A trader having made an assignment of all his estate for the benefit of his creditors, under R.S.O., c. 124, his stock-in-trade was purchased by his wife from the assignee; the defendants, who were creditors of his, and one of them the sole inspector of the estate, becoming responsible to the assignee for payment of the purchase money, and receiving security from the wife upon the goods purchased by her, not only for the amount for which they had become responsible, but also for the full amount of their claims as creditors of the husband. The arrangement to this effect was made before the purchase, and the other creditors were not informed of it. The estate was not sufficient to pay the creditors in full.

In an action by another creditor for an account,

Held, that the estate was entitled to the benefit of whatever advantage the defendants derived from the transaction, and that they should account to the assignee for the difference between the amount of their claims and the amount they would have received by way of dividend from the estate.

Held, also, that the assignee was a necessary party to the action.

James Parkes and *W. C. McKay* for the plaintiffs.

Aylesworth, Q.C., for the defendants.

Chancery Division.

Div'l Court.] [May 10.

BROWN *v.* THE TRUSTEES OF THE TORONTO GENERAL HOSPITAL.

Landlord and tenant—Agreement by landlord to repair—Personal injury from want of repair—Notice—Damage.

The plaintiff, a monthly tenant of a house belonging to the defendants, which they had agreed to repair, finding the steps of the front door out of repair, notified the defendants to repair, which they neglected to do.

He continued to use the steps until he fell through and was injured.

Held, that he could not recover

Herbert M. Mowat and *R. Y. Symth* for the plaintiff.

Osler, Q.C., *and H. D. Gamble* for the defendants.

Practice.

Chy. Div'l Court.] [April 23.

RE THE UNION ASSURANCE CO. AND THE LONDON & CANADIAN LOAN & AGENCY CO. AND J. W. LANG.

Insurance—Loss payable to mortgagees—Right to consolidate two mortgages, one of which did not cover the insured property.

G. mortgaged lands A. to a loan company for $1,000, and afterwards mortgaged lands A. and B. to the same company for $3,000. S. became the owner of the equity of redemption in both lands, and insured buildings on lands B.; "loss, if any, payable to the company as their interest may appear." The $3,000 mortgage was paid off, except the last instalment of $500, the $1,000 mortgage being overdue, and the $500 having become due by virtue of the accelerating clause as the last gale of interest had matured, when a fire loss, amounting to $1,203.30 occurred, and the company claimed the right to consolidate both the mortgages so as to retain the whole amount of insurance money.

Held (reversing the Master in Chambers and ROBERTSON, J.), that the insured having a legal right to recover his insurance, and not being driven to a court of equity to enforce his rights, the company could not consolidate the two mortgages.

The trend of modern decisions is against extending the doctrine of consolidation.

Moss, Q.C., and *F. E. Hodgins* for the appeal.

Arnoldi, Q.C., and *Bristol, contra.*

Chy. Div'l Court.] [May 10.

BRITISH & CANADIAN LOAN COMPANY *v.* TEAR ET AL.

Mortagor and mortgagee—Sale subject to mortgage—Implied covenant to pay off—Assignments of—Evidence to retract.

T. mortgaged certain lands to the plaintiffs and then sold them to L., subject to the mortgage, taking the amount of it into account as part of the purchase money, but did not take any covenant to pay it off. T. then, by an instrument in writing, assigned all his rights and remedies, and the benefit of all covenants, express or implied, he had against L. to the plaintiffs. The plaintiffs brought their action on the mortgage, and sought to recover against both T. and L.

On an appeal to the Divisional Court, it was

Held (affirming ROBERTSON, J.), that the implied covenant that L. should pay off the plaintiff's mortgage was assignable by T. to the plaintiffs.

Held, also (reversing ROBERTSON, J.), that L. should have been allowed to give evidence to show that at the time he purchased from T. he contracted that he should not be liable to pay the mortgage.

Aylesworth, Q.C., and *Schoff* for the appeal.

J. K. Kerr, Q.C., and *G. W. Holmes*, *contra.*

Chy. Div'l Court.] [May 10.

MORSE *v.* LAMB.

Registry laws—Registrar's charges—On subdivision of township lots by registered plan.

