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THE BILLS OF EXCHANGE ACT, 1890.

This new Act, which is a codification of the *Lex Mercatoria* on bills of exchange, cheques, and promissory notes, gives in less than one hundred sections a complete code on that useful and general branch of law. And from a comparison of the laws of different nations on the subject of bills of exchange, it has been truly said that these laws show that in the municipal jurisprudence of every commercial nation there are general principles common to all nations, which constitute an international code, upon which the law of bills of exchange rests, and which establish a universal jurisprudence administered by all tribunals. These principles, having their origin in the customs and practice of mercantile communities, are deemed so proper in themselves as to be of universal obligation; and are held in the absence of any local statutable or positive regulations, to govern cases affecting bills of exchange; while the general deductions of natural law, and the law of nations, as well as those of the Roman Law, are often resorted to in order to expound and enforce them. It has, therefore, been truly said that a bill of exchange is the most cosmopolitan of all contracts; and that the law respecting negotiable instruments is, in a great measure, not the law of a single country only, but of the whole commercial world: *Per* Story, J., in *Swift* v. *Tyson*, 16 Peters, 1.

From the advance sheets of a new work on the "Bills of Exchange Act, 1890," by Thomas Hodgins, Q.C., we are enabled to extract the following references to the controlling effect of mercantile customs in modifying or reversing the rules of the common law, and as further illustrating the power of merchants to frame usages and customs of the trade which are recognized and enforced as law by the Courts.

The *Lex Mercatoria*, or law-merchant, is sometimes spoken of as a fixed body of law, forming part of the common law, and as if it were coeval with it. But as a matter of legal history, this view is altogether incorrect. The law-merchant thus spoken of with reference to bills of exchange and other negotiable securities, though forming part of the general body of the *lex mercatoria*, is of comparatively recent origin. It is neither more nor less than the usages of merchants and traders in the different departments of trade, ratified by the decisions of Courts of Law, which, upon such usages of merchants being proved before them, have adopted them and declared them to be settled law, with a view to the interests

of trade and the public convenience. In thus legalizing mercantile usage, the Courts have proceeded on the well-known principle of law that, with reference to transactions in the different departments of trade, it may be assumed that the parties have dealt with one another on the footing of some custom or usage, prevailing generally in the particular department. By this process, what before was usage only, unsanctioned by legal decision, has become engrafted upon, or incorporated into, the common law, and may thus be said to form part of it: *Per* Cockburn, C.J., in *Goodwin* v. *Robarts*, L. R. 10 Ex. 346. "When a general usage has been judicially ascertained and established," says Lord Campbell, "it becomes a part of the law-merchant, which the Courts of justice are bound to know and recognize, and justice could not be administered if evidence were required to be given *toties quoties* to support such usages:" *Brandao* v. *Barnett*, 12 C. & F. 805.

The universality of a usage voluntarily adopted between buyers and sellers, is conclusive proof of its being in accordance with public convenience. An illustration of the efficacy of usage is to be found in the modern English banking system. It is notorious that, with the exception of the Bank of England, the system of banking has undergone an entire change. Formerly the banker issued his own notes in return for the money of the customer deposited with him. Now the customer is given credit in account, and may draw upon the banker, by what is now called a cheque, payable to bearer or order. Upon this state of things the general course of dealing between bankers and their customers has ingrafted usages previously unknown; and these by the decisions of the Courts have become fixed law. Thus, while an ordinary drawee of a bill of exchange, although in possession of the funds of the drawer, is not bound to accept, unless by his own agreement or consent, the banker, if he has funds of the drawer, is bound to pay cash on presentation of a customer's cheque, payable on demand. Even the admission of funds is not sufficient to bind an ordinary drawee, while it is sufficient with a banker; and money deposited with a banker is not only money lent, but the banker is bound to repay it when called for by the cheque or draft of the customer. Besides this peculiar custom, other customs and usages have grown up between bankers and customers, and between bankers themselves, by which they become bound, and to which the Courts have given the sanction of law. Bills of lading may also be referred to as an instance of how general mercantile usage may give effect to a writing which, without it, would not have had that effect at common law. It is from mercantile usage, as proved in evidence, and ratified by judicial decision, that the right to pass the property in goods by the assignment of bills of lading is derived: *Lickbarrow* v. *Mason*, 2 East 70.

The history of the *Lex Mercatoria* also illustrates the controlling effect of mercantile usage in the assignment of bills and notes from one person to another. In the early days of the common law, great judges declared that the assignment or transfer of *choses in action* was unlawful, because they "would be the occasion of multiplying contentions and suits, and be great oppressions of the people," (10 Co. R. 48); and they interdicted such assignments as being infected

with a taint of maintenance. But prior to such declaration of the common law, merchants had established the usage of transferring bills of exchange (which were also *choses in action*), from hand to hand, by delivery, or by the simple writing of a name on the bill, which assigned at once the right of action, and gave an unwritten contract of guarantee, to the holder of the bill, in silent disregard of both the judicial declaration of the common law, and the legislative prohibition of the Statute of Frauds. The rights of property and the contract liabilities thus established by the custom of merchants, respecting this class of *choses in action*, and the necessity of recognizing bills and notes as part of the negotiable currency of the community, silently incorporated these usages and customs into the common law as part of the *lex mercatoria*, and compelled the harshness of the common law to give way to the more common-sense usages of merchants. But it was not until 1872, that these rules of the *lex mercatoria* were extended to all other classes of *choses in action* by the Ontario Act, 35 Victoria, chapter 12, (now R. S. O. 1887, c. 122 s.s. 6-13).

Another illustration of how mercantile usage has displaced the common law, may be shown in the practice of the Courts, by which a bill of exchange or promissory note, though classed by the common law as a "simple contract," bears on its face the proof of its value in money. No such privilege is allowed to ordinary simple contracts, for the money or other valuable consideration given for them is not presumed, but must be proved. But the specialty or more formal contracts under seal, carry with them the internal evidence of their being made for valuable consideration. Thus by the usage of merchants, the legal privilege of specialty contracts has been conceded by law to bills and notes, for the better facilities of trade and finance ; and for the further reason that these negotiable securities have become part of the recognized currency of the country, in commercial and financial transactions.

This process of law-making has been termed legislation by the judiciary mode, to distinguish it from the ordinary legislative process by which the general laws of a nation are enacted. And as this judicial law has been from time to time formed by judges under the eyes of the sovereign legislature, or has been acquiesced in by its recognition in various statutes, it thereby becomes law by the acquiesence and authority of the sovereign government.

Referring to the mode by which a law is derived from custom or usage, Austin says: "Independently of the position or establishment which it may receive from the sovereign, the rule which a custom implies (or in the observance of which a custom consists), derives the whole of its obligatory force from these concurring sentiments. which are styled Public Opinion. Independently of the position or establishment which it may receive from the sovereign, it is merely a rude morally santioned, or a rule of positive or actual morality. It is properly *jus moribus constitutum*; its only source, or its authors, are those who observe it spontaneously, or without compulsion by the State."

"Law, styled customary then, is not to be considered a distinct kind of law. It is nothing but judiciary law founded on an anterior custom. As merely customary law (in the loose and improper sense of the term 'law'), or rather as

merely positive morality, it comes immediately from the subject members of the community, by whom it was observed spontaneously, or without compulsion by the State. But as positive law, it comes immediately from the sovereign, through subordinate judges, who transmute the moral and imperfect custom into legal and perfect rules:" 2 Austin's Jurisprudence, 553 and 555. On a prior page (p. 548), he distinguishes these processes as "law established in the *legislative* manner," and "law introduced and obtaining *obliquely*," or "law established or introduced in the way of *judicial* legislation." But elsewhere he combats the use of the term "judge-made law."

But it was not without a struggle that the merchants succeeded in compelling the Judges to recognize their customs and usages. Lord Holt, C.J., was, as his reporter states, *totis viribus*, against some of the customs of merchants which he said "proceeded from obstinancy and opinionativeness." And in refusing to hold that a promissory note payable to bearer was valid or negotiable, he said: "It amounted to setting up a new specialty, unknown to the common law, and invented in Lombard street, which attempted in these matters of bills of exchange to give laws to Westminster Hall." And in another case he denounced "the noise and cry that such is the usage of Lombard street, as if a contrary opinion would blow up Lombard street:" 2 Lord Raymond's Reports, 758 and 930. The matter was finally settled by Parliament in favor of the contention of the merchants, by the Act 3 & 4 Anne, c. 9.

But the merchants ultimately became the victors in the struggle to engraft their usages and customs on the common law, mainly through the great assistance of Lord Mansfield, who has been justly styled "the founder of the commercial law of this country," (2 East 73); and judges have had to concede that the custom of merchants is now part of the common law, and that the Courts will take notice of it *ex officio*.

The results of this formation of the law by custom are instructive; for this law of trade usage and custom now controls all negotiable instruments alike, whether they are the contracts of traders or non-traders. The English usage may be called the Banking or Currency theory, as opposed to the French or Mercantile theory. A Bill of Exchange in its origin was an instrument by which a trade debt, due in one place, was transferred to another. It merely avoided the necessity of transmitting cash from place to place. This theory the French law steadily keeps in view. In England, bills have developed into a perfectly flexible paper currency. In France, a bill represents a trade transaction; in England it is merely an instrument of credit. English law gives full play to the system of accommodation paper; French law endeavors to stamp it out. A comparison of some of the main points of divergence between English and French law will show how their two theories are worked out. In England it is no longer necessary to express on a bill that value has been given, for the law raises a presumption to that effect. In France the nature of the value must be expressed, and a false statement of value avoids the bill in the hands of all parties with notice. In England a bill may now be drawn and payable in the same place. In France the place where a bill is drawn must be so far distant from the

place where it is payable, that there may be a possible rate of exchange between the two. A false statement of places, so as to evade this rule, avoids the bill in the hands of a holder with notice. As French lawyers put it, a bill of exchange necessarily presupposes a contract of exchange. In England since 1765, a bill may be drawn payable to bearer, though formerly it was otherwise. In France it must be payable to order; if it were not so, it is clear that the rule requiring the consideration to be expressed would be an absurdity. In England a bill originally payable to order, becomes payable to bearer when endorsed in blank. In France an endorsement in blank merely operates as a procuration. An endorsement to operate as a negotiation must be an endorsement to order, and must state the consideration; in short, it must conform to the conditions of an original draft. In England if a bill be refused acceptance, a right of action at once accrues to the holder. This is a logical consequence of the currency theory. In France no cause of action arises unless the bill is again dishonored at maturity; the holder in the meantime is only entitled to demand security from the drawer and endorsers. In England a sharp distinction is drawn between current and overdue bills. In France no such distinction is drawn. In England no protest is required in case of an inland bill, notice of dishonor alone being sufficient. In France every dishonored bill must be protested. Grave doubts may exist as to whether the English or the French system is the soundest and most beneficial to the mercantile community; but this is a problem which is beyond the province of a lawyer to attempt to solve: Chalmers, Digest of the Law of Bills and Exchange, p. xlv.

