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DIARY FOR SEPTEMBER.

2. Sat. Beauharnois, Governor of Canada 1726.
3. Sun. *13th Sunday after Trinity.*
5. Tue. Court of Appeal sittings begin.
10. Sun. *14th Sunday after Trinity.* Sebastopol taken 1855.
12. Tue. County Court sittings for York begin. Peter Russell President 1796.
13. Wed. Frontenac, Governor of Canada 1672. Quebec taken by the British under Wolfe 1759.

TORONTO, SEPT. 1, 1882.

WE publish in another column some portions of the report of the Select Committee of the English House of Commons on the subject of the law of distress. Our extract is taken from the *Times* of July 22nd. We also publish in this number an interesting letter by the well-known writer, Mr. Sheldon Amos, on the bombardment of Alexandria from the point of view of International law. It appeared in the *Times* for July 17th.

WE alluded, supra p. 229, to a case of *Ley* v. *Kidd*, then standing for judgment before the Divisional Court of the Chancery Division, as involving two interesting points, one as to the proper method of pleading title under the Judicature Act, and the other as to the respectivity of R. S. O. c. 109, sec. 2, an enactment also found in the Evidence Act. Judgment, however, has now been given in the case, and it is found to go off on other points, the above two questions remaining untouched.

WE have received from Winnipeg the prospectus of a new legal periodical, which is to be called the *Manitoba Law Journal*, and is designed to furnish a summary of the more important cases arising in the Manitoba Court of Queen's Bench, and to promote the general interests of the profession in that province. The fact that no system of reports as yet exists in that otherwise highly favoured region, is of itself sufficient to justify such an undertaking; but apart from this consideration, we trust that the bar of Manitoba will recognize the great value to them of such a journal, and will duly reward the enterprise of its projectors. One of these, Mr. W. D. Ardagh, was in former years identified with the publication of this journal; and the other, Mr. R. Cassidy, acted for some time as law reporter of the Toronto *Mail*. We wish these gentlemen every success in their undertaking, in which they promise to persevere so long as it pays expenses. We trust that they may not have long to wait until they reap a more substantial harvest from their labours than the realization of such a modest anticipation.

THE United States Supreme Court have given a decision in the case of *Knickerbocker Ins. Co.* v. *Foley*, 13 Law Rep. 577; 11 Fed. R. 766, which at first sight appears a little startling. In taking out a policy of life insurance, the applicant had answered affirmatively the questions—"Are you a man of temperate habits?" "Have you always been so?" The Supreme Court held that this answer was not necessarily untrue, although the jury might find that he had had an attack of *delirium tremens*, resulting from an exceptional indulgence in drink prior to the issuance of the policy; for that his habits, "in the usual, ordinary and every day routine of life," might nevertheless be temperate. It seems going rather far to say that a man who professes to be of temperate habits, in the usual, ordinary and every day routine of life,

may notwithstanding occasionally indulge in an attack of *delirium tremens*. No doubt one swallow does not make a summer, but it takes a good many swallows to give a man *delirium tremens*.

ALLOWANCE OF INTEREST.

[COMMUNICATED]

Interest in general terms is the consideration paid by the borrower to the lender for the use of money, and may arise by express or implied contract, or by operation of law. Usury can only legally exist when the law fixes a rate, and the contract for the rate of interest is greater than that allowed by law. At common law interest may be recovered upon an express promise or where there is an implied promise from the usage of trade or upon mercantile securities. There has long existed a usage to pay interest on the settled balance of merchants' accounts, *Orme* v. *Galloway*, 9 Ex. 544, but this usage is confined to the dealings of merchants with merchants, and no such usage is implied in the dealings of ordinary tradesmen with their customers, nor does any such usage prevail in cases of sales by retail. There is no usage to pay interest upon money lent and payable either on demand or at a stated time, nor upon money received by one for the use of another, nor for work and labor done, nor upon money received by one on deposit; but such a usage is implied when deeds are deposited with bankers to secure a loan, such a transaction being in effect a mortgage upon a loan from bankers upon the security of title-deeds.

Upon mercantile instruments, such as bills of exchange and promissory notes, in the absence of any agreement they bear interest only from their maturity, and upon all instruments bearing interest, in the absence of any agreement to pay interest after they mature, the better opinion now seems to be that a jury may, and the Court ought, to give interest at the same rate as the debt bore before maturity, if it were reasonably within the contemplation of the debtor and creditor that the rate contracted for while the debt was maturing would be the rate after maturity as well. If the rate be a reasonable rate and one ordinarily paid for the use of money, that would appear to be the proper rate; but if on the other hand the rate be excessive and one that no man would voluntarily pay except for a short while and under some pressure, then the Court may infer that the debtor and creditor made no bargain as to the rate after maturity, and the legal rate, six per cent (see C. S. C. cap 58, sec. 8) would then be the proper rate to be allowed; *Keene* v. *Keene*, 3 C. B. N. S. 144; *Simonton* v. *Graham*, 17 Can. L. J. N. S. 169; *Cook* v. *Fowler*, L. R. 7 H. L. 37; *Dalby* v. *Humphreys*, 37 U. C. R. 514.