The practice in the master's office in a foreclosure action to make it effectual is to add all parties who have any interest in the land, and in procuring a registrar's abstract for that purpose the registrar is entitled to charge a search on any lot shown in any plan or subdivision of the land, even where the mortgage sought to be purchased was in the original township lots, and the plan was registered subsequent to the mortgage, and without the mortgagee's consent.

Decision of ROBERTSON, J., reversed.

Shepley, Q.C., for the appeal.

Laidlow, Q.C., *contra.*

Div'l Court.] [May 10.

PARK *v.* WHITE ET AL.

Nuisance—Permanent or temporary—Property occupied by tenants—Injury to reversion.

In an action by the owner to restrain a nuisance of privy pits by an adjoining owner, in which it was contended that the nuisance, if any, was caused by the acts of the defendant's tenants,

Held (affirming MACMAHON, J.), that if the pits were so constructed that the constant user of them would necessarily result in the creation of a nuisance, if the defendant allowed them to remain in an unsanitary condition when she had the power to remedy the grievance, she was personally liable.

Held, also (per BOYD, C.), that the nuisance in this case was of such a recurring nature as to be practically continuous and permanent, and so the reversion was prejudicially affected, and the owner could bring an action therefor, although the premises were in the possession of tenants.

C. H. Ritchie, Q.C., and *McKeown* for the appeal.

George Ritchie, contra.

Q.B. Div'l Court.] [May 16.

MILLS *v.* THE MERCER COMPANY.

Discovery—Examination of party— Privilege—Criminating answer—Subpœna and appointment—Officer of company—Substitutional service.

In an action upon promissory notes the defendant pleaded that the plaintiff and certain other persons had, contrary to 52 Vict. (D.), c. 41, s. 1 (*c*), conspired together to harass the defendants and lessen trade competition, and had procured the holders of the notes sued on to transfer them to the plaintiff, and the plaintiff was suing thereon as trustee for such other persons.

Under his examination for discovery the plaintiff refused to answer questions as the names of the persons for whom he was acting as trustee, claiming privilege on the ground that to answer would tend to criminate him or render him liable to criminal prosecution under the above statute.

Held, that he was not entitled to the privilege, and must answer.

An order will not be made for substitutional service upon an officer of a litigant corporation of a subpœna and appointment for his examination for discovery.

A. Mills for the plaintiff.

F. E. Titus for the defendants.

MEREDITH, J.] [May 18.

POPHAM *v.* FLYNN.

Costs—Attempted examination of judgment debtor—Rule 1180.

Under Rule 1180 the costs of proceedings to examine a judgment debtor may be allowed in the discretion of a court or a judge where the examination has not actually taken place.

And where the judgment debtor attended upon an appointment for his examination, procured an enlargement, and meanwhile, under force of the proceedings, paid the judgment debt;

Held, that he should be ordered to pay the costs of the proceedings.

J. A. MacIntosh for the plaintiff.

H. C. Fowler for the defendant

Q.B. Div'l Court.] [May 19.

PORTER *v.* BOULTON.

Evidence—Foreign commission—Application for—Evidence of party—Circumstances—Expense.

Application for a foreign commission to take the defendant's evidence on his own behalf in England refused where the matters in question were complicated accounts between the parties arising out of transactions between them.

in Ontario at a time when both were resident there; where it seemed that the expense of executing the commission would exceed the cost of the defendant travelling from England to attend the trial; and where the only reasons given by the defendant for his alleged inability to attend the trial were engagements in England, and want of time and money.

W. H. Wallbridge for the plaintiff.

Bain, Q.C., for the defendant.

FERGUSON, J.] [May 30.

FEASTER *v.* COONEY.

Security for costs—Action of slander—52 Vict., c. 14, s. 1, s-s. 3—Property sufficient to answer costs—Burden of proof.

Upon an application under 52 Vict., c. 14, s. 1, s-s. 3, for security for costs of an action for slander imputing unchastity to a female, the onus is on the defendant to show that the plaintiff has not sufficient property to answer the costs of the action; and to defeat such an application it is not necessary that the plaintiff should have property to the amount of $800 over and above debts, incumbrances, and exemptions.