The little document which has originated this universal code of mercantile law, and has controlled judges in administering, and legislatures in enacting, the laws respecting it has been thus described: A bill of exchange is commonly drawn on a small piece of paper and is comprised in two or three lines; but is so noble and excellent, that it is beyond or exceeding any specialty or bond in its punctuality and precise payment; for if once accepted it must be paid when due, otherwise the acceptor loses his credit:" Beawes' *Lex Mercatoria*, 561.

LIABILITY FOR INJURIES BY MISCHIEVOUS ANIMALS.

THE case of *Shaw* v. *McCreary* (19 Ont., 39), which was recently disposed of by the Chancery Divisional Court, involves some very nice questions of law. The action was brought by the plaintiffs against a man and his wife, to recover damages for injuries sustained from a bear, which escaped from the defendants' premises. The husband was the owner of the bear, and had brought him to the premises where he and his wife lived, and which belonged to her, and on which she carried on a separate trade. The bear was kept in the back yard of those premises, with the wife's assent, or, at all events, without any effective objection on her part. It escaped into the highway, where it made the attack, which resulted in the injuries complained of in the action. At the trial, on it appearing that the husband was the owner of the animal, Sir Thomas Galt, C.J.C.P., withdrew the case from the jury as to the wife, and dismissed the action as against her. From

this judgment the plaintiffs appealed, and the Divisional Court has ruled that the case as against the wife should have been left to the jury, and a new trial was ordered as to her, unless she consented to a verdict being entered against her jointly with her husband, for the amount awarded against her husband. The Divisional Court was of opinion that the fact that the wife suffered the bear to remain upon her premises made her equally responsible with the owner, her husband, for its safe keeping. We believe that in this respect this case carries the law beyond any previous decision that is to be found in the books. The relationship of husband and wife would formerly have protected her from all liability, and it certainly does not now, even under the altered state of the law as to the wife's capacity to hold property, impose on the wife any greater liability than if she were a stranger to her husband. She is held liable because the law has given her the same dominion over her separate property as she would have if a *femme sole*, with all the responsibilities which that dominion entails; and one of those responsibilities the Court has determined to be the due keeping of any wild animals she suffers to be brought upon her property. This is an effect of the Married Women's Property Act which was hardly contemplated.

This liability, if it exists, is not confined to married women, but must be one that is common to all persons who permit wild animals to be brought upon their premises; *e.g.*, an inn-keeper who takes in a strolling tramp and his dancing bear would appear, under this decision, to be responsible, not only for any injury the bear may do while on his premises, but also for any injury it may do off his premises, should it break loose in the night. This is, as we have said, an extension of the law of liability for damages occasioned by wild animals beyond any previous decision; and it is worthy of consideration whether the principle which is laid down in this case is a sound one, and a legitimate development of the previous decisions on the subject. There is a passage in the judgment of Lord Tenterden, C.J., in *McKone* v. *Wood*, 5 C. & P., 2, which seems to give some support to the view which has been adopted by the Divisional Court. The facts are very meagrely reported, and it is not apparent whether the biting in that case took place on the defendant's premises or off them; but assuming that it took place of them, there was evidence that the defendant kept the dog: and Lord Tenterden, C. J., said, "It is immaterial whether the defendant is the owner of the dog or not. It is enough for the maintenance of the action that he keeps the dog; and the harboring of a dog about one's premises, or allowing him to be or resort there, is a sufficient keeping of the dog to support the action; as soon as a dog is known to be mischievous, it is the duty of the person whose premises the dog frequents to send him away, or cause him to be destroyed." But it is obvious this *dictum* could not be very well applied to the case of a bear, because to "send him away" without an efficient escort would produce the same results, probably, as have arisen from his escaping without the will of his owner, or the proprietor of the premises.

It would, moreover, appear that when Lord Tenterden spoke of keeping a dog about one's premises, he can hardly be intended to imply that the liability

depends on the question of the actual ownership of the land on which the animal is harbored. He must be understood as referring to a man's premises, as they are understood in the colloquial and not the strictly legal sense, *i.e.*, the premises on which a man lives or carries on his business, though they may, in no strictly legal sense, be his. It could hardly be supposed that if a man leases land from another, for the purpose of keeping a menagerie, that he thereby imposes on his landlord a liability for any damage which his wild animals may do by escaping from the demised premises. Where a weekly tenant used the demised premises for the purposes of a brothel, and paid an increased rent to the landlord in consequence of the immoral use which he made of the premises, it was nevertheless held that the landlord was not liable for the act of the tenant, and the fact that he did choose to not give him notice to quit made no difference: *Regina* v. *Barrett*, 32 L.J.M.C., 36; *Regina* v. *Stannard*, 33 L.J.M.C., 61.

Not long ago there existed on one of the principal streets in Toronto a menagerie in which lions and tigers, and other ferocious animals, were kept caged up. Assuming that the premises were leased for the purpose, could it be held that the lessor was responsible for any damage which might have been done by any of these animals escaping? It is not uncommon, too, for persons to lease land to travelling circuses and menageries; do they, thereby, become responsible for any damage which the animals may do in case they break loose from the demised premises? We should think not, because the premises are, for the time being, the premises of the lessee, and he alone is answerable for what he may put thereon.

But does the case of a husband, living with his wife upon her premises, stand in any different position? Are not the wife's premises for the purpose of keeping anything he may choose to bring upon them, to be deemed the husband's premises? Can he be said to be in any different position than a tenant at sufferance? He is there lawfully by the consent of the owner, and, being there, he brings upon the premises a wild animal; if he were in sole possession, his wife could hardly be held responsible because she happened to be the rightful owner of the property, and it is somewhat difficult to see why a more extended liability can arise merely from the fact that she happens to be also living on the property and carrying on her own business there. The Divisional Court appears to have based the liability of the wife on the fact of her ownership of the property on which the bear was kept, coupled with the fact that she did not actively oppose her husband's keeping it there. But it seems open to doubt whether this is the proper test of liability in such cases. Suppose a person demised a house to a tenant, who used it as a boarding house, and the landlord boarded with the tenant; and a fellow boarder brought and kept a bear upon the premises; would the landlord and tenant be responsible for the bear's safe keeping? According to the decision of the Divisional Court it is difficult to see how both the landlord and tenant could escape liability under such circumstances, unless they actively resisted the retention of the animal upon the premises.

The observations of Lord Tenterden, C.J., which have been referred to, were made upon a motion in arrest of judgment, it being alleged in the declaration

that the defendant kept the monkey, which caused the injury complained of, but did not allege that he was the owner of it, and it is possible they are intended to be confined to the case of injuries committed by the animal upon the premises upon which it is kept or harbored. If, for instance, in the case under consideration, a person visiting at the female defendant's house had been injured by the bear there would appear to be some reason in holding her immediately liable to the person injured for such an injury, leaving her to her remedy over against the owner; but even this view may seem somewhat hard to support on principle. Suppose a friend visits the house of a neighbor accompanied by a dog known by the neighbor to be savage, but the latter suffers the dog to remain on his premises and takes no active steps to drive him away or destroy him, and the dog bites some person while he is on the neighbor's premises. Does the mere fact of the ownership of the premises where the injury takes place determine the question of the liability for the injury? *Smith* v. *Great Eastern Railway Co.*, L.R. 2, C.P. 4, would seem to show that it does not. In that case a stray dog came upon the defendant's premises and bit the plaintiff. The dog had previously been on the defendant's premises earlier in the day and had torn a person's clothes, and had been driven away but had come back again. And it was held the defendants were not liable, and it certainly seems going rather too far to say that the mere suffering of another to keep a wild animal on one's premises involves a responsibility, not only for the damages which it may occasion while actually on the premises, but also for any damages it may do off the premises in case it breaks loose. Upon this point a passage in the judgment of Lord Denman, C. J., in *May* v. *Burdett* 9 Q.B., 101, seems in point. He says: "It was said indeed further on the part of the defendant that the monkey, being an animal *feræ naturæ*, he would not be answerable for injuries committed by it, if it escaped and went at large without any default on the part of the defendant, during the time it escaped and was at large, because at that time it would not be in his keeping nor under his control. . . . We are of the opinion . . . that the defendant, if he would keep it, was bound to keep it secure at all events."

From this it is clear that the Court considered the keeper responsible for the animal being safely kept, but in that case the defendant was the person who was both the keeper of the animal and the owner or occupier of the premises on which it was kept, and the question which has arisen in *Shaw* v. *McCreary* as to whether a person who permits a wild animal to be brought on his premises by another is to be deemed to assume the responsibilities of being its keeper, did not arise and was not of course adjudicated upon. The case was compared by one of the learned judges in the Divisional Court to the penning back of water upon one's land, and then suffering it to escape to the damage of others, but the parallel appears to be incomplete. If through the act of some adjoining proprietor a quantity of water were lodged on a person's land, and then by the breaking of some natural bank or dam, the water spread over the adjoining lands to the damage of the owners thereof, that would, it appears to us, be more nearly parallel, and in such a case we do not think there would be any liability for the injury on the part of him on whose land the water had originally lodged. In

such cases there must be the doing of some wrongful act, or the wrongful neglect of some duty. The mere permission to bring a bear upon one's premises is not *per se* a wrongful act, the wrong is occasioned by the neglect of the owner or keeper of the animal safely to keep it, so that it may not do harm. That appears to be a wrong for which the owner or keeper of the animal alone is responsible, and not the person who merely passively permits him to use his land on which to keep it.

In the case under consideration the wife virtually said to her husband, "I will permit you to use my land on which to keep your bear, but you are to keep it, not I." The Court, however, has stepped in and said that if she permits her husband to use her land for such a purpose she must also assume the duty of bear keeper herself.

We have suggested one or two instances where this rule would seem difficult to reconcile with sound principles, let us instance one more case. Suppose instead of a bear the husband had brought into the house a loaded gun, which he left so carelessly and negligently about that, like the bear, it went off and injured a man, would the wife be liable for the injury? If she is liable for the bear going off without leave, owing to her husband's negligence, why should she not be equally liable for his gun going off too, through his negligence? This, and many other questions might be propounded, but it is easier to propound questions sometimes than to give them a satisfactory solution.

COMMENTS ON CURRENT ENGLISH DECISIONS.