It has been held that when goods have been sold by an offer in writing, one-third cash and balance by bill at six and twelve months, interest may be collected upon the portion of the purchase money payable in cash from the date of the delivery of the goods if the cash be not paid, *Duncombe* v. *The Brighton Club*, L. R. 10 Q. B. 371; and it was held that it was not necessary that the written offer should state when the cash payment would be payable. It is enough if the demand be of a sum, and at a time, that can be reasonably rendered certain, *Geak* v. *Ross*, 44 L. J. C. P. 317. In the same case it was held not necessary that interest should be demanded in express words if it can be reasonably inferred from the contents of the written demand that the creditor is seeking interest upon the indebtedness due him, and it would seem that if the demand be for interest for the past as well as the future, or for too great a rate, the demand will at all events enable the creditor to claim legal interest from the date of the demand if the debt be then payable. In a recent case Chief Justice Wilson allowed solicitors interest (they having, when rendering their bill, demanded interest), following *Berrington* v. *Phillips*, 1 M. & W. 48. This case seems to be at a variance with *In re*

Smith, 9 Beaven 342, but in principle it would seem that the decision is correct, for it would be hard to point out in what respect a solicitor's bill differs from any other bill, though it might well be that interest should not be allowed till after the expiration of the month succeeding delivery. The client may at any time tax or pay the bill, and if he does not see fit to pay, it is only fair that he should pay interest during the time indulgence is shown.

It may also be here pointed out that if a debt be contracted upon an agreement that it should be arranged by a bill or note, if the debtor neglect or refuse to give the instrument agreed upon, the debt will bear interest from the time such bill or note if given would have enabled the creditor to claim interest, upon the ground that if the debtor had given the note or accepted the bill the debt would at all events from the maturity of the securities bear interest, and the creditor should be in no worse position if he fails to receive the security by the act of the debtor, *Farr* v. *Wald*, 3 M. & W. 25; *Davis* v. *Smith*, 8 M. & W. 399.

An express contract to pay interest may be raised by the conduct of the creditor and debtor when the debtor has been in the habit of paying interest upon obligations from time to time.

The principal statute in force in this Province respecting interest is C. S. U. C., cap 43, ss. 1, 2 and 3, now R. S. O. cap 50, ss. 266 267, 268. By sec. 267 of the Revised Statute, when moneys are payable by virtue of a written instrument at a time certain, a jury may allow interest from the time when such debt became due and payable; and by sub-sec. 2 of the same section, when moneys are payable otherwise than by a written instrument a jury may allow interest from the time when a demand of payment was made in writing informing the debtor of the creditor's intention that interest should be charged from the date of such demand. As has already been intimated, when debts by agreement are payable at a time certain and bear a reasonable interest, that rate will continue to be the rate after maturity of the debt, but in all other cases six per cent is deemed to be the rate of interest when the creditor and debtor have not fixed another rate by an express or implied agreement, or where interest is allowed by operation of law. By sec. 268 of cap. 50 R. S. O., in actions of trover or trespass *de bonis asportatis*, juries may give interest as damages in addition to the value of the goods at the time of the conversion or seizure, and in actions on policies of insurance juries may in like manner allow interest over and above the money recoverable thereon. Also by sec. 269, verdicts in certain cases bear six per cent interest, and in such cases damages are only to be assessed up to the day of the verdict; and again in appeal to the Court of Appeal (sec. 43, R. S. O. cap 38), in any action personal, interest shall be allowed for such time as execution has been delayed by the appeal.

By a salutary doctrine of the Court of Equity, trustees using in trade, or not properly keeping apart the moneys of their *cestui que trust*, may be compelled to account for the same with rests during the time such moneys have remained in their hands, and where profits have arisen from such trading, may also, at the option of the *cestui que trust*, be called upon to account therefor.

RECENT ENGLISH DECISIONS.

Proceeding now to the June numbers of the Law Reports, they consist of 8 Q. B. D. 585—712; 7 P. D. 61—102; 20 Ch. D. 1—229.

GIFT—FIDUCIARY RELATION—PHYSICIAN AND PATIENT.

