Canada Law Journal.

VOL. XXI. APRIL 15, 1885. No. 8.

DIARY FOR APRIL.

19. Sun.....*2nd Sunday after Easter.*
23. Thur.....St. George's Day.
24. Fri.....Lord Cathcart, Governor-General, 1846.
26. Sun.....*3rd Sunday after Easter.*
28. Tue.....Primary Examinations for Students-at-Law and Articled Clerks.
29. Wed .....Graduates seeking admission to Law Society to present papers.

TORONTO, APRIL 15, 1885.

WE are glad to learn that the Benchers have granted permission to the Osgoode Legal and Literary Society to hold their annual dinner on the 22nd inst. in the Convocation Hall. We have always considered that this Society deserved every possible encouragement, and are glad to see the powers that be are of the same opinion. The success of the dinner will no doubt be enhanced by the *genius loci*. That the coming members of the Bar should hold their celebration beneath the portraits of those who have been the leaders of their profession is eminently appropriate. It will give altogether a more professional character to the meeting. It will no doubt lead members of the Bench, as well as more members of the Bar, to attend these dinners, and we believe the Chancellor intends to set the example on the present occasion. Moreover, it is certainly a good thing to keep the youthful members of the Society within the precincts of the temple of Themis, rather than send them to the gilded saloons of Bacchus: by which, to descend to sober English and modern times, we mean that Convocation Hall is a better place for the dinner than the Walker House.

THE ADMINISTRATION OF JUSTICE ACT, 1885.

IT has now become a recognized custom that every Session of the Ontario Legislature shall be marked by an Administration of Justice Act, a sort of omnibus-hodge-podge piece of legislation covering a multitude of diverse subjects, having no sort of connection with each other. An ancient precedent for this kind of statute is found, of course, in 12 Geo. II., c. 13, which was passed to regulate the price of bread, and for the better regulation of attorneys and solicitors. We venture, however, notwithstanding that ancient precedent, to doubt the propriety of this method of legislation.

The Administration of Justice Act, 1885, among other things, provides that when one of the present Judges of the Court of Appeal dies or retires, his place is not to be filled; but instead, an additional Judge is to be appointed for the Chancery Division. People who have to wait for dead men's shoes have a proverbially long time to wait; and, while we hope the learned Judges of the Chancery Division may not be worn out with their labours before the coming fourth man is added to their number, we equally hope long life and vigour to the Judges of Appeal.

After disposing of this little matter, the Act provides that declaratory judgments and orders may be pronounced, though no consequential relief is, or could be asked, which is a legislative reversal of the principle recently acted on by the Chancery Division in *Brookes* v. *Conley*, *ante* p. 36. Next we have a legislative reversal of the rule of law established by the House of

Lords in the recent case of *Foakes* v. *Beer*, 9 App. Ca. 605, 51 L. T. N. S. 833; and a binding agreement, for the payment of part of a debt in satisfaction of the whole, may now be made without its additional "canary bird, or tomtit, or other rubbish," as Sir George Jessel scornfully termed those "valuable considerations," which *Foakes* v. *Beer* solemnly determined were necessary to be given in order to make such a bargain good in law.

Then sections 33, 34 and 43 of the Judicature Act, 1881, are restricted to actions only. After this, the subject of indemnity to defendants in replevin actions is taken up, with a view to altering the law as recently laid down in *Williams* v. *Crow*, 10 App. R. 301, so far as actions of replevin are concerned, which do not arise out of distress for rent, or damage-feasant. Then, for a little diversion, the Queen's Printers' copies of statutes and orders in Council, both Provincial and Dominion, are made *prima facie* evidence.

The High Court is then invested with power to appoint administrators, or administrators *ad litem* with, or without security. This is an extension of the jurisdiction of the High Court. Formerly, it had no power to appoint a personal representative; but it had power to appoint a person to represent the personal estate of a deceased, where no personal representative had been appointed. Persons thus empowered to represent an estate, were often erroneously designated administrators *ad litem*, which of course they were not, as the Surrogate Court alone had jurisdiction to appoint administrators. The Act then goes on to enable the Court to grant a judgment for the general administration of an estate as against an executor *de son tort*, without joining a duly-appointed executor, or administrator.

The jurisdiction of the Master in Chambers is extended to all acts now done by a Judge in Chambers, except the matters excepted by Rules S. C. 420 *a*, 424. The effect of this piece of legislation appears to be to take away from the learned Master in Chambers, the power to make orders for the payment of money out of Court which, under the recent Rule S. C. 548, had been conferred on him—the reason of which is to be found in the fact that, by a subsequent section of the same Act, each County Judge and Local Master is authorized in his respective County to exercise the same jurisdiction as the Master in Chambers, and we suppose that the allowing orders for payment of money out of Court to be made by all these officers, although it might lead to a decentralization of the moneys in Court, was thought not to be of so great a public convenience, as the possible inconveniences which might result from that course.

The result of giving the various local officers these enlarged powers we predict will lead to a great diversity of practice—possibly a different one for each county—together with increased work for the judges in the way of appeals. The various innocents who passed this measure are, no doubt, of opinion they are making law cheaper. Doubtless, they are right too. It will prove cheap, but accompanied with many inconveniences which will in the end, we fear, prove excessively expensive. Formerly, you could go to Osgoode Hall and find the whole record of an equity suit, the decree and the various orders made in it. Now, unless one knows which of the forty offices an action is commenced in, one is pretty well in the position of "searching for a needle in a bundle of hay." In searching titles and other proceedings involving the necessity of examining the papers in any suit, this decentralization which is all the rage, will prove an endless nuisance and a costly luxury. We fear that too many of the lawyers in the House are actuated by Sir

Boyle Roche's ideas, when he exclaimed, "What has posterity ever done for us?" We question the wisdom of this legislation.

To return to our *moutons*. Provision is made for additional Assizes in Middlesex and Hamilton, and such other places as the judges may appoint. Amendments are then made to the Jurors' Act of 1883. Then there is a clause enabling Courts of Record, and judges of Division Courts having cognizance of penal actions, to remit the penalties recovered in such actions wholly or in part, whether payable to the Crown, or an informer.

The next subject legislated upon is the Accountant of the Supreme Court, who is created a corporation sole; and the moneys now in the Court of Appeal, and hereafter to be paid into that Court, are to be placed under his control. The Accountant's office is therefore now constituted the sole office in which moneys are to be paid into, or out of Court, for both the Court of Appeal and the several Divisions of the High Court.

Having disposed of the Accountant, the extension of the jurisdiction of the County Judges and Local Masters to which we have referred is provided for, and then power to tax costs, including counsel fees, is given to Deputy Clerks of the Crown, Local Masters, and Local Registrars, in all cases begun or pending in their offices, subject only to appeal to a judge. Why Deputy Registrars are excluded from the category of officers entitled to tax does not appear, and we are equally in the dark whether it is intended to abolish revision in those cases where it is by the Judicature Rules made compulsory. Further provisions are then made respecting County Court appeals, in a way which seems to indicate that it is special legislation to meet some particular difficulty.

Powers are given to make Surrogate Court Rules, and to frame a tariff of fees for Courts of General Sessions of the Peace and Surrogate Courts, which we trust may be exercised in a liberal spirit, and thus remedy a long standing grievance. The present tariff is an absurdity. Provision is then made for the appointment of official interpreters: and the next section enables the Court or Judge to exclude any creditor who refuses to join in contesting a claim under section 10 of the Interpleader Act from any benefit resulting from the contestation.

Then comes an increase of Sheriff's fees in criminal proceedings and a clause relating to gaols in Nipissing, and another enabling Stipendiary Magistrates in districts to act as coroners. Then comes a provision for affixing stamps on proceedings insufficiently stamped.