The Law Reports for July comprise 25 Q.B.D., pp. 1-192; 15 P.D., pp. 121-135; 44 Chy.D., pp. 217-329; and 15 App. Cas., pp. 201-251.

PRACTICE—STAYING ACTION—LIBEL—SECOND ACTION FOR SAME PUBLICATION—RES JUDICATA—FRIVOLOUS AND VEXATIOUS ACTION.—PUBLICATION OF PART OF JUDICIAL PROCEEDINGS.

Macdougall v. *Knight*, 25 Q.B.D., 1, is one instance; and *Laurance* v. *Norreys*, to which we shall refer later on, is another, of the power the Court sometimes exercises to put an end in a summary way to frivolous and vexatious litigation. This was a second action for libel in respect of the same publication as was in question in *Macdougall* v. *Knight*, 17 Q.B.D., 636, and 14 App. Cas., 194 (noted *ante* vol. 22, p. 395, and vol. 25, p. 492). The libel complained of was the publication by the defendant of a verbatim report of a judgment of North, J. But in this action the plaintiff selected other passages than those objected to in the former action as being libellous. The defendant moved to strike out the statement of claim, and to dismiss the action as frivolous and vexatious, and an order was made to that effect by the Master, and confirmed by the Judge at Chambers. On appeal to the Divisional Court (Lord Coleridge, C.J., and Mathew, J.), the latter made an order that if the balance of the costs of the former action were paid within a week, the appeal should be allowed; but if not, the action should be stayed until the costs of the former action were paid. The defendent appealed from this order, and the Court of Appeal (Lord Esher, M.R., and Fry and Lopes,

L.JJ.) were of opinion that the order was wrong, that notwithstanding the plaintiff had objected in this action to different passages from those complained of in the former action, the case was *res judicata,* and that the action was therefore frivolous and vexatious, and should be stayed. We may observe that the Court of Appeal regarded the law as laid down by that Court in the former case (17 Q.B.D., 636), to the effect that the publication of the judgment of a court of law is privileged and therefore not actionable, as unaffected by the decision of the House of Lords, 14 App. Cas., 194, notwithstanding the doubts expressed by some of their Lordships.

PRACTICE—RECOVERY OF SPECIFIC PROPERTY, OTHER THAN LAND—LIEN—SECURITY—PAYMENT INTO COURT—ORD. L., R. 8 (ONT. RULE 1136).

In *Gebruder Naf* v. *Ploton,* 25 Q.B.D., 13, the Court of Appeal (Lord Esher, M,R., Fry and Lopes, L.JJ.) were called on to construe Ord. l., r. 8 (Ont. Rule 1136), and came to the conclusion (affirming Huddleston, B., and Grantham, J.) that under that Rule, in order to entitle the plaintiff to the delivery up of the specific goods in question, he must pay into Court not merely the value of the goods, but the whole amount for which the defendant claims a lien thereon, even though it exceeds the value of the property.

BILL OF SALE—HIRING AND PURCHASE AGREEMENT.

In re Watson, 25 Q.B.D., 27, an attempt was made to evade the Bills of Sale Act by a transaction which purported to be a sale of chattels followed by a hiring and purchase agreement, whereby the vendor agreed to hire the chattels from the purchaser, and to pay quarterly sums for such hire, until a certain amount was paid, when the chattels were again to become the property of the vendor, and power was given to the purchaser to take possession on default in payment. It appeared, however, that no sale or hiring was really intended, and that the real object was to make a security for a loan of money to the supposed vendor from the supposed purchaser. The Court of Appeal (Lord Esher, M.R., and Cotton, Lindley, Fry, and Lopes, L.JJ.) under these circumstances affirmed Cave and Lawrance, JJ., in holding that the transaction was void for non-compliance with the Bills of Sale Act.

LANDLORD AND TENANT—COVENANT—"GOOD TENANTABLE REPAIR," WHAT IS.

In *Proudfoot* v. *Hart,* 25 Q.B.D., 42, the question was, what was the meaning of a covenant contained in a lease to keep a house in good tenantable repair, and so leave the same at the expiration of the lease. The Court of Appeal (Lord Esher, M.R., and Lopes, L.J.) were agreed that it was immaterial whether the premises were, or were not, in repair when the term began, and that if they were not in repair it was the duty of the covenantor to put them in repair, and that good repair or tenantable repair is such repair as having regard to the age, character, and locality of the house, would make it reasonably fit for the occupation of a reasonably-minded tenant of the class who would be likely to take it. The dispute in this case was as to the liability of the

covenantor to paper and paint and whitewash the premises, and the test to be applied in the opinion of the Court is this, whether the paint, papering, and whitewashing are in such a condition (having regard to the considerations aforesaid) as to be reasonably fit for the occupation of a reasonably-minded tenant of the class likely to take it. If they are, the covenant is answered; if not, then it is broken.

GIFT—CHATTEL CAPABLE OF DELIVERY—PASSING PROPERTY TO DONEE.

The point decided in *Cochrane* v. *Moore*, 25 Q.B.D., 57, by the Court of Appeal (Lord Esher, M.R., and Bowen and Fry, L.JJ.), after an elaborate discussion, is simply this, that a verbal gift cannot be made *inter vivos* of a chattel capable of delivery, unaccompanied by an actual delivery, even though the donee assent to the gift, and his assent is communicated to the donor. The subject of the alleged gift in the present case was a fourth interest in a horse, then in the custody of a third person. The donor informed this person of the gift, but did not tell the donee that he had done so, nor did the latter know of the communication. Subsequently the donor included the horse in a bill of sale, under which the horse was sold, and the alleged donee now claimed one-fourth of the proceeds as against the person claiming under the bill of sale. Lopes, L.J., before whom the issue was tried, held that delivery was not indispensible to the validity of the gift. This, their Lordships held, in appeal, was contrary to the doctrine laid down by Tinterden, C.J., in *Jones* v. *Smallpiece*, 2 B. & A., 551, and many other cases, that a verbal gift of chattels, unaccompanied by delivery of possession, passes no property to the donee. According to Lord Esher there cannot be a gift of a chattel by parol, without an actual giving by the giver, and an acceptance by the donee of the thing given. The elaborate judgment delivered by Fry, L.J., on behalf of himself and Bowen, L.J., tracing the law on this subject back to its foundation, will well repay perusal. But though the Court was adverse to the defendant's view that there had been a gift, and therefore refrained from going into the discussion as to how delivery of an undivided interest in a chattel can be made, yet it nevertheless decided in his favor, on the ground that what had taken place was, though void as a gift, nevertheless a valid declaration of trust of a fourth interest in the horse, and on the ground that the bill of sale had been obtained by a fraudulent misrepresentation, and was repudiated by the giver of it as soon as he discovered the fraud. As to the question of delivery of an undivided interest in chattels, it may be useful to refer to *Gunn* v. *Burgess*, 5 Ont., 685.

COMPANY—SALE OF SHARES—VOUCHER OF TITLE—ESTOPPEL—ACT ULTRA VIRES—REPRESENTATION AS TO CREDITOR'S ABILITY—SIGNATURE OF PARTY TO BE CHARGED—LORD TENTERDEN'S ACT (9 GEO. 4, C. 14), s. 6 R.S.O., c. 123, s. 7).

Bishop v. *Balkis Consolidated Company*, 25 Q.B.D., 77, is one of that class of cases in which the law suffers a company to do an injury to a third party by the negligence of its officers, with impunity. One Lupton, claiming to be the owner of shares in the defendant company, contracted to sell them to the plaintiffs; the brokers took the document by which it was intended to transfer the shares to the

defendants before it had been executed by the plaintiffs, or the price had been paid, and procured the defendants to place upon it the words, "certificate lodged," with the signature of the secretary. The object of these words was to satisfy purchasers of shares that the vendor had the shares in the company which he purported to sell. Acting upon the faith of this memorandum, the brokers, as agents for the plaintiffs, completed the purchase, and paid over the price. The defendants subsequently discovered that Lupton had no shares, and refused to register the transfer. This action was then brought against the company to recover the value of the shares. But although the facts were found as above, yet it was held the defendants were not liable; first, because the granting of the memorandum or certificate was *ultra vires* of the secretary, and second, because it was a representation as to the credit and ability of Lupton, and was void for not being under seal.

DENTISTS' ACT, 1878—ERASING NAME FROM DENTISTS' REGISTER—ERRONEOUS EXERCISE OF DISCRETION, LIABILITY FOR.

Partridge v. the *General Council of Medical Education*, 25 Q.B.D., 90, was an action brought by a dentist against the General Council of Medical Education to recover damages for having erroneously removed his name from the dentists' register. Under the Dentists' Act the Council were empowered to remove the name of a person who has been guilty of infamous or disgraceful conduct. The plaintiff had been registered as a dentist in respect of a diploma conferred upon him by the Royal College of Surgeons in Ireland. Such diploma was afterwards withdrawn, on the ground that the plaintiff had advertised his business, in breach of an undertaking not to do so, given by him when his diploma was granted. The defendants, on being informed of the withdrawal of the diploma, without calling for an explanation, removed his name from the register. An application for a mandamus to restore his name was made, and it was held that the defendants had acted erroneously, and the plaintiff's name was ordered to be restored to the register; but it was held by the Court of Appeal that the defendants, having a *quasi* judicial discretion, were not liable in damages, though they had exercised it erroneously, in the absence of *mala fides*.

COPYRIGHT—WORK OF ART—WHAT DRAWINGS MAY BE SUBJECT OF COPYRIGHT—ABSENCE OF ARTISTIC MERIT—AUTHOR.

Kenrick v. *Lawrence*, 25 Q.B.D., 99, was an action for infringement of copyright. The plaintiffs were a firm of printers. Jefferson, who was a member of the firm, conceived the idea of printing and publishing cards having a drawing thereon of a hand holding a pencil in the act of completing a cross within a square, with the view to such cards being used for the guidance of illiterate voters at elections in marking their ballot papers. Jefferson, being unable to draw, employed an artist in the service of the firm to make the required drawing, which the plaintiffs registered, and in the memorandum stated Jefferson to be the author of the drawing. Subsequently the defendants published similar cards. The hand was in a slightly different position, but the idea was taken from the plaintiffs' cards. Neither the plaintiffs' nor defendants, drawings were of any

artistic merit. It was held by Wills, J., that the action would not lie on the grounds that the plaintiffs' drawing was so far not the subject of copyright that it was not entitled to protection against an imitation which was not an exact reproduction, and, also, because Jefferson was not the author of the plaintiffs' drawing, and consequently the registration was void.

DAMAGES, MEASURE OF—CONTRACT--WRONGFUL DISMISSAL OF APPRENTICE—FALSE CHARGE OF MISCONDUCT.