The first case requiring notice in the first of these, is *Mitchell* v. *Humfray*, p. 587, before the Court of Appeal. In this case the executors of a certain Mrs. Geldard, who died in 1876, strove to recover a sum of £800 from the defendant, who had acted as Mrs. Geldard's medical attendant. The defendant received the money in 1871. The case was

tried before a jury at the Assizes, and the jury then found, in answer to questions put to them, that the advance of the £800 was a gift, and not a loan; that there was no undue influence; that the relation of patient and medical attendant came to an end in 1872, and after that relationship had been ended, and after any effect produced by it had been removed, Mrs. Geldard intentionally abode by what she had done; and that the signature to certain receipts (which the defendant produced, signed by Mrs. Geldard, and which he alleged were for moneys paid by him to her, in accordance with an agreement that he was to pay her an annuity of £40), was not obtained by fraud. The judge entered judgment for the defendant on these findings, and the plaintiff appealed. Counsel for the plaintiff, on this appeal, amongst other things, raised the point that the jury were not asked whether the testatrix had knowledge of her rights, and whether she knew that the gift was impeachable. The Court of Appeal, however, now affirmed the judgment. Lord Selborne, L. C., remarked on the embarrassment caused by the shape in which the case came before the Court, whereby they were limited to a discussion on the findings of the jury, and said: "It ought to have come before us in such a shape that the whole facts should be presented for our consideration and judgment." As to the merits, he said: "No doubt the questions as to the state of the mind of the testatrix were very important; there was no evidence that she actually knew that the gift was impeachable; but she was dead at the time of the trial; and the findings of the jury imply all that ought to be inferred in the defendant's favour; they have found that the relationship of physician and patient had come to an end long before the death of the testatrix, and that she had intentionally abode by what she had done. It must be held that whether she knew or not that she had power to retract the gift, she was determined to abide by her acts; this is not a case of mere acquiescence; she had determined that she would not undo what she had done." It may be added, that this case is contained in the American Law Register for June, p. 871, and in the notes there appended to it, the general subject of gifts between persons standing in confidential relations to each other, is discussed.

FIRE INSURANCE—VENDOR AND PURCHASER—SUBROGATION.

Castellain v. *Preston*, p. 613, is a case which appears to demand very special attention. It arose out of the same contract of insurance as that with which *Rayner* v. *Preston*, L. R. 18 Ch. D. 1—noted 17 C. L. J. 460—was concerned. It may be remembered there was here a contract for the sale of a house, on which a policy of insurance existed. Nothing was said in the contract as to the policy. After the date of the contract, but before the date fixed therein for the completion thereof, the fire took place. In *Rayner* v. *Preston*, the purchaser, having completed his purchase, sought to recover from the vendor money received by him under the above policy of insurance, and the Court of Appeal held that he was not entitled thereto as against the vendor. As, however, is observed by Boyd, C., in *Gill* v. *Canada Fire and Marine Insurance Co.*, not yet reported, but noted supra p. 178, the Lords Justices in *Rayner* v. *Preston* intimated an opinion that the insurance company, who had not, when they paid the amount insured, been informed of the contract of sale, could recover the money from the vendor. In consequence of the doubt thus expressed in *Rayner* v. *Preston*, the insurers now brought the present action of *Castellain* v. *Preston*, seeking to recover the money paid by them on the policy. The company contended that the contract of insurance is merely a contract of indemnity, and unless they recovered in this action the defendants would receive double satisfaction. Chitty, J., however, held that the insurers were not entitled to recover back the insurance money from the vendor, either for their own benefit or as trustees for the purchaser.