A growing tendency of some Judges to prolong the sittings of Court to unreasonable hours, gives rise to the next clause, which provides that when any such sittings are prolonged after eight p.m., an additional allowance to any officer paid by *per diem* allowance may be made upon the certificate of the presiding judge. We think it would have been far better to pass an act expressly prohibiting judges from sitting after six o'clock, p.m., or holding Court on any day appointed to be observed as a public holiday. The remaining sections apply to Justices of the Peace.

OUR ENGLISH LETTER.

(From our own Correspondent.)

UPON a very quiet time in the Courts has followed a chapter teeming with incidents of a more or less sensational character. First, came the great Durham Divorce case, then the horse-flesh libel case, and then the action between the pot and the kettle represented respectively by the editor and proprietor of *The World*, and the some-time editor of the *Whitehall Review*. The Durham divorce case,

besides being tolerably scandalous in itself, was marked by a peculiar but somewhat interesting incident. A gentleman by the name of Stanburg, a law-student with a strong *penchant* for the Divorce Court, attempted one day to force his way into the Court while this great case was proceeding, and afterwards, by dint of making a detour through the back ways of the Court, actually did succeed in forcing his way in through the Judge's entrance and in making a flying leap from the bench into the well of the court. All this occurred during the adjournment for luncheon, and the offender found himself at Bow Street almost before the Judge had taken his seat. Upon the next day Sir James Hannen, naturally enough, received a letter from the irate student, and took the desired opportunity of hauling the officials over the coals. "Never" he said, "did I have any difficulty of this kind until I came to this building;" in addition, he clearly expressed his opinion that although Mr. Stanburg's actions had been indecorous, those of the door keepers had been illegal. In fact, there is no doubt that ever since the new Courts were opened there has been an unendurable infringement upon the public rights; the publicity of Courts of Justice has been forgotten; yet it is one of their first attributes. But the Durham case has other points of interest than this. Our public mind has been largely stirred by the argument and the judgment, and while the latter is confessed to be the only possible inference from the existing law, there is an universal consensus of opinion that the existing law is out of date. It is a monstrous thing that a man of large estate, naturally desirous of begetting an heir, should be tied up to a lunatic wife as long as Providence permits her to live; and there is doubtless much force in the suggestion that the law only permits this because in the eye of the law the prospect of the procreation of lunatics is not intolerable.

The action against the editor of *The World* was brought by a person of the name of Legge who had at one time filled the honourable position of editor of the *Whitehall Review*. The case shows some features of special professional interest from the fact that certain curious facts of a highly unpleasant character were elicited by the cross-examination of the plaintiff. Society journalism deals largely with the Divorce Court, and it appears to have been the practice of Mr. Legge to bribe the solicitors' clerks with the view of obtaining the dates of citations, and of the hearing of petitions. Mr. Justice Hawkins spoke strongly upon this practice which has been unwontedly prominent of late. Long before the public ought to have known anything definite about the Garmoyle case the details of the pleadings had been published in almost every newspaper. It goes without saying that the betrayal and publication of matters of this kind is fatal to the confidence which men naturally feel that they are entitled to place in their professional advisers.

To proceed to more general topics, the Bar was undoubtedly disappointed at the unexpected stability of the Government; for now there appears to be every chance that there may be no change in the law-officers for another twelve-month. It appears also to be likely enough that no new Q.C.'s will be appointed in the interval. This is depressing, for the delay in promotion is causing a positive block at the outer Bar. On the other hand business is becoming more brisk, except in bankruptcy. At the Assizes, crimes are rare, except in the largest provincial towns, and this decrease of crime is traceable to something more than the extended jurisdiction of Sessions. In fact, education is bearing good fruit. But the tone of satisfaction adopted by Lord

Coleridge, and the Duke of Westminster is undoubtedly a little premature. Depression of trade is almost always accompanied by slackness in the criminal industries; for almost all crimes, other than those of the habitual criminal are committed by men in a state of intoxication, and intoxication is the result of money. Now the poverty of the labouring classes at this present moment is deplorable, and it would be wise, before venturing to pronounce an opinion upon the morality and honesty of the community to wait for prosperous and free-handed times. This consideration is strongly forced upon me by the fact that crimes of educated men show no tendency to diminish, but rather a strong tendency to increase. Commercial business is reviving fast, and changing hands a little: of libel actions there is an unusually strong crop.

Since this letter was commenced, a somewhat peculiar proceeding has been taken in the Chancery Division. An attempt has been made toprocure the committal of Mr. Hoare, the well-known banker, for holding prohibited communication with a young lady who was a ward of this court. The peculiarity of the proceeding consisted in the fact that the order was made during the infancy of the ward, but was said to extend to the period of her majority. Mr. Justice Chitty seemed to think, although he declined to commit, that the contention was correct in law. If so, the doctrine is new not only to the general public but to the mass of the legal profession, and it is open to question whether the powers of an Equity Judge acting "in personam" ought to be curtailed.

It has long been in my mind to say something of the nominal fusion of Law and Equity. The Judicature Acts have now been in force so long that the process of blending ought to be complete if it was ever possible. It amounts to nothing more than this, that an Equity doctrine is occasionally brought forward in the Queen's Bench Division where it is considered with curious awe by Counsel and Judge, notwithstanding that it is always described as "well-known." Occasionally, too, a Judge of the Queen's Bench Division sits in the room of, or rather to assist, his brother of the Chancery side. Mr. Justice Field is doing so now to aid Mr. Justice Chitty, who, as a popular Judge and a courteous, has a list unduly full; and Mr. Justice Field usually says, by way of overture to the proceedings: "You will understand, of course, that I am perfectly ignorant of these matters." One symptom of the forensic manner of the age may perhaps be due to the fusion. Conversation has now taken the place of oratory, and disputatiousness has conquered argument. There is hardly a Judge on the Bench who will allow a man to state his contention in his own words without interruption by questions; yet the normal consequence of such interruption is waste of time and, upon the part of the advocate who often fails to state his real argument, of temper.

Temple, March 18.

RECENT ENGLISH DECISIONS.

THE March numbers of the Law Reports comprise 14 Q. B. D., pp. 225–379, and 10 P. D., pp. 17–32, 28 Ch. D., pp. 183–332. 10 App. Cas. 1-143.

CARRIER—RAILWAY COMPANY—PASSENGERS' LUGGAGE—DELIVERY TO PASSENGER.

The first case in the Queen's Bench Division to which we propose to refer that of *Hodkinson* v. *The London and North-Western Railway* (14 Q. B. D., 228). This is a short case upon the question as to the liability of a railway company for a passenger's luggage which had been lost under the following circumstances:—The plaintiff arrived at a station with two

boxes which were taken from the baggage van by the defendants' porter. The porter asked the plaintiff if he should engage a cab for her. In reply, she said she would walk, and leave her luggage at the station for a short time, and send for it. The porter said "All right; I'll put them on one side, and take care of them;" whereupon the plaintiff quitted the station, leaving her boxes in the custody of the porter. One of them was lost. The Court (Coleridge, C. J., and Cave, J.) were of opinion, that what passed when the boxes were taken from the luggage van, and placed at the plaintiff's disposal, put an end to the responsibility of the defendants, and that when she left them in the porter's custody, he had ceased to be the defendant's agent.

MURDER—KILLING HUMAN BEING UNDER PRESSURE OF HUNGER.

The next case that it is needful to mention in the March number of the Reports of the Q. B. Division is the *cause celebrê* case on criminal law of *The Queen* v. *Dudley* (14 Q. B. D., 273), in which Lord Coleridge, who delivered the judgment of the Court, after elaborately reviewing the authorities bearing on the subject, declared that the prisoners, who, in order to save themselves from death by starvation, had killed and eaten a companion who with themselves had been cast away at sea, were guilty of murder. The sentence of death passed on the prisoners was afterwards, as we know, commuted by the Crown to six months' imprisonment.