In *Maw* v. *Jones*, 25 Q.B.D., 107, the sole question was, as to the proper measure of damages to which the plaintiff was entitled for being wrongfully dismissed from his employment as an apprentice. Under the articles of apprenticeship the defendants had power to dismiss the plaintiff in case he showed a want of interest in his work, on giving him a week's notice. The defendants summarily dismissed the plaintiff for alleged disobedience of orders. The jury found that no grounds existed for the defendants dismissing the plaintiff without notice, but that there were grounds for dismissing him on a week's notice, and the question was whether the damages should be confined to the week's wages, which the plaintiff had lost by reason of his being summarily dismissed. Manisty, J., at the trial, directed the jury that they were not limited to the week's wages, though they might take into consideration the fact that the defendants would have been justified in dismissing the plaintiff under the notice clause; they gave a verdict for £21, which was considerably in excess of a week's wages and the Divisional Court (Lord Coleridge, C.J., and Mathew, J.) held that the verdict could not be disturbed.

MORTGAGE—REDEMPTION—MORTGAGEE'S COSTS—SOLICITOR MORTGAGEE—PROFIT COSTS.

In re Wallis, 25 Q.B.D., 176, the Court of Appeal (Lord Esher, M.R., Fry and Lopes, L.JJ.), following in the line of the late case of *Re Roberts*, 43 Chy.D., 52, noted *ante* p. 110, held that in the absence of express contract, where a solicitor is mortgagee, he cannot collect from his mortgagor, as part of his costs, charges and expenses incurred as mortgagee, profit costs in respect of professional services rendered by him in proceedings taken by himself as solicitor to enforce the payment of the mortgage debt.

SHERIFF—ACTION FOR TAKING DEFAULTING DEBTOR TO PRISON WITHIN 24 HOURS OF ARREST—32, GEO. 2, C. 28, S. 1—ARREST UNDER DEBTORS' ACT.

In *Mitchell* v. *Simpson*, 25 Q.B.D., 183, the decision of the Divisional Court, 23 Q.B.D., 373, noted *ante* vol. 25, p. 555, to the effect that a judgment debtor arrested by virtue of an order of commitment for non-payment of the debt pursuant to order, is not a person arrested by virtue of "an attachment for debt," and consequently the sheriff may take him to prison within twenty-four hours of his arrest. In short, the Court holds that the prohibition to the sheriff conveying a prisoner to prison until the expiration of twenty-four hours from his arrest only applies to a debtor arrested on *mesne* process.

VENDOR AND PURCHASER—CONTRACT—CONVEYANCE—TITLE—TRUSTEES HAVING NO IMMEDIATE POWER OF SALE—SUBSTITUTION OF VENDOR.

In re Bryant and Barningham, 44 Chy.D., 218, is a decision of the Court of Appeal (Cotton, Lindley, and Lopes, L.JJ.), affirming a judgment of Kay, J., which shows that where a vendor has entered into a contract of sale, and it turns out that he has no title, he cannot insist on substituting as a vendor the person who has the title, even with the latter's concurrence. In this case the vendors were trustees, and it was objected that they had no immediate power of sale, whereupon they offered to procure a conveyance to the purchaser from the tenant for life, under the Settled Lands Act, but the purchasers declined to enter into any new contract with the tenant for life, and insisted on a return of the deposit; and on an application under the Vendors and Purchasers' Act, it was held that they were entitled to take that position. As Kay, J., puts it, the case is altogether different from that of a vendor having a partial interest agreeing to sell the fee, and subsequently being in a position to obtain a conveyance of the fee to himself; in such a case the Court would enforce the contract, but here the vendors had no power to sell at all, and no interest, and no right to call for a conveyance, and the title of the vendor is not made good by joining with them the persons entitled to sell under the Settled Lands Act.

PRACTICE—ADMINISTRATION—CREDITOR—ANNUITANT.

In re Hargreaves, Dicks v. *Hare*, 44 Chy.D., 236, the short point decided by the Court of Appeal (Cotton, Lindley, and Lopes, L.JJ.), affirming North, J., is simply this, that an annuitant whose annuity is secured by a covenant of a testator, but which is not in arrear, is not a creditor of his estate so as to be entitled to obtain an administration of the estate, even though the annuity deed provides that the annuity is to be considered as accruing "from day to day by equal quarterly payments."

COVENANT AGAINST CARRYING ON TRADE.

Buckle v. *Fredericks*, 44 Chy.D., 244, was an action to restrain the defendant from carrying on a trade in breach of a covenant not to do so. The facts of the case were that the defendant was lessee of a theatre, and bought an adjoining piece of land which was subject to a covenant, that "the trade of an innkeeper, victualler, and retailer in wine, spirits, or beer," should not be carried on there. On this piece of ground he erected a building which was to furnish convenient egress from the theatre; and on each floor he set up a counter for selling wine, spirits, and beer. This counter could not be approached from the outside, but any person who paid for admittance to the theatre, when open for theatrical performances, could purchase refreshments at these counters. The Court of Appeal (Cotton, Lindley, and Lopes, L.JJ.) agreed with Kekewich, J., that this was a breach of the covenant.

PRACTICE—INJUNCTION—UNDERTAKING AS TO DAMAGES.

In *Tucker* v. *New Brunswick Trading Company*, 44 Chy.D., 249, one or two points are made clear as to the practice regarding the undertaking as to damages

which is usually required on the granting of an interim injunction. First, the Court cannot compel an undertaking to be given; all that it can do is to say that if the undertaking is not given, it will refuse to grant the injunction applied for. Secondly, when an undertaking is required, it should extend not only to the damages sustained by the defendant enjoined, but also to those sustained by the other defendants, if any. Thirdly, when a defendant appears for and asks for an undertaking as to damages which is as given, but the order is drawn up with an undertaking confined to the damages sustained by a co-defendant against whom the injunction is granted, the order is erroneous and may be corrected on the application of the defendant who asked for the undertaking, so as to make it apply to damages sustained by him; but it cannot, in such a case, be extended to a defendant who did not appear, and who was not served with notice of the motion, because if imposed as regards him, the plaintiff might have elected not to take the order.

PATENT—INFRINGEMENT—MEASURE OF DAMAGES—LOSS BY REDUCTION IN PRICE BY PATENTEES.

The American Braided Wire Co. v. *Thomson*, 44 Chy.D., 274, was an action for infringement of a patent, and the question was as to the proper measure of damages. The Referee, to whom the action was referred, found that the prices at which the defendants at first sold the patented articles were lower than the plaintiffs' original prices, and that they lowered them from time to time during the period of infringement to meet the competition of the defendants, but never reduced them below defendants' prices for the time being. He also found that but for the defendants' illegal competition the plaintiffs would have made all sales made by the defendants as well as themselves, at the original prices, subject to a percentage for increased sales, caused by the connection and exertions of the defendants, and by reduction of prices. The Court of Appeal (Cotton, Lindley, and Lopes, L.JJ.) were of opinion that the plaintiffs were entitled to recover all the profits they would have made if all the sales made by themselves and by the defendants had been made at the original prices, subject to a deduction for the increased sales attributable to the defendants' connection and exertions, and to the reduction of prices. Kekewich, J., who decided that the reduction in price was not a direct consequence of the infringer's act, was therefore overruled. The case was distinguished from the *United Horseshoe and Nail Co.* v. *Stewart*, 13 App. Cas., 401 (*ante* vol. 24, p. 462), on which Kekewich, J., relied, on the ground that there the reduction in price was consequent on general competition, which could not be traced to the wrongful act of the defendant.

COMPANY—ILLEGAL CONTRACT—LOTTERY—ADVERTISING FOREIGN LOTTERY—9, GEO. I., C. 19, S. 4—6, 7, W. 4, C. 66—(R.S.C., C. 159, S. 6).

Macnee v. *Persian Investment Co.*, 44 Chy.D., 306, was an action by a shareholder of the defendant Company, to restrain them from purchasing a concession conferring the exclusive privilege of conducting all operations in connection with lottery loans in Persia, and from issuing a prospectus or advertisements relating to the acquisition of this concession, or to the lottery loans, and from applying

the funds of the Company to the purchase of the concession, on the ground that the enterprise was illegal and in contravention of the Lottery Acts. But it was held by Chitty, J., that the proposed purchase of the concession was lawful; that the Company were not attempting to set up a lottery in England within the meaning of 9, Geo. I., c. 19, s. 4; and the statements in the prospectus did not amount to a publication, advertisement, or notice of a foreign lottery, within the meaning of 6, 7, W. 4, c. 66—(R.S.C., c. 159, s. 6).

EXPROPRIATION OF LAND—PAYMENT OF PURCHASE MONEY INTO COURT—SUBSEQUENT MORTGAGE OF SHARE—PAYMENT OUT—COSTS OF MORTGAGEE.

In re Olives' Estate, 44 Chy.D., 316, money had been paid into Court on an expropriation of land, under a statute. One of the parties interested in the land had subsequently mortgaged his share, and on the application for payment out, the question arose whether the expropriators were liable to pay the mortgagee's costs; and it was held that they were liable therefor, the amount being fixed at 42s.; and it was also held that they were liable for the costs of serving the petition for payment out on the mortgagee.

ARBITRATION—PARTNERSHIP—INJUNCTION.

In *Farrar* v. *Cooper*, 44 Chy.D., 323, although Kekewich, J., admitted the Court had jurisdiction in a proper case to restrain a party from proceeding to arbitration when, for instance, it is clear that injury will result to the party complaining if the arbitration is allowed to proceed; yet he refused to grant an injunction in the present case, because it was obvious that if the contemplated arbitration were proceeded with, it would be futile. The circumstances being that under a partnership deed, containing a clause requiring disputes to be referred to arbitration, two of the partners had appointed arbitrators, and had applied to the plaintiff, the third partner, to appoint his arbitrator, which he declined to do, as he denied the existence of any dispute, and requested the other two partners to furnish him with the particulars of the alleged dispute, which they refused to do until he had appointed his arbitrator; and they threatened if he did not appoint his arbitrator, they would proceed to arbitration before their own arbitrators. These facts, Kekewich, J., held, furnished no sufficient ground for the interference of the Court, for the reason above indicated.

SOLICITOR—COSTS—TAXATION OF PART OF BILL.

In *Storer* v. *Johnson*, 15 App. Cas., 203, the House of Lords affirmed the decision of the Court of Appeal, *In re Johnson, and Weatherall*, 37 Chy.D., 433, noted *ante* Vol. 24, p. 268, to the effect that under its general jurisdiction the Court has power to direct a taxation of part of a solicitor's bill.