And where it was shown that the plaintiff had property of the value of $500 at least, and it was not shown that she had not property of much greater value, the application was refused.

J. W. McCullough for the plaintiff.

Patullo for the defendant.

FERGUSON, J.] [May 30.

SCARLETT *v.* BIRNEY.

Mortgage—Foreclosure after abortive sale—Time for redemption.

In deciding as to whether there should be a long or short period for redemption, or in default foreclosure, after an abortive sale of the mortgaged premises in an action to enforce a mortgage, the facts and circumstances of the case should be taken into consideration.

And where the amount of money to be paid was about $150,000, and the mortgaged property was of very great value, though at the time there was much difficulty in converting it into ready money, the period of three months was allowed.

Campbell v. *Holyland*, 7 Ch.D. 166, followed.

Goodall v. *Burrows*, 7 Gr. 449, and *Girdlestone* v. *Gunn*, 1 Ch. Chamb. R. 212, considered.

E. P. McNeill for the plaintiff.

J. C. Hamilton for the defendants J. & J. L. Birney.

W. Cook for the other defendants.

MEREDITH, J.] [June 1.

LIVINGSTONE *v.* SIBBALD.

Writ of summons—Service out of jurisdiction—Rule 217 (b) and (g).

Action by an alleged creditor of one of the defendants to set aside a conveyance of land in Ontario by one defendant to another as fraudulent. The

plaintiff claimed to be a creditor in respect of a promissory note made and payable, and the makers of which resided out of the jurisdiction; but did not seek judgment upon the promissory note.

Held, a case in which, under Rule 217 (*b*), service of the writ of summons effected out of the jurisdiction was allowable.

The different sub-rules of Rule 217 are disjunctive; and under (*b*) it is not necessary that the whole subject-matter of the action should come within its provisions.

Semble, also, that the case came within sub-rule (*g*); for, although the defendant alleged to be within the jurisdiction had not been served, it was not necessary that she should be served first, but only that the service without should not be allowed until the service within had been effected, and an adjournment for that purpose might be granted.

D. Armour for the plaintiff.

Swabey for the defendant Charles B. Paget.

Chy. Div'l Court.] [June 7.

DELAP *v.* CHARLEBOIS.

Security for costs—Several defendants—One security—Rules 1245, 1247—Bond—Execution of.

Where, upon an application by one of several defendants, an order is made for security for costs, it may properly provide that the security is to answer the costs of all the defendants.

Construction of Rules 1245 and 1247.

Execution by the plaintiffs of a bond for security for costs may be dispensed with in a proper case.

Bristol for the plaintiff.

Chrysler, Q.C., and *L. G. McCarthy* for the defendant Charlebo

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Q.B. Div'l Court.] [June 1

BRISTOL AND WEST OF ENGLAND LOAN COMPANY *v.* TAYLOR.

Jury notice—Power to strike out, where regularly served—R.S.O., c. 44, s. 80—Master in Chambers—Discretion of trial judge.

A Judge in Chambers or the Master in Chambers has jurisdiction under s. 80 of the Judicature Act, R.S.O., c. 44, to strike out a jury notice where it has been regularly served; but the jurisdiction should not be exercised, because the exercise of it will hamper the discretion of the trial judge.

H. E. Stone for the plaintiffs.

Middleton for the defendant.

Appointments to Office.

ASSOCIATE CORONERS.

County of Victoria.

Philip Palmer Burrows, of the Town of Lindsay, in the County of Victoria, Esquire, M.D., to be an Associate Coroner within and for the said County of Victoria.

County of Hastings.

James T. McKenzie, of the Town of Trenton, in the County of Hastings, Esquire, M.D., to be an Associate Coroner for the said County of Hastings, in the room and stead of Henry W. Day, Esquire, M.D., resigned.

County of Essex.

Thomas Hobley, of the Town of Amherstburg, in the County of Essex, Esquire, M.D., to be an Associate Coroner within and for the said County of Essex, in the room and stead of William Curran Lundy, Esquire, M.D., deceased.

DIVISION COURT CLERKS.

County of Dufferin.