MARRIED WOMAN—TRESPASS TO SEPARATE PROPERTY.

The only other case in the March number of the Queen's Bench Division to be noted is one in which the somewhat notorious Mrs. Weldon figures as plaintiff, viz., *Weldon* v. *De Bathe* (14 Q. B. D., 339), and in which an important question touching the rights of married women in their separate property, under the Married Women's Property Acts, 1870 and 1872, came up for consideration. The plaintiff was in sole occupation of a house bought by her out of her own earnings since the Married Women's Property Act, 1870, and on the 14th April, 1878, the defendant in collusion, as it was alleged, with the plaintiff's husband and other persons, entered the house and remained there ten minutes, and thereby caused the plaintiff disgrace, trouble and annoyance. To this statement of claim the defendant delivered an objection in the nature of a demurrer, which the Divisional Court allowed, and struck out the claim for trespass; but on appeal to the Court of Appeal this decision was reversed, and it was held by the latter Court that, under the Act of 1882, a married woman may maintain an action for trespass to her separate property without joining her husband, and that the leave and license of the husband would be no defence to such an action.

Lindley, L. J., however, observes: "this case does not raise the question as to whether a married lady, having a house settled to her separate use, can keep her husband out of it; nor the question whether, if he be living there, he can invite anybody to come and see him. . . . The question we have to consider is whether, when a married woman is in possession of a house settled upon her for her separate use, and is not living with her husband, he can authorize somebody to enter the house without her consent. In my opinion the husband can give no such authority. The right of possession of the property to which she is entitled to her separate use, is an exclusive right against her husband; and, whatever his rights are, he cannot authorize anybody to intrude on the possession of his wife's separate property."

EVIDENCE—ENGINEER'S LOG.

Passing by the case of *The Beeswing*, which we have already noted in the

English Practice Cases, the only other case in the March number of the Probate Division necessary to be referred to is *The Earl of Dumfries* (10 P. D. 31), in which it was held that in an action for damages by collision, the engineer's log though inadmissible for, is nevertheless admissible against, the ship owner by whom the engineer was employed.

WARD OF COURT—REMOVAL FROM JURISDICTION.

The first case in the March number of the Chancery Division is that of *Re Callaghan, Elliott* v. *Lambert* (28 Ch. D. 186), in which the Court of Appeal overruled the decision of Kay, J., refusing an application of the guardian of a ward of Court to remove the ward beyond the jurisdiction. The ward was a young lady of about twenty, who was born in Jamaica, and her guardian was her mother, who desired to proceed to Jamaica which she regarded as her home. Upon the appeal the Judges had a personal interview with the guardian of the ward; and an uncle of the young lady, resident in England, submitting to be appointed a joint guardian of his niece, the Court thereupon authorized the ward to proceed to Jamaica with her mother.

Baggallay, L. J., said: Mr. Justice Kay seems to have thought that in no case will the Court allow its ward, especially a female ward, to be taken out of the jurisdiction unless it is shown to be necessary. We think there is not any absolute rule of that kind, and that all that we have to consider is whether it is established to our satisfaction to be for the benefit of the ward that the application should be granted," and Fry, L. J., remarked, "We have only to consider two points: first, what is for the interest of the young lady? secondly, what is the security which the Court has that any further order will be obeyed? . . . In the appointment of the guardian, resident in this country, the Court has the requisite security."

LEASE—MISTAKE—RECTIFICATION.

The case of *Faget* v. *Marshall* (28 Ch. D. 255) is one which very clearly illustrates the different nature of the relief which is granted in suits founded upon an alleged mistake in a deed, when the mistake is mutual, and when it is merely unilateral. In this case the Court found that there was no sufficient evidence of mutual mistake, and therefore refused a rectification of the instrument, but, holding that a unilateral mistake on the part of the plaintiff had been established, decreed a rescission of the lease in question with an option to the defendant to accept a rectification instead. The law on the subject was succinctly stated by Bacon, V.-C.: "If it is a case of common mistake—a common mistake as to one stipulation out of many provisions contained in a settlement, or any other deed, that upon proper evidence, may be rectified—the Court has power to rectify, and that power is very often exercised. The other class of cases is one which is called unilateral mistake, and then if the Court is satisfied that the true intention of one of the parties was to do one thing, and he by mistake has signed an agreement to do another, that agreement will not be enforced against him, but the parties will be restored to their original position, and the agreement will be treated as if it had never been entered into."

TRUSTEE—IMPROVIDENT INVESTMENT—LIABILITY FOR LOSS.

We now come to the case of *Fry* v. *Tapson* (28 Ch. D. 268), a decision of Kay, J., on the subject of the liability of trustees for improvident investments, which while recognizing the rule that trustees acting according to the ordinary course of business, and employing agents as prudent men of business do on their own behalf, are not liable for the default of the agent so employed, yet establishes the important limitation that the agent must not be

employed out of the ordinary scope of his business. The loss in question was occasioned by the investment of £5,000 upon mortgage of freehold land valued at from £7,000 to £8,000. The trustees had not exercised their own judgment in the choice of a valuer, but accepted the suggestion of their solicitors, that a surveyor —who had introduced the loan, and was in fact the agent of the mortgagor with a pecuniary interest in the completion of the mortgage—should value the property for the mortgagees, and they acted on his report which proved to have been of an inflated character. Under these circumstances the trustees were held jointly and severally liable to replace the sum advanced with interest from the date of the loan.

VENDOR AND PURCHASER—STATUTE OF FRAUDS.

Passing over two or three cases which do not seem to require notice here, we come to a decision of North, J., upon that fruitful source of litigation, The Statute of Frauds, viz., *Studds* v. *Watson* (28 Ch. D. 305). The defendant verbally agreed with the plaintiff to sell him her shares in certain property for £200 and signed and gave him the following receipt: "Sept. 22 1882, Received of J. Studds £1 of my share in the Barrett's Grove property the sum of £200." No time was fixed for completion and no abstract was delivered, and on the 16th March, 1883, the agent of defendant wrote to the plaintiff: "Mr. Studds, Sir,—If the balance of £199 on account of the purchase of my share of the property be not paid on or before the 22nd inst. I shall consider the agreement (made 22nd Sept, 1882) not any longer binding." This letter was not complied with; but on the 5th April, 1883, plaintiff tendered the defendant the balance of the purchase money, and a conveyance of the property for her execution, but this was declined. The plaintiff thereupon brought the action for specific performance, and the question was whether the receipt and letter could be read together, and whether they together constituted a sufficient memorandum, and it was held that the word "balance" in the latter sufficiently connected it with the receipt to enable the two to be read together, and that being read together, they were a sufficient memorandum, and further that even if the word "balance" was not sufficient to connect the two documents, yet as they both referred to the same parol agreement, all the terms of which were contained in one or other of them, they could be read together even though they contained no reference to each other.

VENDOR AND PURCHASER—MISREPRESENTATION—RESCISSION.

In the case of *Brewer* v. *Brown* (28 Ch. D. 306), which follows, we have another decision on the law of vendor and purchaser, in which the danger of a vendor making misrepresentations as to the character of the property offered for sale is again illustrated. The property purchased was a villa residence, and the misrepresentation consisted in the statement that the garden was "enclosed by a rustic wall with tradesmen's side entrance." The wall, in fact, did not form part of the property. This was known to the vendor, but not disclosed to the purchaser. The conditions provided that mistakes and errors in the description of particulars, should not annul the sale, but that compensation should be given. The plaintiff, who was purchaser, paid £200 and took possession in May, 1880. In October, 1883, before conveyance or payment of the balance of the purchase money, he discovered that the wall, and the site of it, belonged to the adjoining owner, and thereupon commenced this action to rescind the contract. It appeared that the wall in question divided the premises from a road on which they abutted, and

that a stone was let into the wall bearing the name of the villa which the plaintiff bought; the side entrance had been opened through the wall, but was enjoyed only by sufferance. The Judge found that the plaintiff had purchased believing, as he reasonably might, that the wall formed part of the property. Under these circumstances it was held by North, J., that the case was not one for compensation, but that the purchaser was entitled to have the contract rescinded. The ground of the decision was this: any one looking at the property might have come to the conclusion that the wall was part of the property, and that the purchaser would get it; it was therefore incumbent on the vendor in describing the property to take care that the persons who inspected it would know that the wall was not a thing to be sold.