STRIKING OUT STATEMENT OF CLAIM—FRIVOLOUS AND VEXATIOUS ACTION—STATUTE OF LIMITATIONS (3 AND 4, W. 4, C. 27), S. 26 (R.S.O., C. 111, S. 31)—PLEADING.

Lawrence v. *Norreys*, 15 App. Cas., 210, has been already referred to. In this case the House of Lords affirmed the decision of the Court of Appeal (39 Chy.D., 228) noted *ante* Vol. 25, p. 78, striking out the claim and dismissing the action,

on the ground that it was frivolous and vexatious. The plaintiff relied on s. 26 of the Statute of Limitations (R.S.O., c. 111, s. 31), which excepts cases of concealed fraud from its operation, and their Lordships held that in such a case general averments of fraud are not sufficient, but that the statement of claim must contain precise and full allegations of facts and circumstances leading to a reasonable inference that the fraud was the cause of the deprivation, and excluding other probable causes, and in default of such allegations the Court has an inherent jurisdiction to dismiss the action as an abuse of procedure.

COMPENSATION FOR LANDS EXPROPRIATED—MINERAL CONTENTS OF LAND—ONUS PROBANDI.

Brown v. *Commissioners for Railways*, 15 App. Cas., 240, was an appeal from the Supreme Court of New South Wales. The action was brought to recover compensation for lands expropriated under a statute. The Judge, after hearing conflicting evidence as to the existence of coal in paying quantities, assessed damages in respect thereof, and it was held that the verdict being one that a jury could reasonably find, it could not be set aside as against the weight of evidence, but their Lordships of the Privy Council were also of opinion that there is no rule which imposes upon the plaintiff, in such a case, the burden of proving by costly experiments the mineral contents of his land, nor that because a seam of coal is not presently workable at a profit, no compensation should be allowed for it, if it is likely to prove profitable in the future.

Notes on Exchanges and Legal Scrap Book.

NEGLIGENCE OF SOLICITORS.—"I have heard a Lord Chancellor say that of all gambling the law is the most uncertain," observed O'Brien, J., at the recent trial of *Lannon* v. *Feely*, an action against a solicitor for alleged negligence in the performance of his duty (which, being merely a jury case, resulting in a disagreement, we neither report nor comment on). This "glorious uncertainty of the law" redounds to the advantage of its practitioners, on the one hand, while rendering their existence as trained experts essential; and, on the other hand, supplies abundant reason for not holding them too strictly accountable for errors of judgment that skill and prudence such as should be ordinary on the part of a solicitor could not have precluded. "No attorney is bound to know all the law," said Chief Justice Abbott; "God forbid that it should be imagined that an attorney, or a counsel, or even a judge, is bound to know all the law, or that an attorney is to lose his fair recompense on account of an error, being such an error as a cautious man might fall into": *Montriou* v. *Jefferys*, 2 C. & P. 113. "Against the attorney, the professional adviser, or the procurator, an action can be maintained. But," said Lord Campbell, "it is only if he has been guilty of gross negligence, because it would be monstrous to say that he is responsible for even falling into what must be considered a mistake. You can only expect from him that he will be honest and diligent, and if there is no fault to be found either with his integrity or diligence, that is all for which he is answerable. It would be utterly impossible

that you could ever have a class of men who would give a guarantee binding themselves in giving legal advice, and conducting suits at law, to be always in the right": *Purves* v. *Landall*, 12 Cl. & F. 91. As it was put by Sherwood, C.J., in a recent case before the Supreme Court of Michigan: "A lawyer is not an insurer of the result in a case in which he is employed, unless he makes a special contract to that effect, and for that purpose. Neither is there any implied contract when he is employed in a case, or any matter of legal business, that he will bring to bear learning, skill, or ability beyond that of the average of his profession. Nor can more than ordinary care and diligence be required of him, without a special contract made, requiring it. Any other rule would subject his rights to be controlled by the vagaries and imaginations of witnesses and jurors, and not unfrequently by the errors committed by the courts. This the law never has done; and the fact that the best lawyers in the country find themselves mistaken as to what the law is, and are constantly differing as to the application of the law to a given state of facts, and even the ablest jurists find themselves frequently differing as to both, shows both the fallacy and danger of any other doctrine: *Babbitt* v. *Bumpus*, 28 Am. L. Reg. 529, Sect., 1889. Therefore, it is that, as says Lord Ellenborough, "an attorney is only liable for *crassa negligentia*": *Baikie* v. *Chandless*, 3 Camp. 17. But undoubtedly, as admitted by Chief Justice Tindal, "it would be extremely difficult to define the exact limit, by which the skill and diligence which an attorney undertakes to furnish in the conduct of a cause is bounded; or to trace precisely the dividing line between that reasonable skill and diligence which appears to satisfy his undertaking, and that *crassa negligentia* or *lata culpa* mentioned in some of the cases, for which he is undoubtedly responsible": *Godefry* v. *Dalton*, 6 Bing. 460. Such *crassa negligentia* or *lata culpa*, however, should be taken as involving failure to use such skill as may be reasonably expected from a man's profession. As it was put in an American decision, the want of ordinary skill and care and reasonable diligence, is, in the case of an attorney, gross negligence: *Pennington* v. *Yell*, 11 Ark., 212. A solicitor is not responsible, for instance, for the consequences of a mistake in point of law upon which a reasonable doubt might be entertained: *Kemp* v. *Burt*. 4 B. & Ad. 424. Errors to which responsibility attaches should, indeed, be very gross. "They should be such," added Chief Justice Sherwood, in the case already quoted, "as to render wholly improbable a disagreement among good lawyers as to the character of the service required to be performed, and as to the manner of its performance under all the circumstances in the given case, before such responsibility attaches;" and it was said in another American case that "it is not enough that doubts may be raised of the soundness of his opinions, or correctness of his course, unless they are accompanied by the absence of all reasonable doubts of the propriety of an opposite course of opinion in the mind of every member of his profession of ordinary skill, sagacity, and prudence, caused by a decisiveness of reason and authority in its favor": *Bowman* v. *Tallman*, 27 How. Pr. (N.Y.) 274. This strong expression of the doctrine in hand is, at all events, no stronger than the reasons on which it is based would seem to justify; and it would be satisfactory to find the principle as broadly and cogently laid down by other tribunals. Chief Justice Tindall, in

Godefroy v. Dalton (ubi supra), sums up the cases as establishing, in general, that a solicitor is liable for the consequences of ignorance or non-observance of the rules of practice of his court, for the want of care in the preparation of the cause for trial, or of attendance there with his witnesses, and for the mismanagement of so much of the conduct of a cause as is usually and ordinarily allotted to his department of the profession; whilst, on the other hand, he is not answerable for error in judgment upon points of new occurrence, or of nice and doubtful construction, or of such as are usually intrusted to men in the higher branch of the profession of the law." And it may be gathered from *Foy* v. *Cooper* (2 Q.B., 937) that, whatever it is important for the client to know, it is the duty of his solicitor to report to him, and that failure in this respect is a ground for an action of negligence by the client against his solicitor.—*Irish Law Times*.

TRIAL BY JURY.—In the following letter, which appears in the *Times*, Mr. Jelf, Q.C., makes a forcible plea for the abolition of trial by jury:

"Three causes in which I have been engaged as counsel during the past week—two on circuit and one in London—have ended in the disagreement and consequent discharge of the jury. This fact, coupled with what seems to me to be the increasing frequency of such an abortive and lamentable result as this, has strengthened the conviction which has for many years been growing up in my mind that, at all events in the majority of civil causes, trial by jury is, at the present day, a mistake.

"That this conviction is shared by many of my professional brethren and of the suitors is shown by the great number of common law causes (which used all to be tried by juries), both in London and on the circuits, which are now tried, by the consent of both parties, before a judge without a jury.

"The advantages of trial by judge over trial by judge and jury seem to me to be manifold.

"In the first place, the judge must make up his mind one way or the other. He cannot say half his mind is of one opinion and the other half of the other. A definite result is obtained, and it is generally right.

"If it is wrong, it can be set right in the Court of Appeal. Thus the scandal and the grievous expense and suspense to the parties of an abortive trial through indecision is impossible.

"Secondly, the judge can, and often will, say what is passing through his mind. If he sees that the case is a very doubtful one, he can frankly say so, and recommend a compromise which may save hundreds of pounds to one of the parties, and scores of pounds to the other.

"No such collective expression or suggestion can be obtained from the jury. Except by a chance observation here and there of a single juryman, or by the uncertain and often misleading sign of look or gesture, counsel cannot tell what is passing in the minds of the majority of the jury. Nay, more, till the summing-up is over, the jury do not often know how the case is going themselves.

"Thirdly, the same muteness of the jury prevents counsel from grappling with the points which are really affecting them. The judge usually lets counsel know what is pressing on his mind, so that counsel can direct his evidence and his arguments to meet the difficulties. Not so the jury. It is almost entirely fighting in the dark, so far as they are concerned, and undetected prejudice or external influence is often at work in a manner which it is impossible to counteract.

"Fourthly, if a verdict is obtained, no one knows on what grounds it is given, and on appeal the matter is only open to conjecture. A judge, on the other hand, gives his reasons, which can be dealt with and considered in the Court of Appeal.

"Fifthly, the jury panel cannot, in practice, be strictly scrutinized, and the presence of a friend or a foe of one of the parties on the jury may, even though it be unconsciously, turn the scale.

"Sixthly, a strong judge is sometimes unduly impregnable, because he impresses the jury with his view, and yet the ultimate finding is, nominally at all events, that of the jury, whose reasons are inscrutable, and can only be set aside if twelve reasonable men could not have so found. Whereas, if he is alone, the judge must stand or fall in the Court of Appeal upon his own findings, and, as before stated, must formulate his reasons if he desires his judgment to have its proper weight.

"Seventhly, while allowing due weight to the importance of defining the issues of fact and law, and to the value of commercial views of business in some classes of cases, I think trial by jury, in the complicated problems of mixed law and fact which arise in the present day, puts an undue strain upon the ingenuity of the judge in disentangling the points on which the opinion of the jury ought to be taken. A judge with a logical mind can far better deal himself with the questions *seriatim*, eliminating at once those which are obviously open to only one proper answer, than submit them all alike to the jury, who often make contradictory findings and reduce the verdict to an absurdity.

"Eighthly, as a last, but not least, important reason, I maintain that jurymen engaged and jurymen in waiting are put to great loss and expense in attending for trials which could often be better and always more expeditiously conducted without their presence, and in which that presence is often, by consent, dispensed with after much time has been wasted.

"For these, amongst other reasons, I venture to suggest that the rights of either party to insist on a jury should be largely curtailed, and that the onus of showing that in a given case a jury is desirable should rest on the party who asks for it.