He observes, in his judgment, that there was no English authority directly in point, and the question had to be decided on principle; and he also remarks that the circumstance that the insurers were ignorant of the existence of the contract for sale was immaterial; for that it is clear from *Collingridge* v. *Royal Exchange Ass. Co.*, L. R. 8 Q. B. D. 173, the vendors could have recovered notwithstanding the contract for sale. He then examines at length the case of *Darrell* v. *Tibbetts*, L. R. 5 Q. B. D. 560, which was mainly relied on by the plaintiffs. In that case the insurance company had insured a lessor. A fire occurred. After the insurers had paid the lessor for his loss, the tenant repaired, in obedience to a covenant in the lease, whereby he was bound to do so. The Court of Appeal, under these circumstances, held the insurance company were entitled to recover the amount they had paid. Chitty, J., calls marked attention to the fact that there the covenant in the lease, obliging the tenant to repair, was a contract *relating to the loss*, by which the landlord was entitled to receive compensation in damages, and which the insurance company might have called upon him to enforce for their benefit. What was decided in *Darrell* v. *Tibbitts* was that the landlord, having received the benefit of the covenant in the lease, the insurers had a right to treat him as being under an obligation to use it as they might direct. But it is here that *Castellain* v. *Preston* differs; and, indeed, Chitty, J., says the plaintiffs admitted the doctrine of subrogation would not apply here, the contract of sale being independent of the subject matter of the insurance. He says: "It was felt impossible to contend that the insurers, on payment of the loss, were entitled to bring, either in their own names or in the names of the vendors, the defendants, an action to enforce the contract of sale, or even to compel the vendors to complete. The contract of sale was not a contract either directly or indirectly for the preservation of the buildings insured. The contract of insurance was a collateral contract, wholly distinct from and unaffected by the contract of sale." Having thus dealt with the case, so far as the doctrine of subrogation was concerned, the learned judge proceeds to point out that the insurance was one against fire, and it could not be dealt with as though it were an insurance of the solvency of the purchaser; and, therefore, it could not be argued that because the purchase money had been paid, the vendors had in the result suffered no loss, and that for this reason the insurance company could recover back the money paid on the policy. Perhaps the most remarkable feature of the judgment is the distinct approval expressed in it of the decision in the American case of *King* v. *State Mutual Fire Ins. Co.*, 7 Mass. (Cush.) 1. In that case it was decided that where a mortgagee obtained an insurance for himself—the insurance being general upon the property, and not limited in terms to his interest as mortgagee, although his only insurable interest was that of a mortgagee—and a loss by fire occurred before the payment of the debt and the discharge of the mortgage, the mortgagee had a right to recover the amount of the loss for his own use. The result is that if such a mortgagee first recovers the loss from the insurers, and afterwards recovers the full amount of his debt from the mortgagor to his own use, he receives, as it were, a double satisfaction. It is pointed out in *King* v. *State Mutual*, that in such case the mortgagee does not really recover a double satisfaction for one and the same debt, for his contract with the insurers is quite distinct and independent from his contract with the mortgagor; and Chitty, J., in *Castellain* v. *Preston*, adopts and endorses this reasoning. In the United States, however, as appears from an article on the right of insurers to be subrogated and the rights of mortgagees, in the American Law Register for 1879, the view of the law taken in *King* v. *State Mutual* has not been adopted in the majority of the States, neither would it appear to find acceptance in our own courts. In

the latter, as in the majority of the States, the received principle appears to be that where the insurance is taken out by the mortgagee for his own benefit, or by the mortgagor solely for the benefit of the mortgagee (*Westmacott* v. *Hanley*, 22 Gr. 382), there is a right of subrogation on payment of the loss, but where the insurance is taken out by the mortgagor, or by the mortgagee on behalf of the mortgagor, that there is no right of subrogation, unless there be a special subrogation clause in the policy, and the mortgagor be a party thereto. Thus in the very recent case of *Howes* v. *The Dominion Ins. Co.*, before Proudfoot, J., noted supra p. 564, where the policy was taken out by the mortgagee on behalf of the mortgagor, the latter paying the premiums, it was held there was no right of subrogation. For although the policy contained what is called the "subrogation" or "unconditional" clause the mortgagor was not a party thereto. It may be mentioned that there is another case, *Kline* v. *The Union Ins. Co.*, standing for judgment in the Chancery Division, in which the question of subrogation is involved.

CORPORATION—DIRECTORS—RATIFICATION.

York Tramways Co. v. *Willows*, p. 685, seems to be an important case on company law. The defendant strove to escape the payment for some shares in the plaintiffs' company. The two points in the case with which the judgments chiefly deal, may be briefly put thus: (i) The constitution of the company required the business of it to be managed by the board of directors, which board was not to be less than three. It was also provided that any "casual vacancy" in the directorate might be filled up by the board; and that in the event of a "casual vacancy" the continuing board might act. In this case the shares in question were allotted by two directors only; and it was, moreover, a question whether there was a third director in existence, since the man who had been appointed third director had sent in his resignation, which resignation had, by the constitution, to be accepted by the board before taking effect, and which resignation was accepted by the other two existing directors at the very meeting at which they allotted the shares in question to the defendant. Nevertheless, in either view, Lord Coleridge, C. J., and Brett, L. J., agreed in holding that the allotment was valid because it was made by the directors—that is, by a majority. The former says: "If there were three directors, the two acted as a majority of the board. If there were two directors only, the two were acting during a casual vacancy. . . I will consider the contention that the resignation of Fry (the third director) did not create a vacancy until it was accepted. Even according to that view the defendant cannot escape from liability, for the board must act by a majority; and until Fry's resignation was accepted the board did act by a majority, and did by a majority allot these shares to the defendant." Brett, L. J., puts the point very clearly: "If the board consisted of three members, two of them, being a majority, might act; for the articles of association direct that the board shall consist of not less than three directors, and that the business of the company shall be transacted by the board, and I think it sufficient that the majority acted. Then Fry's resignation created a casual vacancy within the meaning of the 72nd article, and it was lawful for the continuing board to act until the proper number of the board should be filled up. This circumstance makes a difference between the present case and all the others cited before us, in which the powers of boards of directors have been discussed." The third L. J. (Sir John Holker) however, though he agreed in the final result on other grounds, viz., that the defendant must pay for the shares, yet dissented as to the above matter. He said, as to this: "It is said that when the board consists of three members, it is sufficient if the majority act on behalf of the board. In my opinion the better view is that the