ADMINISTRATION—INSUFFICIENT ESTATE—SOLICITOR'S LIEN.

The case of *Batten* v. *Wedgwood, Coal and Iron Company* (28 Ch. D. 317), to which we now come, does not seem to present any very novel features; but appears to us merely to affirm principles already well understood. The suit was brought by a debenture-holder of a company on behalf of himself and other debenture-holders to enforce a trust for the payment of the debenture. A receiver and manager was appointed who carried on the business of the defendant company for some years at a loss. The original plaintiff become bankrupt, and another debenture-holder was substituted as plaintiff, and the papers in the hands of the original plaintiff's solicitors were ordered to be delivered to the substituted plaintiff, without prejudice to their lien. After this the trust property was sold and the fund proved insufficient, and on the hearing of the action on further directions, it was held, that the fund should be applied: (1) in payment of the plaintiff's costs of realizing the property, including the costs of an abortive sale; (2) the balance due the receiver including his remuneration and costs; (3) the costs, charges and expenses of the trustees; (4) the two plaintiffs' costs of suit, *pari passu*. And it was held that the first plaintiff's solicitors had no lien on the documents delivered up by them, which could entitle them to priority in respect of their costs. Under Rule 1002, ss. 21 (similar in terms to the Ontario Rule 436), it was held that costs which a party is entitled to receive out of a fund may be set off against costs which he is ordered to pay personally.

INHERITANCE—DESCENT—TESTATOR DISPOSING OF LANDS NOT HIS OWN.

The only other case in the March number of the Chancery Division is that of *Re Douglas, Wood* v. *Douglas* (28 Ch. D. 327), which arises from that curious equity doctrine of election, which in effect enables a man by his will to dispose of estates which do not belong to him. A testator in 1852 died, devising as his own, an estate which had devolved on his late wife in fee, as heiress of her mother; the devise was to trustees to pay the rents to the testator's son and two daughters and the survivors or survivor of them, with remainder to the children of the son and daughters in fee, with an ultimate remainder to the testator's own heirs. The son and daughters survived the testator, but all died without issue. The son who survived the daughters died intestate, he was the heir, both of his father and mother. The testator had also devised real estate of his own to the son, who elected to confirm the will, but he never made, or was asked to make, any conveyance to the trustees of the land which descended to him as heir of his mother. It was held by Pearson, J., that the equitable estate which the son took under the will merged in the legal estate he took as heir of his mother, and that

upon his death the descent was to be traced *ex parte materna*.

BRITISH NORTH AMERICA—LAW STAMPS—POWERS OF LOCAL LEGISLATURES.

The only case in the March number of the Appeal Cases which appears to have any special interest in this Province is that of *The Attorney-General for Quebec* v. *Reed* (10 App. Cas. 141), in which the validity of a statute of the Province of Quebec (43 & 44 Vict. c. 9), imposing a fee of ten cents upon every exhibit filed in Court, was called in question and held, by the Judicial Committee of the Privy Council, to be *ultra vires*. It was contended that the duty imposed was a direct tax in pursuance of s. 92, ss. 2, of the B. N. A. Act, 1867; but Lord Selborne, who delivered the judgment, after reviewing the opinions of various political economists, was of opinion that it must be considered to be an indirect tax. His lordship, while holding the particular tax to be invalid, nevertheless remarked that it was not necessary to determine whether —if a special fund had been created by a Provincial Act for the maintenance of the administration of justice in the Provincial Courts, raised for that purpose, appropriated to that purpose, and not available as general revenue for general Provincial purposes—in that case the limitation to direct taxation would still have been applicable. The result of the matter appears to be that Provincial Legislatures cannot validly impose taxes on legal proceedings, so as to raise a fund for the general purposes of the Province; yet it is possible they may validly impose such taxes provided they take care that they shall constitute a separate fund to be exclusively applied towards the maintenance of the administration of justice.

REPORTS.

Discussed. Re Clarke and Toronto Grey and Bruce Ry. Co. 18 O.L.R. 628

CANADA.

ONTARIO.

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Followed Philbrick and Toronto and Quebec Ry. Quebec Ry. Co., Re, 11 P.R. 373

RE LEA AND THE ONTARIO AND QUEBEC RAILWAY COMPANY.

Interest payable on award out of moneys paid into court.

Where money is paid into Court under sub.-sec. 28 of sec. 9 Con. Ry. Act (Dom.) 1879, by a railway company as security for the compensation of land expropriated by them, pending an arbitration to ascertain such compensation; on such amount being ascertained, the owner is only entitled to the current rate of interest on the fund in Court, and not to legal interest.

[March 13.—Galt, J.

The Ontario and Quebec Railway Company on 25th April, 1883, paid into the Canadian Bank of Commerce the sum of $8,000 under the direction of the judge, pursuant to sub-section 28 of section 9 of the Consolidated Railway Act, 1879, as security for the lands of one John Lea, expropriated by them for the purposes of their railway, and thereupon obtained an order for immediate possession of the said lands. The money remained on a deposit receipt in the bank to the joint credit of the land owner and the company, bearing interest at 4 per cent. Subsequently, January on 1st, 1884, the amount of compensation coming to the land owner was ascertained to be $3,792 by arbitration under the provisions of the Act.

Afterwards, on March 13th, 1885, on motion by both parties for payment out, the question arose as to what rate of interest the land owner was entitled to.

Galt, J. (following *Great Western Railway Co.* v *Jones*, and *Wilkins* v. *Geddes*, 3 S. C. 216), made an order for payment to both parties of their respective shares out of the $8,000, with interest thereon at the rate of 4 per cent. from date of the taking of possession of the land by the company.

Shepley, for the land owner.

MacMurchy (Wells & Co.), for the company.

ENGLAND.

RECENT ENGLISH PRACTICE CASES.

HOLGATE v. SHUTT.

Order for account—Right to set up, and impeach—Settled accounts.

Where an order directing accounts was silent as to settled accounts, *held* the accounting party might nevertheless set up, and the opposite party impeach, settled accounts.

[28 Ch. D., 111—C. A.

On a motion for payment into Court and for a receiver coming before the Court, the parties agreed to an order for an account. The order made no reference to settled accounts. In taking the accounts a question arose whether settled accounts could be set up, and, if set up, whether they could be impeached.

FRY, L. J.—"It has been urged upon us that this inquiry is precluded by the form of the original order directing the account, for that if the plaintiffs desired to impeach the accounts they were bound to make a case for so doing at the hearing of the motion of the 14th December, 1883" (when the order for the account was made), "and ought at any rate to have obtained liberty to impeach settled accounts. In my judgment that argument comes too late, because the very point was decided by the Court when the case came before it in June last." (See 27 Ch. D., 111, 115,)

HURST v. HURST.

Administration action—Costs—Estate taken by heir in consequence of forfeiture under provisions of will.

Real estate descended to a testator's heir-at-law by reason of a forfeiture by the devisee under the provisions of the will, *held* not to be liable to pay the costs of an action to administer the testator's estate, in priority to specifically devised and bequeathed freehold and leasehold estate.

[28 Ch. D., 159.

PEARSON, J.—"The forfeited interest is not absolutely and primarily liable to pay all the costs, but is liable only to pay such a proportion of the costs as it would have been liable to pay if it had remained in the son's possession as tenant for life under the will."

IN RE KLŒBE.