"In the past, when judges were supposed to be unduly influenced against the people, trial by jury may have been the 'palladium of our liberties,' though I believe the history of the institution is not wanting in illustrations of an opposite character.

"At the present day, however, I see no reason why, as a rule, on the common law side, a single judge should not try all sorts of civil causes involving, on the whole, probably less important issues than those which have been so long and so ably disposed of by single judges on the Chancery side."

DIARY FOR SEPTEMBER.

2. Tues..Court of Appeal Sittings begin.
3. Wed...Sir Edward Coke died, 1634, æt. 82.
4. Thur..Chancery Division High Court of Justice sits.
7. Sun....*14th Sunday after Trinity.*
8. Mon...Trinity Term Commences.
9. Tues..General Sessions and County Court Sittings for Trial in York.
12. Fri.....Frontenac, Governor of Canada, 1692.
13. Sat.....Quebec taken, and death of Wolfe, 1759.
14. Sun....*15th Sunday after Trinity.* Sir J. S. Copley (Lord Lyndhurst), Master of the Rolls, 1826.
17. Wed...First Parliament of Upper Canada met at Niagara, 1792.
18. Thur..Quebec surrendered to the British, 1759.
20. Sat.....Trinity Term ends.
21. Sun....*16th Sunday after Trinity.*
23. Tues..Courcelles, Governor of Canada, 1665.
28. Sun....*17th Sunday after Trinity.* W. H. Blake, 1st Chan. U. C., 1849.
29. Mon...St. Michael and all Angels.
30. Tues..Sir Isaac Brock, Administrator, 1811.

Reports.

IN THE FIRST DIVISION COURT OF THE COUNTY OF YORK.

WOOD *v.* JOSELYN AND SHEPPARD, GARNISHEE.

Garnishing summons—Effect of—Priority of assignment for benefit of creditors under R. S.O., c. 124, s. 9—Division Court's Act, s-s. 173, 185, and 189.

When the primary debtor, after judgment obtained against him and service of a garnishing summons on the garnishee, but before final order for payment against garnishee, makes an assignment for the benefit of his creditors, the assignee takes priority over the garnishing creditor, by virtue of the provisions of sec. 9 of R.S.O., c. 124. TORONTO, May 31, 1890.

This was an action brought by John Wood & Sons, to recover the sum of $171.40 from H. Joselin and Son and one John Sheppard, who was made a party (garnishee) to attach a debt alleged to be due by him to H. Joselin & Son, the primary debtors.

MORGAN, J.J.: On the return of the summons in this action, the primary debtors did not appear or make any defence, and I gave judgment against them in favor of the primary creditors, for the sum of $171.40 and costs of suit, and I then adjourned adjudication on the claim against the garnishee until the termination of an action in the High Court of Justice between the primary debtors and the garnishee, wherein the alleged debt garnished was in litigation between them. This action has since been determined in favor of the primary debtors, and I am now called upon to determine the right of the primary creditors to the debt or fund garnished

No evidence was given, all material facts being admitted.

The garnishee Sheppard now admits a liability between him and the primary debtors for more than sufficient to satisfy the claim and judgment of the primary creditors, and submits to pay same upon the order of this Court, but alleges that since the service on him of the garnishing summons in the action, and pending adjudication on the garnishment branch of this action, the primary debtors have made an assignment for the general benefit of their creditors, and that the fund garnished had been paid by the assignee.

The assignee also intervenes, and claims under the assignment the fund garnished, and the primary debtors, so far as they have any right to do so, support the contention of the assignee.

The assignment is under and within the statute R.S.O., chap. 124.

It is urged on the part of the primary creditors that by force of the garnishing or attaching summons, and sections 173, 185, and 189 of the R.S.O., chap. 51 (Division Courts Act), the fund or debt in the hands of the garnishee, or due by him to the primary debtors, was attached to answer the claim of the primary creditors, and thereupon became a security to the primary creditors, and that the property in the debt or fund garnished was, on the garnishee being served with the summons in the action, transferred from the primary debtors to and became vested in the primary creditors, and that, therefore, the assignment by the primary debtor for the general benefit of his creditors, executed as it was after the service of the garnishing summons, did not pass to the assignee any title to the garnisheed debt, because by section 4 of the R.S.O., chap. 124, such assignment would under the statute only pass to the assignee the estate of the assignor belonging to him at the time of the assignment.

This contention, supported as it is by a long line of cases in the English and in our own Courts, would have been unanswerable but for section 9 of chap. 124, R.S.O. This section was, in my judgment, intended by the Legislature to have the same operation as section 45 of the English Bankruptcy Act of 1883, namely, to secure to the general creditors of an assignor or insolvent *pro rata* distribution among them, under an assignment for their benefit, all the

estate of the assignor, completely discharged from and unaffected by any judgments, executions, or other processes of law not completely executed by payment to or in favor of any particular creditor who would, but for the operation of the section, be entitled to the fruits of his judgment or execution or other process of law for enforcing judgment.

Butler v. *Wearing*, L.R. 17, Q.B.D. 183, and *ex parte Pillers In re Curtoys*, L.R. 17, Q.B.D., 653, are authorities under the English Bankruptcy Act of 1869 and 1883, in support of the view that the attachment to prevail against the assignee in bankruptcy must be completed by payment. All recent legislation has been in the direction of a *pro rata* distribution amongst his creditors of the debtor's whole estate as opposed to the right of single creditors to absorb such estate, either in whole or in part, by force of judgments or executions held by them or against the debtor. The Creditors' Relief Act aims, though somewhat feebly, in that direction, and the Act under consideration was obviously intended to accomplish that result. It is true that only the term "execution" is used in sec. 9 as a method by which a judgment may be enforced, and of which an assignment is to take precedence, but the intention of the Legislature is clear, and I ought to apply the principle of the statute, though the section be inartistically drawn and is wanting in apt words.

It could never have been the intention of the Legislature to give an assignment for benefit of creditors precedence over an execution not completely executed by payment, and at the same time to permit a garnishing summons or attachment to prevail, where the primary creditor, before he could get any fruit of his attachment under such summons, would not only have to get a judgment against the primary debtor but also, if resisted by the garnishee, prove the liability of the garnishee to the primary debtor, and get judgment against the garnishee and enforce the same by execution. The same reasoning, I think, would apply if the garnishing summons or attachment was under a judgment already recovered against the primary debtor.

The question arising in this action is a new one, turning, as I have suggested, on the construction to be put on section 9 of the Ontario Statute, respecting assignments for benefit of creditors. It gives me much satisfaction to know that my judgment may be reviewed by the Court of Appeal, and if I have erred in my view of the meaning of the section, the primary creditors can obtain relief. I am, however, strongly impressed that the word "execution" in section 9 must mean all process upon a judgment by which a creditor may obtain out of a debtors assets of every kind, satisfaction of his judgment.

The garnishee must be discharged and this action dismissed as against him with costs, leaving him to pay to the assignee for benefit of creditors any amount due by him to the primary debtors.

Early Notes of Canadian Cases.

SUPREME COURT OF CANADA.

NOVA SCOTIA.] [June 13.

LAWRENCE *v.* ANDERSON.

Debtor and creditor—Assignment in trust—Release to debtor by—Authority to sign—Ratification—Estoppel.

L. brought an action against A. on an account stated, to which the defence set up was release by deed. On the trial it was shown that A. had executed a deed of assignment in trust for the benefit of his creditors, and under authority by telegram had signed the same in the name of L. After the execution of the deed by A. the creditor L. continued, with knowledge of the deed, to send him goods, and about a month after he wrote A. as follows: "I have done as you desired by telegraphing you to sign deed for me, and I feel confident that you will see that I am protected and not lose one cent by you. After you get matters adjusted I would like you to send me a cheque for $800." Four years after A. wrote to L. a letter, in which he said: "In one year more I will try again for myself, and hope to pay you in full." The account sued upon was stated some eighteen months after this last letter.

Held, reversing the judgment of the Court below, TASCHEREAU and PATTERSON, JJ., dissenting, that L. was not estopped from denying that he executed the deed of assignment; and as it was evident that he did not expect to participate in the benefit of the deed, but looked to the debtor A. for payment, he could recover on the account stated.

Held, per PATTERSON, J., that although A. had no sufficient authority to sign the deed for L., yet there was an agreement to compound the debt which was binding on L., and the understanding that L. was to be paid in full would be a fraud upon the other creditors of A.

Appeal allowed with costs.

Eaton, Q.C., for the appellant.

Newcombe for the respondent.

NOVA SCOTIA.] [June 12.

O'BRIEN *v.* COGSWELL.

Assessments and taxes—Lien—Priority of mortgage made by Statute—Construction of Act—Healing clause—Effect and application of.

The Halifax City Assessment Act, 1888, made the taxes assessed on real estate in said city a first lien thereon, except as against the Crown.

Held, affirming the judgment of the Court below (21 N. S. Rep. 155, 279), that such lien attached to a lot assessed under the Act, in preference to a mortgage made before the Act was passed.

The Act provided that in case of non-payment of taxes assessed upon any lands thereunder, the city collector should submit to the Mayor a statement in duplicate of lands liable to be sold for such non-payment, to which statements the Mayor should affix his signature and the seal of the Corporation; one of such statements should then be filed with the city clerk and the other returned to the collector with a warrant annexed thereto, and in any suit or other proceeding relating to the assessment on the real estate therein mentioned, any statements or lists so signed and sealed should be received as conclusive evidence of the legality of the assessment, etc. In a suit to foreclose a mortgage on land which had been sold for taxes under this Act, the legality of the assessment and sale was attacked.

Held, per STRONG, TASCHEREAU, and GWYNNE, JJ., that to make this provision operative to cure a defect in the assessment caused by failure to give a notice required by a previous section, it was necessary for the defendants to show affirmatively that the statements had been signed and sealed in duplicate and filed as required by the Act; and the production and proof of one of such statements was not sufficient.

Per RITCHIE, C.J., and PATTERSON, J., that it was sufficient to produce the statement returned to the collector signed and sealed as required, and with the necessary warrant annexed, and in the absence of evidence to the contrary, it must be assumed that all the proceedings were regular, and that the provision of the statute had been complied with.

The Act also provided that the deed to a purchaser of lands sold for taxes should be conclusive evidence that all the provisions with reference to the sale had been complied with.

Held, per STRONG, TASCHEREAU, and GWYNNE, JJ., that this provision could only operate to make the deed available to cure defects in the proceedings connected with the sale, and would not cover the failure to give notice of assessment required before payment of the taxes could be enforced.