William Love, of the Village of Stanton, in the County of Dufferin, Gentleman, to be Clerk of the Third Division Court of the said County of Dufferin, in the room and stead of John A. Love, resigned.

Court of Renfrew.

Thomas F. O'Gorman, of the Village of Shamrock, in the County of Renfrew, Gentleman, to be Clerk of the Fifth Division Court of the said County of Renfrew, in the room and stead of John Gorman, resigned.

DIVISION COURT BAILIFFS.

County of Brant.

Alonzo McKenzie Malcolm, of the Village of Scotland, in the County of Brant, to be Bailiff of the Fifth Division Court of the said County of Brant, in the room and stead of Charles Wheeland, resigned.

County of Middlesex.

Thomas O. Currie, of the Town of Strathroy, in the County of Middlesex, to be Bailiff of the Sixth Division Court of the said County of Middlesex.

County of Frontenac.

Isaac Lanson Smith, of the Village of Verona, in the County of Frontenac, to be Bailiff of the Fourth Division Court of the said County of Frontenac, in the room and stead of Henry Sly, resigned.

LOCAL MASTERS.

County of Welland.

William Weir Fitzgerald, of the Town of Welland, in the County of Welland, Esquire, Judge of the County Court of the said County of Welland, to be a Local Master of the Supreme Court of Judicature for Ontario, in and for the said County of Welland.

County of Halton.

Colin George Snider, of the Town of Milton, in the County of Halton, Esquire, Judge of the County Court of the said County of Halton, to be a Local Master of the Supreme Court of Judicature for Ontario, in and for the County of Halton.

CROWN ATTORNEYS.

City of Toronto.

James Walter Curry, of the City of Toronto, in the County of York, Esquire, Barrister-at-law, to be Crown Attorney for the said City of Toronto.

COMMISSIONERS.

County of London (England).

Ernest Spencer Baynes, of Broad Street House, 55 and 56 Old Broad Street, London, England, Gentleman, Solicitor, to be a Commissioner for taking affidavits within and for the County of London, and not elsewhere, for use in the courts of Ontario.

POLICE MAGISTRATES.

City of Hamilton.

George Frederick Jelfs, of the City of Hamilton, in the County of Wentworth, Esquire, Barrister-at-Law, to be Police Magistrate in and for the said City of Hamilton, in the room and stead of James Cahill, Esquire, deceased.

Flotsam and Jetsam.

SIMILIA SIMILIBUS (NON) CURANTUR.

OUR English contemporary, *The Law Times*, takes exception to the Law Reports for having reported the case of *Christie* v. *Davey*, (1893) 1 Ch. 316, and especially that it should be allowed to occupy so much space as twelve pages. We have referred the matter to our friend Briefless, who has obligingly furnished us with the following report of the case, to which, we trust, even our learned contemporary can take no exception :

CHRISTIE *v.* DAVEY,

(1893) 1 Ch. 316.

Christie's wife and daughter both were tunefully inclined,
And on pianos strummed away when e'er they had a mind ;
And Christie's son was also quite a musical young fellow,
And in the kitchen oft he went to practise on the *'cello.*
And Christe's friends came often, too, to gladden his hearthstone
With music played on violins, and songs in strident tone.

But Davey was a neighbour man who lived at the next door,
And Christie's music smote his ears, and he profanely swore.

"These most infernal sounds," he said, "are more than I can bear;
They almost make me wild with rage; my wits away they'll scare."
So he began to ponder well how Christie he might fetter,
And down he sat and wrote to him a pretty cheeky letter,
In which he told him plump and plain, in terms most unpolite,
"That he was quite a nuisance, and disturbed him day and night,
But soon he hoped to even up the debt he felt he owed;
If a worse din he couldn't make, he hoped he would be blowed."
And having thus relieved his mind, his threat he put in force,
And banged away on trays and drums, and whistled himself hoarse.
He shrieked and shouted loud and long, and made a fearful noise;
On horns, and flutes, and pianos he played, himself and boys,
Till Christie's music was quite lost in perfect babel din,
And triumph gleamed in Davey's eyes, and Christie got quite thin.