KANNREUTHER v. GEISELBRECHT.

Administration—Foreign creditors.

In the administration of an English estate of a deceased person who in his lifetime was domiciled abroad, the foreign creditors are entitled to dividends *pari passu* with English creditors.

[28 Ch. D., 175.

PEARSON, J.—"No one doubts that, according to the jurisdiction of the country where the assets are, the assets must be divided. . . . The law of England has always been that you must enforce claims in this country according to the practice and rules of our Courts; and, according to them, a creditor, whether from the farthest north or the farthest south, is entitled to be paid equally with other creditors in the same class. I must refuse to alter that which has always been the law of this country, and which I must say, for the sake of honesty, I hope will always be the law of this country."

SAUNDERS v. PAWLEY.

Notice of trial—Abridging time for plaintiff giving notice of trial.—Ord. 36, r. 12; Ord. 64, r. 7. (Ont. Rules, 255, 462.)

[14 Q. B. D., 234.

The Court has no power under Ord. 64, r. 7 (Ont. Rule 462) to abridge the time allowed a plaintiff for giving notice of trial under Ord. 36, r. 12. (Ont. Rule 255.)

Note.—Under the English Rules the defendant cannot give notice of trial until the expiration of six weeks allowed to the plaintiff for giving the notice. Under Ont. Rule 255, either plaintiff or defendant may give notice of trial as soon as the cause is at issue.—See *McLean* v. *Thompson*, 19 C. L. J. 235; 9 P. R. 553.

FELLOWS v. THORNTON.

Attachment of debts.—Lapse of six years from recovery of judgment.—Ord. 42, rr. 6, 8, 22, 23. (Ont. rules 342, 355, 356.)—Ord. 45. (Ont. rule 370.)

[14 Q. B. D., 335.

An order attaching debts may be made on the application of a judgment creditor, notwithstanding six years may have elapsed from the date of the recovery of his judgment, without execution having issued. Moneys actually in the hands of a trustee to which the judgment debtor is entitled may be

attached. but not moneys to be paid to the trustee at a future time.

Note.—The Court, although agreeing that the attaching order might issue, differed on the question whether an attachment of debts could be regarded as an execution—Coleridge, C.J., holding that it was not an execution, and Stephen, J., holding that it was—but that the granting of the attaching order was equivalent to granting leave to issue execution within the meaning of Ord. 42.

EBRARD v. GASSIER.

Security for costs—One of several plaintiffs coming within jurisdiction—Appeal—Change of circumstances pending appeal.

[28 Ch. D., 232—C. A.

In answer to an application for an order for security for costs, on the ground that the plaintiffs were resident out of the jurisdiction, an affidavit was filed to show that the plaintiffs had assets within the jurisdiction. This affidavit was considered insufficient, and the order was refused. From this order the defendants appealed. On the appeal an affidavit was produced on the part of the plaintiffs showing that, since the order, one of their number had come to reside within the jurisdiction for the purpose of carrying on the action.

Held, that though the affidavit as to assets within the jurisdiction was insufficient, yet the fact that one of the plaintiffs had come within the jurisdiction since the making of the order disentitled the defendants to security, and that the order must therefore be affirmed.

FOAKES v. WEBB.

Practice—Discovery—Privileged communication—Professional confidence.

[28 Ch. D., 287.

A plaintiff interrogated a defendant as to whether interviews and correspondence had not, between certain dates, taken place between their respective solicitors, and also between the defendant's solicitor and a third person, in reference to the agreement which the action was brought to enforce.

The defendant refused to answer so far as the question related to communications between his solicitor and other persons, on the ground that he had no personal knowledge, and that the only information he had was derived from confidential communications between him and his solicitor in reference to his defence in the action.

Held, that the privilege from discovery resulting from professional confidence does not extend to facts communicated by the solicitor to the client which cannot be the subject of a confidential communication between them, even though such facts have relation to the case of the client in the action, and that therefore the defendant was bound to make a further answer.

KAY, J.—"The privilege of the solicitor is the privilege of the client; and how can there be a privilege as to a fact which is so outside the relation between them that it could not be the subject of a confidential communication? . . . Here the question is, did the defendant's solicitor communicate with the other side. As the solicitor never could protect himself from answering that question if he were in the witness box, it seems to me impossible to say that his client could refuse to answer an interrogatory as to that external fact on the ground it is privileged."

BLACKIE v. OSMASTON.

Particulars of demand.

The plaintiffs by their statement of claims alleged that they and their testator had paid sums of money under a contract of suretyship, under which the defendant was also liable, and that, after deducting contributions received from other quarters, the balance paid by them was £16,233; and the plaintiff claimed the defendant was liable to pay them half of that sum.

Before putting in a defence the defendants applied for particulars of the £16,233.

Held, on appeal from Pearson, J., who had refused particulars, that as the plaintiff did not ask merely for an account, but claimed payment of a definite sum, they were bound to give particulars of demand.

[28 Ch. D., 119—C. A.

BAGGALLAY, L.J.—"It is true it is not the practice of the Court to order the plaintiff to give particulars when he only asks a general account, but the rule is otherwise when he asks for payment of a definite sum."

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

COURT OF APPEAL.

HAMILTON PROV. L. CO. v. CAMPBELL.

Interpleader—Ejectment—Right to growing crops seized before judgment in ejectment.

The judgment of the Court below, 50 R. 371, affirmed.

Muir, for appeal.

G. H. Watson, for respondent.

From Co. Ct., Wentworth.] [January 13.

PROCTOR v. MCKENZIE.

Ca. Sa.—Returnable after execution—Premature return—Liability of bail.

Bail are not obliged to render their principal before the return day of a *ca. sa.*

Therefore, where a writ of *ca. sa.*, which would remain in force for two months, was not returnable on a day certain, but immediately after execution, lay in the sheriff's hands from the 16th July (the day of the *teste*) till the 21st July, when it was returned *non est inventus*,

Held, HAGARTY, C. J. O., dissenting (reversing the judgment of the Court below), that the bail were not fixed.

Held, also, that the objection was not a matter of practice only which should have been taken advantage of by motion, but was a matter of law to be taken advantage of by plea.

MacKelcan, Q.C., for the appellant.

W. F. Walker, for the respondent.

From Boyd, C.] [January 13.

VANKOUGHNET v. DENISON.

Sale of land—Restrictive covenant—Ambiguous description—Parol evidence—Maps not referred to in deed—Admissibility of.

D. sold to the predecessor in title of the plaintiff certain land, and the deed contained the following, which was held to amount to a covenant, the benefit of which passed to the plaintiff:—"Bellevue Square is private property, but it is always to remain unbuilt upon, except one residence with the necessary outbuildings, including porter's lodge." The land having been sold under mortgage a portion came again to the hands of D. who proceeded to convey parts of it for building purposes.

Held, that parol evidence was admissible to show what was meant by "Bellevue Square," no plan or description being incorporated in the deed.

Held, also, that the defendant's liability under the restrictive agreement not to build on Bellevue Square revived on his again acquiring the property.

Certain maps of the City of Toronto, made by city surveyors in 1857 and 1858, showing thereon a square marked "Bellevue Square," were offered in evidence to show the boundaries of the square. It was shown that the defendant knew of these maps, but they were not prepared under his instructions.

Held, that the maps could not be received in evidence to show the boundaries of the square.

Per HAGARTY, C. J. O.—The maps were admissible to show that there was such a square known as Bellevue Square, but not as evidence of title or boundary.

Per BURTON, PATTERSON AND OSLER, J.J.A.—The maps were not admissible in evidence without its being shown that they had been prepared under the instructions of the defendant, or on information given by him.

The parol evidence showing that but a portion of the land claimed by the plaintiff to be the square was undoubtedly within the limits of the square, the appeal was allowed as to all but that portion.