Held, per RITCHIE, C.J., and PATTERSON, J., that the deed could not be invoked in the present case to cure any defects in the proceedings, as it was not delivered to the purchaser until after the suit commenced; therefore, a failure to give notice that the land was liable to be sold for taxes, which notice was required by the Act, rendered the sale void.

Appeal dismissed with costs.

Sedgewick, Q.C., and *Lyons*, for appellant.

Lash, Q.C., and *McDonald*, for respondents.

NEW BRUNSWICK.] [June 13.

PROVIDENCE WASHINGTON INSURANCE CO. *v.* GEROW.

Marine Insurance—Construction of policy—Port on west coast of South America—Guano Islands—Commercial usage.

A vessel was insured for a voyage from Melbourne to Valparaiso for orders, thence to a loading port on the western coast of South America, thence to United Kingdom. She went to Valparaiso, and from there proceeded to Lobos, an island from twenty-five to forty miles off the west coast of South America, where she loaded guano and sailed for England. Having met with heavy weather she returned to Valparaiso, and a survey was held by which it appears that to repair her would cost more than she would be worth afterwards. The owner claimed payment under the policy for a constructive total loss, which was resisted on the ground of deviation in the vessel loading at a port off the coast.

On the trial of an action on the policy, evidence was given by shipowners and mariners to the effect that, by the usage of the shipping trade, a loading port on the west coast of South America, as specified in the policy, would include the Guano Islands lying off the coast. The jury found for the plaintiff.

Held, affirming the judgment of the Supreme Court of New Brunswick, that the policy must be construed to mean what would be understood by shippers, shipowners, and underwriters, and the jury having based their verdict on evidence of what such understanding would be, their finding could not be disturbed.

Appeal dismissed with costs.

Stratton for the appellants.

Weldon, Q.C., for the respondent.

NOVA SCOTIA.] [June 13.

CLARK *v.* CLARK.

Will—Construction of—Devise to two persons—Joint tenants or tenants in common—Severance.

The will of R. C. devised his real estate to his two sons, their heirs, executors, and assigns, and ordered that said sons should jointly and in equal shares pay the testator's debts, and the legacies granted by the will. There were six legacies given to two other sons of the testator of £50 each, payable by the devisees in two, three, four, five, six, and seven years respectively. The estate was vested in the devisees before the passing of the Act abolishing joint tenancies in Nova Scotia.

Held, reversing the decision of the Court below (21 N.S., Rep. 378), TASCHEREAU and GWYNNE, JJ., dissenting, that the provisions for payment of debts and legacies indicated an intention on the part of the testator to effect a severance of the devise, and the devisees took as tenants in common and not as joint tenants. *Fisher* v. *Anderson* (4 Can. S.C.R., 406), followed.

On the trial of a suit, between persons claiming through the respective devisees, to partition the real estate so devised, evidence of a conversation between the original devisees as to the manner in which they regarded their tenure of the estate, was tendered and rejected.

Held, GWYNNE, J., dissenting, that such evidence was properly rejected.

Held, per GWYNNE, J., that the evidence could not have had the effect of assisting to explain the will, which was the ground upon which it was rejected at the trial, but it should have been received as evidence of a severance between the devisees themselves, joint tenants under the will. Appeal allowed with costs.

Harrington, Q.C., for the appellants.

Borden for the respondents.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

COURT OF APPEAL.

From Q.B.D.] [Jan. 8.

HENDERSON *v.* KILLEY ET AL.

Partnership—Dissolusion—New firm—Novation—Trust—Right of third person to enforce.

K. and M. carried on business under the name of K. & Co., and dissolved partnership, K. giving to M. sixteen promisory notes for $500 each, with interest, for M.'s share in the business, which was continued by K. K. afterwards formed a partnership with O., and by the articles of partnership transferred to the co-partnership, as his contribution to the capital, all the assets of his business subject to the deduction therefrom of his liabilities, which was to be assumed by the co-partnership and charged against him. Amongst K.'s liabilities known to O., were ten of the notes which M. had endorsed over to the plaintiff before maturity, and the assets transferred to the co-partnership were sufficient to pay all K.'s liabilities including these notes. The firm of K. and O. paid two of the notes and also paid interest on another note, and some negotiations took place between the plaintiff and the firm of K. & O. for an extension of time for payment of the unpaid notes.

Held (BURTON, J.A., dissenting), reversing on this point the judgment of the Queen's Bench Division, 14 O.R., 137, that no trust was established in favor of M., by the co-partnership agreement between K. and O., and that the plaintiff, assignee of M., was not entitled to enforce, as against O., the performance of the stipulation in the deed for payment of the notes held by her.

Gregory v. *Williams*, 3 Mer. 582, and *In re Empress Engineering Co.*, 16 Chy.D., 125, specially considered.

But (*per* HAGARTY, C.J.O.), that the evidence established that an independent agreement

had been entered into between the firm of K. & O., and the plaintiff to pay the notes in question.

The Court being thus divided in opinion, the appeal was dismissed with costs.

Robinson, Q.C., and *Mackelcan*, Q.C., for the appellants.

Osler, Q.C., and *Teetzel*, for the respondent.

From Q.B.D.] [May 13.

REGINA v. COUNTY OF WELLINGTON.

Constitutional Law—British North America Act—Bankruptcy and insolvency—Banking, and incorporation of banks—Property and civil rights—Crown—Taxation—Tax Sale—R.S.O. (1887), c. 193, s. 7, s-s. 1.

Certain lands, after the grant from the Crown, became, by certain mesne conveyances, the property of the Bank of Upper Canada, and, upon the failure of the bank, were conveyed to its trustees, and were subsequently, with the other assets of the bank, vested in the Crown, by 33 Vict., c. 40 (D.). The Crown then sold them, and the purchaser gave a mortgage back to secure part of the purchase money. The mortgage contained the usual provisions for payment of taxes, but the taxes were not paid, and the lands were sold, this action being brought to set aside the sale.

Held, per HAGARTY, C.J.O., and OSLER, J.A., that the Act, 33 Vict., c. 40 (D.), was *intra vires*, being properly to be regarded as one dealing with "bankruptcy and insolvency," or "banking, and incorporation of banks." That the lands were therefore properly vested in the Crown, as trustee, and that the interest of the Crown, as mortgagee and trustee, could not be sold for arrears of taxes, but was exempt under R.S.O. (1887), c. 193, s. 7, s-s. 1.

Per BURTON, J.A.: That the Act was *ultra vires* as an interference with "property and civil rights in the Province," and that the lands remained in the trustees subject to taxation. That even if the Act was *intra vires*, still the lands, being vested in the Crown in the place and stead of the trustees, voluntarily selected by the shareholders of the bank, were not exempt from taxation.

Per MACLENNAN, J.A.: That the Act was *ultra vires* and the lands subject to taxation, but that upon the evidence, the sale was fraudulent and void as far as the interest of the Crown was concerned.

The judgment of the Queen's Bench Division was therefore affirmed, BURTON, J.A., dissenting.

Bain, Q.C., and *Kappele*, for the appellants.

H. D. Gamble and *H. L. Dunn* for the respondent.

J. R. Cartwright, Q.C., for the Attorney-General for Ontario.

FROM CO. CT. HASTINGS.] [June 6.

ASHLEY *v.* BROWN.

Assignments and preferences—Creditor—Knowledge of insolvency—R.S.O. (1887), c. 124.

One who has a right of action for tort, and subsequently recovers judgment, is not a creditor within the meaning of the Assignments and Preferences Act, so as to be in a position to attack a transaction entered into by the tort feasor before the action was commenced.

Where a transaction is attacked under that Act, knowledge by the transferee of the insolvency of the transferor must be shown.

Johnson v. *Hope*, 17 A.R., 10, adhered to.

Judgment of the County Court of Hastings affirmed.

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

Watson, Q.C., and *Redick*, for the respondent.

HIGH COURT OF JUSTICE.

Queen's Bench Division.

DIV'L CT.] [June 27.

IN RE LONG POINT CO. *v.* ANDERSON.

Game—Feræ naturæ—Property of owner of land in deer found thereon—29 & 30 Vict., c. 122—R.S.O., c. 221, s. 10, Construction of—Prohibition — Division Court— Undisputed facts—Error in law—Misconstruction of statutes.

The defendant killed upon his own land, which adjoined that of the plaintiffs', and was unfenced, a deer, one of the progeny of certain deer imported by the plaintiffs, and allowed to run at large upon their land.

Held, that the deer was *ferae naturae* and, having been shot by the defendant on his own land, belonged to him.

Held, also, that neither the Act incorporating the plaintiffs, 29 & 30, Vict., c. 122, nor R.S.O.,

c. 221, s. 10, vested the absolute property in the deer in the plaintiffs.

Prohibition was granted to a Division Court where there were no facts in dispute, and the Judge in the inferior Court applied a wrong rule of law to the facts, and grounded his judgment upon a misconstruction of the facts above referred to.

W. M. Douglas for plaintiffs.

C. E. Barker for defendant.

Div'l Ct.] [June 27.

PECK *v.* AGRICULTURAL INS. CO.

Insurance—Fire—Unoccupied building--Special condition—Reasonableness--Information given to agent of Insurance Co., but not in application—Powers of agent—Evidence—Rejection of.

The defendants issued a policy of insurance against fire, dated 23rd April, 1889, upon a house of the plaintiff.

The application signed by the plaintiff stated that the house was occupied as a residence by the plaintiff's son. A fire took place on the 14th November, 1889, at which date, and for six months previously, the house had been unoccupied. One of the special conditions indorsed upon the policy was that if a building became vacant or unoccupied, and so remained for ten days, the entire policy should be void. The plaintiff and his wife swore that when the agent came to him and drew the application he asked the plaintiff if there was anyone in the house at the time, and the plaintiff told him that his son was living there at the time, but was going to leave in about two weeks, and asked if that would make any difference, and was informed by the agent that it would not. By a clause in the application the plaintiff agreed that no statement made or information given by him prior to issuing the policy to any agent of the defendants should be deemed to be made to or binding upon the defendants unless reduced to writing and incorporated in the application ; and on the margin of the application there was a notice showing that the powers of agents were limited to receiving proposals, collecting premiums, and giving the consent of the defendants to assignments of policies.

Held, that the special condition referred to was not an unreasonable one. and that the agent had no power to vary it ; and an action to recover the amount of the loss was dismissed.

The plaintiff at the trial sought to give evidence of certain transactions between the agent of the defendants and a brother of the plaintiff for the purpose of showing that the plaintiff, having become aware of them before the application was made by him, was justified in believing that the defendants did not regard the condition as to occupation as a material one.

Held, that this evidence was properly rejected.

Clute, Q.C., for plaintiff.