But Davey's triumph was short-lived, for he was dragged before
A grave and reverend Chancery judge, who said to him, "Wherefore
Have you disturbed your neighbours thus by your malicious rows,
Why into bedlam have you turned the place you call your house?"
And Davey said, "I am a man of homœopathic bent,
And like by like I thought to cure, and that was my intent.
I'm ready quite at any time to terminate my row
If Christie and his family will to my wishes bow."

"Nay, nay, my friend, this cannot be," the learned judge replied,
"You cannot thus put lawless bounds to music's rolling tide!
Christie, I find, has nothing done at all unlawfully,
While you have acted madman-like, and most maliciously.
There's no such maxim in the law as you quoted just now!
The law is not a homœopath, as you will soon allow
When you have had a dose of it—'twill make you feel quite queer,
And very allopathic, too, you'll find it is, I fear.
To regulate such men as you, and your misdeeds restrain,
Is why I am upon this seat, and why I can't refrain
From granting unto Christie here, as now it is my function,
That which he claims and which he gets against you—an injunction.

A LADY IN COURT.—The following piquant sketch of a first experience of the Old Bailey is from a letter to Miss Berry by Lady Dufferin, daughter of Sheridan and mother of Lord Dufferin, ex-Governor-General of Canada. It is found in the life of Miss Berry and her sister by Lady Theresa Lewis, vol. iii., p. 497; and its humour is not unworthy of the wit of the "Critic," or the fun of the "Yacht Voyage to Iceland."

HAMPTON HALL, DORCHESTER,
Saturday (Oct. 14), 1846.

Your kind little note followed me hither, dear Miss Berry. As you guessed, I was obliged to follow my things (as the maids always call their

raiment) into the very jaws of the law! I think the Old Bailey is a very charming place. We were introduced to a live Lord Mayor, and I sat between two sheriffs. The Common Sergeant talked to me familiarly, and I am not sure that the Governor of Newgate did not call me "Nelly." As for the Rev. Mr. Carver (the ordinary), if the inherent vanity of my sex does not mislead me, I think I have made a deep impression there. Altogether, my Old Bailey recollections are of the most pleasing and gratifying nature. It is true I have only got three pairs and a half of stockings, one gown, and two shawls; but that is but a trifling consideration in studying the glorious institutions of our country. We were treated with the greatest respect and ham sandwiches, and the two magistrates handed us down to our carriage.

HAMPTON COURT, October 22nd.

My mother and I have returned to this place for a few days in order to make an ineffectual grasp at any remaining property. Of course, you have heard that we were robbed and murdered the other night by a certain soft-spoken cook, who headed a storming party of banditti through my mother's kitchen window; if not, you will see the full, true, and dreadful particulars in the papers, as we are to be "had up" at the Old Bailey on Monday next for the trial. We have seen a good deal of life and learned a good deal of the criminal law of England this week—knowledge cheaply purchased at the cost of all my wardrobe and all my mother's plate. We have gone through two examinations in court; they were very hurrying and agitating affairs, and I had to kiss either the Bible or the magistrate, I don't know which, but it smelt of thumbs.

I find that the idea of personal property is a fascinating illusion, for our goods belong, in fact, to our country and not to us; and that the petticoats and stockings which I fondly imagined mine are really the petticoats of Great Britain and Ireland. I am now and then indulged with a distant glimpse of my most necessary garments in the hands of different policemen; but "in this stage of the proceedings" may do no more than wistfully recognize them. Even on such occasions the words of justice are: "Policeman B 25, produce your gowns"; "Letter A 26, identify your lace"; "Letter C, tie up your stockings." All this is harrowing to the feelings, but one cannot have everything in this life. We have obtained justice, and can easily wait for a change of linen. Hopes are held out to us that at some vague period in the lapse of time we may be allowed to wear all our raiment—at least so much of it as may have resisted the wear and tear of justice; and my poor mother looks confidently forward to being restored to the bosom of her silver teapot. But I don't know. I begin to look on all property with a philosophic eye as unstable in its nature; moreover, the police and I have had my clothes so in common that I shall never feel at home in them again. To a virtuous mind the idea that "Inspector Dawsett" examined into all one's hooks and eyes, tapes and buttons, is inexpressibly painful. But I cannot pursue that view of the subject.—*The Green Bag.*