S. H. Blake, Q.C., and *Black*, for the appellants.

Maclennan, Q.C., for the respondent.

ADAMSON v. YEAGER.

Principal and agent—Commission on sale—Limitation of agency.

The defendant, at the instance of the plaintiff, placed his, the defendant's, farm in his hands for sale, subject to the payment of a

certain commission in case the farm should be disposed of through him, and if the defendant himself sold without the aid of the plaintiff, the commission should be only one-half. The defendant alleged that it was a term of the arrangement that if the land remained unsold at the end of two years the agreement should cease.

Held, that if parol evidence as to the limitation of time was not admissible, the law would infer its continuance for a reasonable time only; and that in deciding what was a reasonable time, the time spoken of by the parties, which was two years, might be considered.

Per BURTON, and PATTERSON, JJ. A., such parol evidence was admissible.

Held, also, that the defendant having refused to sell to a proposed purchaser found by the plaintiff, the plaintiff was not entitled to recover his full commission as on a sale, but the value of his services as on a *quantum meuri* or damages for the defendant's wrongful refusal.

Ball, Q.C., for appeal.

G. T. Blackstock, contra.

HUNTER v. CARRICK.

Patent of invention—Infringement of patent—Want of novelty.

Held, reversing the judgment of Proudfoot, V. C., reported 28 Gr. 489, that the combination of the tilting grate and the feed door above the sole of the oven mentioned in the specification of the plaintiff as the first subject of claim for a patent, was so wanting in novelty as to render the patent obtained in respect, thereof, invalid. (PATTERSON, J. A., dissenting.)

McMichael, Q.C., for appeal,

Cassels, Q.C., contra.

PARKES v. ST. GEORGE.

Chattel mortgage—Consideration expressed—Future advances—Assignment for creditors—R. S. O. ch. 119—Simple contract creditor—Fraudulent assignment.

A judgment or execution creditor is entitled to impeach a chattel mortgage on the ground of an irregularity or informality in the execution of the document, or by reason of its non-compliance with the provisions of the Chattel Mortgage Act (R. S. O. ch. 119); but a creditor who is not in a position to seize or lay on an execution on the property, cannot maintain an action to have the instrument declared invalid. A creditor in that position can only maintain such a proceeding where the security is impeached on the ground of fraud.

Q. and A. carrying on business as licensed victuallers were indebted to the defendant S., a wine merchant, to the amount of $1,551.66; and being desirous of obtaining further advances to aid them in carrying on their business, applied to S. therefore, which S. agreed verbally to make upon receiving security for such advances as well as such prior indebtness, and Q. and A. accordingly on the 24th of January, 1882, executed a mortgage to S. on all their stock-in-trade, securing $2,400, S. agreeing to make the further advances in money and goods, as they should require them in the course of their business, and he did in fact between the date of the execution of the mortgage and the 3rd of March following, advance to them $300 in money and goods, and the balance of the further advance was ready to be given to them at any time during that period. The affidavit of indebtedness in the sum of $2,400 was in the usual form, and the mortgage was duly registered. On the last mentioned date, Q. and A. executed a deed of assignment for creditors to the defendant C. of all their estate, whereupon S., treating this assignment as a breach of the covenant against selling or parting with possession of the goods, seized them in the hands of the assignee and sold the same, undertaking to hold the proceeds subject to the order of the Court. Thereupon the plaintiff, a simple contract creditor of Q. and A., upon a demand due at the date of the mortgage, instituted proceedings seeking, on behalf of all the creditors of Q. and A., to have the mortgage declared void, and the amount realized on the sale of the goods paid to the assignee.

Held, that although the fact of the mortgage being expressed on the face of it to be made for a sum greatly in excess of what it was proved was due, was such an objection as rendered the security void under R. S. O. ch. 119, as against creditors, yet, it being clearly shewn that everything between the parties in

connection therewith was done *bona fide*, and there being no creditor in a position to seize the goods if the mortgage were set aside, the plaintiff could not succeed, and the Court (PATTERSON, J. A., dissenting) reversed the judgment of the Court below (2 O. R. 342.)

Per PATTERSON, J. A., the mortgage and the affidavits accompanying it, though in their form and statements complying with all that is prescribed by the statute, being untrue in fact, rendered the security void.

Per BURTON, J. A.—Although no ground was shewn for impeaching the transaction as a fraudulent preference, the mortgage under the Chattel Mortgage Act, R. S. O. ch. 119, was invalid as against creditors who were in a position to attack it, which the plaintiff here was not, and as any informalities in the transaction were cured by the mortgagee having taken possession of the property, the plaintiff could not maintain the action.

Per OSLER, J. A.—The agreement between the mortgagors and mortgagee might be looked upon as having been really one for a present advance, though the amount was to be paid out to them as they required it. It was not necessary, therefore, that it should be set forth in the mortgage under sec. 6 of the Chattel Mortgage Act, R. S. O. ch. 119.

Barker v. *Leeson*, 1 O. R. 114, dissented from per BURTON, J. A.

Moss, Q.C., for appeal.

Cassels, Q.C., contra.

MAGURN v. MAGURN.

Alimony—Foreign divorce—Fraud—Domicile.

In an action for alimony the defendant relied upon a divorce granted on his petition by the Circuit Court of St. Louis County, Missouri, where he then resided, the wife (the present plaintiff) having made no defence thereto, though notified of the proceedings. It appeared that the domicile of the husband at the time of the marriage and the divorce was Canadian, though the marriage was celebrated at Detroit, and the wife was an American citizen. It was proved that the evidence of desertion, as alleged by the husband, by the wife, and on which the decree of a divorce was founded, was untrue.

Held, that the decree, having been obtained on an untrue statement of facts, and for a cause not recognized by our law, could not be set up as a bar to the wife's claim for alimony.

Held, also, that the non-feasance of the wife in failing to appear or defend the action for divorce did not amount to collusion on her part, so as to estop her from impeaching the validity of the decree made in that action.

Held, also (affirming the decision of the Court of Appeal from, and following *Harvey* v. *Farnie*, L. R. 5 P. D. 153; 6 P. D. 35; 8 App. Cas. 43), that the jurisdiction to divorce depends upon the domicile of the parties, *i.e.*, of the husband, and that this being Canadian, the Missouri Court had no jurisdiction.

Per HAGARTY, C. J. O.—"There is no safe ground for distinction between domicile for succession, and for matrimonial purposes, or a domicile for residence."

S. H. Blake, Q.C., and *Miller*, for the appeal.

Maclennan, Q.C., and *Biggar*, for the respondents.

COMMON PLEAS DIVISION.

Rose, J.] [Feb.

HAMILTON, ETC., ROAD CO. v. BINCKLEY.

Road company—Power to exempt from payment of tolls—Ultra vires—Lapse of time.

By agreement made in the year 1869 between a road company and the city of Hamilton, the road company were to extend their road from a point near the Desjardins Canal into the limits of the city, and, as part of such road, should build a bridge over the canal, the city to lend the road company $5,000 for ten years, at the nominal rate of interest of one per cent.; and a by-law was passed by the city to give effect to the agreement, the by-law containing a proviso that no toll should be exacted from any parties residing on, or owning property within the limits of the city on passing over said bridge. In this year litigation arose between the road company and the city, the Great Western Railway Company and the Desjardins Canal Company, as to the erection of the bridge, which was continued until 1874, when a settlement was effected by its being agreed by all parties interested that a fixed, stationary bridge should be erected and

maintained by the road company, free from any toll thereon, which was legalized by the Act 27 Vict. ch. 73, O. The defendant objected that the proviso in the by-law as to not exacting tolls from residents of Hamilton was *ultra vires*, being unreasonable, unjust and discriminating in favour of a class; and that the by-law was bad for uncertainty, the location of the road not having been made prior to the passing of the by-law.