J. W. Kerr for defendants.

Practice.

C. P. Div'l Ct.] [June 27.

McLEAN *v.* BRUCE.

Receiver—Residuary estate under will—Cross-examination of executor and residuary legatee—Account of debts and legacies unpaid.

In answer to the defendant's application for a receiver to receive the interest of the plaintiff as residuary legatee under a will, of which he was also the surviving executor, the plaintiff filed an affidavit in which he stated that the estate was insufficient to pay the debts and specific legacies, and that there would be no sum coming to the plaintiff as residuary legatee.

Held, that the plaintiff upon cross-examination upon his affidavit must swear as to whether there were any and what debts and legacies unpaid.

H. Cassels for plaintiff.

Hoyles, Q.C., for defendant.

C.P. Div'l Ct.] [June 27.

MACLEAN *v.* THE BARBER & ELLIS CO.

Discovery—Inspection of document before delivery of statement of claim—Merits.

In an action to recover an amount alleged to be due by the defendants upon an advertising contract after crediting an amount admitted to be due by the plaintiff to the defendants for rent, and also to recover damages for illegal distress for rent, it appeared that the defendants had agreed to pay a certain sum to the plaintiff for advertising, and had also written a letter to the plaintiff agreeing that a certain part of the rent should be taken out in advertising. This letter purported to be in answer to a letter

written by the plaintiff making a proposal which the defendants agreed to.

Held, that the plaintiff was entitled to have his own letter produced by the defendants for his inspection before delivery of his statement of claim, in order to enable him to frame it properly.

Hooey v. *Gilbert*, 12 P.R., 114, distinguished.

It is not necessary that an application by a plaintiff for inspection should be supported by a specific statement of merits, if from the material before the Court it can be determined whether the claim is or is not based upon merits.

T. S. Jarvis for the plaintiff.

Kilmer for defendants.

Q. B. Div'l Ct.] [June 27.

FULTON *v.* VIPOND.

Costs—Depriving successful party of—"Good cause"—Rule 1170—Reversing decision of trial Judge—Application of trial.

The Court can interfere with the trial Judge's discretion in depriving a successful party of costs in an action tried by a jury, where he has given effect to considerations which do not constitute "good cause" within the meaning of Rule 1170.

The plaintiff's principal claim, upon which he succeeded, was for wood cut and removed by the defendant. The trial judge ruled that the conduct of the plaintiff caused unnecessary litigation, and he deprived him of the costs of that claim. The plaintiff and defendant had each had a measurement made, and differed as to the result. The plaintiff refused to have a re-measurement, and brought the action, the result of which showed that his measuremeut was correct.

Held, that the plaintiff's refusal was not misconduct inducing the litigation, and there was no "good cause" for depriving him of costs.

Huxley v. *West London Extension R. W. Co.*, 14 App. Cas., at pp. 33-4, specially referred to.

Rule 1170 provides that where an action is tried by a jury the costs shall follow the event, unless upon application made at the trial for good cause shown, the Judge otherwise orders.

Semble, that there must be substantially an application at the trial, and if the trial Judge anticipating the application of counsel makes the order in presence of opposing counsel, he makes it on application.

D. W. Saunders for the plaintiff.

Hoyles, Q.C., for the defendant.

Appointments to Office.

PROVINCE OF ONTARIO.

The Honorable Sir Thomas Galt, Knight, Chief Justice of the Common Pleas, Ontario, to be the Administrator of the Government of the Province of Ontario during the absence on leave of the Honorable Sir Alexander Campbell, K.C.M.G., the Lieut.-Governor of the said Province of Ontario.

LOCAL JUDGE OF THE HIGH COURT OF JUSTICE.

District of Thunder Bay.

Frederick William Johnston, of Goderich, Junior Judge of the District Court of Thunder Bay, to be Local Judge of the High Court of Justice for Ontario.

COUNTY COURT JUDGES.

Grey.

Duncan Morrison, of Owen Sound, Barrister, to be Deputy Judge of the County Court of the County of Grey.

Oxford.

Henry Birkett Beard, of Woodstock, one of Her Majesty's Counsel, to be Deputy Judge of the County Court of the County of Oxford, for the period of four months, from 1st July, 1890.

Nova Scotia.

John P. Chipman, of Kentville, one of Her Majesty's Counsel, to be Judge of the County Court of the several counties comprised in district number four, in the Province of Nova Scotia.

SHERIFF.

District of Thunder Bay.

Alexander William Thompson, of Port Arthur, to be Sheriff in and for the District of Thunder Bay, *vice* John Fitzgerald Clarke, deceased.

LOCAL REGISTRAR.

District of Thunder Bay.

James Meek, of Port Arthur, to be Local Registrar of the High Court of Justice for Ontario, Clerk of the District Court, and Registrar of the Surrogate Court, in and for the District of Thunder Bay, *vice* Charles Kreissman, resigned.

COUNTY COURT CLERKS.

Honorable Alexander McLagan Ross, of Goderich, to be Clerk of the County Court of the County of York, *vice* Walter McKenzie, deceased.

POLICE MAGISTRATE.

Leeds.

Reid Burritt Alguire, of Athens, to be Police Magistrate for the Village of Athens, in the County of Leeds, without salary.

REGISTRAR OF DEEDS.

Durham.

James Wellington McLaughlin, of Bowmanville, M.D., to be Registrar of Deeds in and for the West Riding of the County of Durham, *vice* Robert Armour, deceased.

DIVISION COURT CLERK.

Ontario.

Joseph Edwin Gould, of Bolton, to be Clerk of the Fourth Division Court of the County of Ontario, *vice* Z. Hemphill, resigned.

Peel.

David Pearcy, of Bolton, to be Clerk of the Fourth Division Court of the County of Peel, *vice* Samuel Jefferson, resigned.

ASSOCIATE CORONERS.

Brant.

Archibald J. Sinclair, of Paris, M.D., to be an Associate Coroner within and for the County of Brant.

Carleton.

Oliver Cromwell Edwards, of Ottawa, M.D., to be an Associate Coroner within and for the County of Carleton.

District of Nipissing.

Robert Baxter Struthers, of Sudbury, M.D., to be an Associate Coroner within and for the District of Nipissing.

Oxford.

John Mearns, of Woodstock, M.D., to be an Associate Coroner within and for the County of Oxford.

York.

Carson Henry Britton, of East Toronto, M.D., to be an Associate Coroner within and for the said County of York.

DIVISION COURT BAILIFFS.

Algoma.

Jacob Stevenson, of Thessalon, to be Bailiff of the Third Division Court of the District of Algoma, *vice* W. J. Miller, resigned.

Halton.

Robert Lucas, of Oakville, to be Bailiff of the Second Division Court of the County of Halton, *vice* John Weir, resigned.

District of Thunder Bay.

John Woodside, of Port Arthur, to be Bailiff of the First Division Court of the District of Thunder Bay, *vice* Edward Donovan, resigned.

COMMISSIONERS FOR TAKING AFFIDAVITS FOR USE IN ONTARIO.

England.

Sydney Hampden Peddar, of London, England, 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.

United States.

Harris Buchanan, of Pittsburgh, in the State of Pennsylvania, to be a Commissioner for taking Affidavits within and for the Territory within which the Circuit Court of the United States for the Western District of Pennsylvania has jurisdiction, and not elsewhere, for use in the Courts of Ontario.

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

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

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

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

CURRICULUM OF THE LAW SCHOOL, OSGOODE HALL, TORONTO.

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

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

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

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

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

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

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

The Law School examinations at the close of the School term, which include the work of the

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

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

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

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

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

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

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

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

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

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

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

The Course during each term embraces lectures, recitations, discussions, and other oral methods of instruction, and the holding of moot courts under the supervision of the Principal and Lecturers.

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

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

FIRST YEAR.

Contracts.

Smith on Contracts.
Anson on Contracts.

Real Property.

Williams on Real Property, Leith's edition.

Common Law.

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

Equity.

Snell's Principles of Equity.

Statute Law.

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

SECOND YEAR.

Criminal Law.

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

Real Property.

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

Personal Property.

Williams on Personal Property.

Contracts and Torts.

Leake on Contracts.
Bigelow on Torts—English Edition.

Equity.

H. A. Smith's Principles of Equity.

Evidence.

Powell on Evidence.

Canadian Constitutional History and Law.

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

Practice and Procedure.

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

Statute Law.

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

THIRD YEAR.

Contracts.

Leake on Contracts.

Real Property.

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

Criminal Law.

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

Equity.

Lewin on Trusts.

Torts.

Pollock on Torts.
Smith on Negligence, 2nd edition.

Evidence.

Best on Evidence.

Commercial Law.

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

Private International Law.

Westlake's Private International Law.

Construction and Operation of Statutes.

Hardcastle's Construction and Effect of Statutory Law.

Canadian Constitutional Law.

British North America Act and cases thereunder.

Practice and Procedure.

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

Statute Law.

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

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

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

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

GENERAL PROVISIONS.

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

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

The Moot Courts will be presided over by the Principal or the Lecturer whose series of lectures is in progress at the time in the year for which the Moot Court is held. The case to be argued will be stated by the Principal or

Lecturer who is to preside, and shall be upon the subject of his lectures then in progress, and two students on each side of the case will be appointed by him to argue it, of which notice will be given at least one week before the argument. The decision of the Chairman will be pronounced at the next Moot Court, if not given at the close of the argument.

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

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

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

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

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

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

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

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

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

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

LITTELL'S LIVING AGE—The numbers of *The Living Age* for August 23rd and 30th contain The Origin of Alphabets, *Edinburgh;* Western China: Its Products and Trade, *Quarterly;* The Shetland Isles in the Bird's-nesting Season, *Contemporary;* A Voice from a Harem, *Nineteenth Century;* The Cession of Heligoland, *Scottish;* Comedy in Fiction, "In Sickness and in Health," and The Bamboo, *Blackwood;* Christmas-tide at Tangier, and Watteau: His Life and Work, *Temple Bar;* Chapters from some Unwritten Memoirs, *Macmillan;* Rural Reminiscences, and the Sea and Seaside, *Cornhill;* A Manual for Interior Souls, and The "Smart" Way of Shaking Hands, *Spectator;* Tarantulas, *Saturday Review;* The Oxford Summer Meeting, *Speaker;* Hyacinth Culture in Holland, *Chambers';* with instalments of "Marcia," and "An Attractive Young Person," and poetry.

For fifty-two numbers of sixty-four large pages each (or more than 3,300 pages a year) the subscription price ($8) is low; while for $10.50 the publishers offer to send any one of the American $4 monthlies or weeklies with *The Living Age* for a year, both postpaid. Littell & Co., Boston, are the publishers.