Held, that the company could agree not to charge toll to any person or body of persons, unless there was something in the act of incorporation, which there was not here, which prevented them doing so: that the city of Hamilton had paid a substantial sum for the privilege, and there was no discrimination as regards the residents thereof: that the proviso only applied as to not exacting tolls on the bridge, and had nothing to do with the road, and was legalized by 37 Vict. ch. 73, O.

Held, also, that the objection as to the location was not tenable after the road had been located and in use for some fifteen years.

Lash, Q.C., for plaintiffs.

Sadlier, for defendant.

Rose, J.] [March 11.

BEASLEY v. CORPORATION OF HAMILTON.

Accident—Negligence of municipal corporation—Statement of defence—Sufficiency of—Notice.

Statement of claim for damages for an accident to the plaintiff by his stepping upon the covering or lid of a manhole on the sidewalk which was alleged to be defective, loose and out of repair through defendants' default and negligence. By the first paragraph of the statement of defence the defendants denied the correctness of the statement contained in the plaintiff's statement of claim; and by the second paragraph set up that the defendants had no notice or knowledge that the covering or lid was defective, loose, or out of repair.

Held, on demurrer to the second paragraph of statement of defence, that the whole statement of defence must be read together, and that the second paragraph, taken with the first, either constituted a good defence or was immaterial: that it certainly could not embarrass the plaintiff, for if he proved actionable negligence, he must prove either actual or presumptive notice. The demurrer was therefore over-ruled.

MacKelcan, Q.C., for the plaintiff.

A. D. Cameron, for the defendants.

Rose, J.] [March 16.

RE BORTHWICK AND CORPORATION OF OTTAWA.

By-law—Fresh fish—Markets.

Sec. 1 of Art. IX. of a by-law passed by the corporation of the city of Ottawa provided that no person should sell any fresh fish elsewhere than in such places as shall be allotted and designated by the standing committee on markets in any of the aforesaid markets. Sec. 1 of Art. X. provided that the vendors of any articles, in respect of which a market fee might, under the Municipal Act, be imposed, might lawfully, without paying market fees, offer for sale any such articles at any place within the city, excepting the market-places thereof. Sec. 1 of Art. IV. provided that all produce, provisions, or articles of any kind brought to any of the meat, fish and produce markets and exposed for sale, should be placed in boxes and exposed in carts or other vehicles which should be placed upon said markets under the direction of the market inspector, etc. Any persons refusing to comply therewith, or to remove such articles, vehicles, boxes, etc., after selling their contents, should be subject to the penalty imposed by the by-law and liable to expulsion from the market. It appeared that the by-law was a consolidation of previously existing by-laws passed from time to time; and that many years ago certain stalls in each market were set apart as fish markets, and that no application was ever made for standing-room for carts or other vehicles from which to sell fish, and no provision made by the council for so bringing fresh fish to the markets.

Held, that sec. 5 of Art. IV., though wide enough to cover fresh fish, would appear not to have been framed with reference to it, and that reading sec. 1 of Art. IX. and sec. 1 of Art. X. together they could be reconciled by construing them as providing that fresh fish might be sold in stalls and nowhere else in the

markets; but outside of the markets no restrictions should be placed on selling.

A motion to quash the conviction was therefore refused.

Shepley, for the motion.

Maclennan, Q.C., contra.

CHANCERY DIVISION.

Divisional Court.] [February 12.

BRIDGES v. THE REAL ESTATE, LOAN AND DEBENTURE CO.

Action by second mortgagee against assignee for value, without notice of first mortgage—Defence —Registry Act.

Y., being the owner of certain land, mortgaged it with other lands to The P. B. Society, by mortgage dated July 12th, 1873, registered July 14th, 1873. Subsequently, being desirous of selling part of the property and paying off the mortgage, by an agreement in writing he arranged with the society to leave the mortgage standing, take a further loan of $700 and have certain of the lands released (of which the lot in question was part) by the society. A second mortgage for the $700 advance was prepared and executed, dated February 1st, 1875, registered February 11th, 1875, which by mistake included all the lands in the first mortgage, and a release dated February 9th, 1875, was duly executed by the society releasing the lot in question from the operation of the mortgage of July 12th, 1873, and was afterwards registered March 20th, 1876. B., the plaintiff, being aware of the agreement, but unaware that the second mortgage included the lot in question, which should have been omitted, loaned Y. certain moneys, and took a mortgage dated May 21st, 1877, registered June 6th, 1877, to secure the payment thereof. The society assigned the second mortgage and all moneys secured thereby to the defendant by assignment dated March 1st, 1880, registered January 17th, 1881, and by deed dated March 1st, 1882, registered June 2nd, 1883, Y. conveyed his equity of redemption to B.

In an action by B. to correct the mistake by compelling the defendants to convey the lot in question to him, it was

Held (sustaining the judgment of FERGUSON, J.), that the combined operation of R. S. O. c. 111 s. 8, and R. S. O. c. 95 s. 8, formed a complete defence against the plaintiff's right to maintain the action, and that whatever doubt may have existed before, there is now none that the assignee of a mortgage for value having the legal estate may defend as a purchaser for value without notice, and claim also the protection of the Registry Act as against a subsequent purchaser or mortgagee from the original mortgagor.

G. Bell, for the plaintiff.

A. C. Galt, for the defendant.

Proudfoot, J.] [February 18.

ZUMSTEIN v. HEDRICK.

Will—Devise to son who died before testator—R. S. O. c. 106—Lapse.

H. made his will on October 10, 1868, devising land to his son, J., without words of limitation, and added a codicil on February 23rd, 1870, by which he confirmed the will, save as changed by the codicil. J., the devisee, died February 17, 1874, and H., the testator, died December 15, 1879.

Held, that as the will was made and republished by the codicil prior to January 1, 1874, the sections subsequent to sec. 7 of R. S. O. c. 106, and among them sec. 35, did not apply, and that the former law as to lapse governed this case, and that under that law the devise to J. lapsed.

Lash, Q.C., for the plaintiff.

White, for the defendant.

Ferguson, J.] [March 31.

LEAN ET AL. v. HUSTON ET AL.

Article patented in foreign country—Improvements —Original ideas—Employment of mechanic to make model—Enjoining manufacture under a patent obtained by him.

The plaintiffs were the patentees of a certain invention in the United States, and being desirous of having the article, with some improvements, patented in Canada, one of them employed one of the defendants, a mechanic,

to make a model, and under the pledge of secrecy, placed the United States patent in his hands, and imparted to him his ideas as to the improvements. It was afterwards discovered that the defendant so employed had, during his employment, taken out a patent for a similar article, under which he and the other defendants were manufacturing. In an action brought to set aside this patent, and for an injunction restraining the manufacture by the defendants of the article, in which action it was contended on their behalf that the article was not protected in Canada by the United States patent, and, in fact, that the idea was public property. It was

Held, following *Morison* v. *Moat*, 9 Ha. 241, that the plaintiffs had the right to succeed as to the injunction, or that their title was good as against the defendants, even though they might not have a good title against the public, and the injunction was granted.

Moss, Q.C., and *F. E. Hodgins*, for plaintifis.
Bain, Q.C., and *Malone*, for defendants.

PRACTICE.

Mr. Dalton, Q.C.] [March 25.

THE QUEBEC BANK v. RADFORD ET AL.

Judgment—Rule 80, *O. J. A.—Married Women's Property Act*, 1884.

Judgment was granted under Rule 80, O. J. A., in an action on a promissory note against one of the defendants, a married woman, as indorser, where the note matured after the passing of the Married Women's Property Act, 1884 (47 Vict. c. 19 O.), and where there was no allegation that the married women was possessed of separate estate. The following limitation was imposed in the order for judgment: That the amount of the judgment should be levied and payable out of the defendant's separate property (if any) of which she was possessed or entitled to at the time of the making of the note, or out of any separate property which she may thereafter acquire or have acquired, and which she is not restrained from anticipating.

D. T. Symons, for the plaintiff.
The defendant was not represented.

Mr. Dalton, Q.C.] [March 25.

CAMERON v. RUTHERFORD ET AL.

Judgment—Rule 80 *O. J. A.—Married Women's Property Act*, 1884.

Judgment was granted under Rule 80, O. J. A., in an action on a promissory note against one of the defendants, a married woman, where the marriage and the maturity of the note were before the Married Women's Property Act, 1884 (47 Vict. ch. 19 O.), following the case of *Burrill* v. *Tanner*, 13 Q. B. D. 691.* The same limitations as to execution were imposed as in *The Quebec Bank* v. *Radford*, *supra*, and in *Burrill* v. *Tanner*.

Lefroy, for the plaintiff.
Aylesworth, for the defendant.

*See also *Gloucestershire Banking Co.* v. *Phillips*, 12 Q. B D. 533, and *Weldon* v. *Neal*, 51 L. T.

Ferguson, J.] [March 30.

BINGHAM v. WARNER.

Jury notice — Sec. 45 *O. J. A.*

In an action brought in the Chancery Division by a landlord against his tenant, the statement of claim prayed specific performance of a covenant to repair, or damages for breach of the covenant. A jury notice was served by defendant.

Held, that the action was in effect a common law action, notwithstanding the frame of the statement of claim, for specific performance of such a covenant would not be decreed, and the defendant was entitled under sec. 45 O. J. A. to the benefit of his jury notice.

Cattanach, for the plaintiff.
Hoyles, for the defendant.

Rose, J.] [April 7.

BAKER v. JACKSON.

Examination of witness de bene esse—Ex parte order—Affidavit of information and belief.

[An action in the Common Pleas Division.]

An *ex parte* order of a local judge for the examination of a witness *de bene esse* on the ground that he was dangerously ill and not likely to recover was affirmed on appeal.

Held, that the Chancery practice must be followed, and that by it the local judge had jurisdiction to make the order *ex parte*.

Semble, that an affidavit of the solicitor of his information and belief that the witness was dangerously ill was sufficient.

The affidavit and the circumstance that the order was not acted upon for thirteen days after it was issued were regarded as unsatisfactory, and limitations were imposed upon the use at the trial of the evidence taken under the order.

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

Holman, contra.

Rose, J.] [April 7.

BULL v. NORTH BRITISH CANADIAN INVESTMENT COMPANY ET AL.

Amending statement of claim—Changing place of trial—Rule 179 O. J. A.

The plaintiff, having in his statement of claim named Toronto as the place of trial, afterwards amended it on *præcipe* under rule 179 O. J. A., naming in the amendment Belleville as the place of trial.

Held, on appeal, affirming the decision of the Master in Chambers, and following *Freitsh v. Winkler*, 3 Chy. Cham. Rep. 109, decided under Chy. G. O. 81, which is substantially the same as rule 179, that no change of the place of trial could be made by amendment of the statement of claim.

Millar, for the plaintiff.

Creelman and *Urquhart*, for the defendants.

Mr. Dalton, Q.C.] [April 5.
Rose, J.] [April 10.

THE DAVIES B. & M. CO. v. SMITH.

Executions—Money paid to sheriff—Creditors' Relief Act, 1880.

The plaintiffs placed a writ of execution against the defendant in the hands of the sheriff of Ontario on the 6th December, 1884.

The sheriff seized the defendant's goods on the 8th December.

The defendant made a mortgage of his goods to D. on the 9th December.

B. placed a second execution against the defendant in the hands of the sheriff on the 22nd December.

On the 31st December the mortgagee, D., paid to the sheriff the whole amount of the first execution, $115, specially appropriating the payment to that execution, and the sheriff in like manner received the money on that execution.

Held, that the money paid to the sheriff was not "levied" by him within the meaning of the Creditors' Relief Act, 43 Vict. (O.) c. 10, and that the first execution creditor was entitled to the whole of it.

Holman, for the sheriff.

Watson, for the first execution creditors.

H. D. Sinclair, for the second execution creditor.

J. R. Roaf, for the claimant.

Ferguson, J.] [March 16.

PETRIE v. GUELPH LUMBER CO. ET AL.

STEWART v. GUELPH LUMBER CO. ET AL.

INGLIS v. GUELPH LUMBER CO. ET AL.

Costs—Taxation—Appeal—Cases printed and argued together—Defendants severing.

Appeal from the certificate of one of the taxing officers on the taxation of the costs of these actions in the Court of Appeal.

Quære, whether the appeal should not have been to a judge of the Court of Appeal.

The defendants were the same in all three actions. The actions were brought against the defendants other than the company as wrongdoers. They were sued for an alleged conspiracy to defraud, which, it was alleged, they carried into effect by defrauding the plaintiffs respectively. The defendant, McLean, defended meeting the charge directly. The other defendants did the same, but they further said that they obtained their information from McLean, and that they believed it to be true, and believed that the statement made by them and McLean, which is the foundation of the actions, was true.

Held, that the taxing officer was right in allowing two bills of costs, one to the defendant, McLean, and one to the other defendants.

When the actions were in the Court of Appeal, BURTON, J. A., made an order that only one appeal book should be printed for the three cases, and the three cases were argued together.

Held, that the taxing officer was right in allowing separate counsel fees in each case.

Appeal dismissed with costs.

Creelman, for the plaintiffs.

Walter Barwick, for the defendant, McLean.

Richard Cassels, for the other defendants.

Mr. Dalton, Q.C.] [April 14.

ONTARIO BANK v. BURK.

Special endorsement—Judgment—Rules 14 *and* 80, *O. J. A.*

The following endorsement, specially endorsed on a writ of summons under Rule 14 O. J. A., was held insufficient for a motion for judgment under Rule 80 O. J. A.:

"The plaintiffs claim is $1,702.72, for money lent by the plaintiffs to the defendant, the same being the amount due to the plaintiffs in respect of the defendan's overdrawn bank account with the plaintiffs' branch or agency affice at P., and interest thereon from the 1st day of December, 1884, until judgment."

Held, that it was necessary for the defendant's information to state the date at which his account was overdrawn to the amount specified.

Walter Barwick, for the plaintiffs.

Watson, for the defendant.

LAW STUDENTS' DEPARTMENT.

EXAMINATION QUESTIONS.

SECOND INTERMEDIATE.

EQUITY.—HONORS.

1. Explain the doctrine of resulting use, and state the effect of the Statute of Uses upon that doctrine as to the vesting of the legal estate in lands.

2. A., being the absolute owner of certain lands, voluntarily executes a declaration of trust thereof in favour of B. Does B. take any interest in the lands? Give reasons,

3. A testator devises Blackacre to A., charged with payment of $1,000 to testator's wife, and Whiteacre to B. in trust to pay the testator's debts, which are subsequently found to amount to $1,000. A. and B. are both strangers to the testator. Each of the properties is worth $2,000. What beneficial interests, if any do A. and B. respectively take?

4. A mortgage contains an express provision that in the event of default being made in payment for one year, the mortgagor shall lose his right to redeem and the mortgagee's title to the land become absolute, and that time shall be deemed strictly of the essence of the contract. Default is made for a year, and the mortgagor afterwards tenders payment to the mortgagee, who refuses to accept same. The mortgagor brings an action to redeem. Can he succeed? Give reasons.

5. A married woman has obtained judgment in an action for alimony, but fears that her husband is about to dispose of his farm for the purpose of defeating her claim. What statutory provision is there enabling her to provide against this?

6. A brings an action against B. which is dismissed with costs, but without paying these costs he again brings another action against B. for the same cause. What statutory remedy has B.?

7. Land is sold under order of the Court in an action, and the proper persons to convey, although parties in the action, cannot be found. How can title be made to the purchasers?