articles of association direct that the business of the company shall be managed by not less than three directors, and that the shares must not be allotted by less than three. I think the business of the company cannot be said to be managed by the minimum number allowed by the articles, when one person is absent; it would not then be a board of three." (ii) The second phase of the case was as follows. At the same meeting at which the two directors allotted the shares in question, they also elected the defendant a director, under the provision in the constitution, that any casual vacancy occurring in the board might be filled up by the board. Having been so elected a director, the defendant attended a meeting subsequently held; he then confirmed the allotment to himself, he concurred in an order made upon the company's bankers, and agreed to a certain mode of raising money for the company's benefit. The defendant, therefore, acted as a director, and joined in these proceedings as a member of the board. Then, after doing so, he withdrew his application for shares, and refused to pay the amount of the call made in respect of them. The question, therefore, was whether he was estopped from denying his liability in the shares by having acted as director. The L. J. J. unanimously held that he was, even if it could be contended that under the plaintiffs' constitution the defendant was not duly qualified to act as director. Brett, L.J., says: "I will assume that the defendant was not qualified to be a director. . . Nevertheless he acted as a director, and did so *bona fide* and with the intention of discharging the duties of director. . . I think that the defendant was bound by his acting as a director; in this point of view also it must be taken that he joined in the allotment to himself, and I think that he is estopped from denying his liability."

FRAUDULENT SOLICITOR—LARCENY ACT—DOM. 32-33 V., C. 21, S. 77.

The last case in this number of the Q.B.D. is *Reg.* v. *Newman*, p. 706, where the question was whether a solicitor who had been entrusted by a client with money to invest on mortgage, and who fraudulently appropriates it to his own use, is to be considered to have been entrusted "with the property of any other person for safe custody," within Imp. 24-25 Vict. c. 96, s. 76 (the Larceny Act), which corresponds to Dom. 32-33 Vict. c. 21, s. 77. The court for Crown Cases Reserved held that he was not. Stephen, J., says: "If money is entrusted to an agent on the terms that he is to keep it by him and then to lay it out on mortgage, I should say that is an entrusting for safe custody within s. 76 (Dom. s. 77); for this, *Reg.* v *Fullagar*, 41 L. T. (N. S.) 448, appears to me a direct authority. In the present case we are not informed whether money in any specific form was intrusted, nor whether there were any specific directions as to the keeping of it, or whether it was simply paid by cheque, with possibly a current debtor and creditor account; if the latter were the true state of things, there could clearly be no offence within s. 76 (Dom. s. 77). Again, there is no evidence of what was to be done with the money in the interval between the intrusting and the investment; therefore, it is impossible to conclude that it was intrusted for safe custody during that interval."

Of the June number of the Law Reports, the cases in 7 P. D. 61—102, and in 20 Ch. D. 1—229, still remain for consideration.

A. H. F. L.

SELECTIONS.

INTERNATIONAL LAW AND THE BOMBARDMENT OF ALEXANDRIA.

The annexed letter from a leading authority on the subject of international law, will be found interesting by our readers. It appeared in the *Times* for July 17th:

To the Editor of the "Times."

SIR,—While I cordially acquiesce in the argument of your leading article of to-day, that international law has to be ever reforged, in accord-

ance with its native spirit, out of new facts as they continuously present themselves, I also think the legal justification of the recent bombardment is nearer at hand than this.

In the cases of the treaty for the pacification of Greece, concluded on the 6th of July, 1827; of the quadruple alliance of 1834 between France, Great Britain, Spain, and Portugal, for "establishing internal peace throughout the Peninsula;" and in the cases of the repeated utterances of the President of the United States as to possible intervention in Cuba in order to put an end to the "deplorable strife of parties,"(see message to Congress, December 7th, 1874), the principle of limited and temporary hostilities for the mere sake of humanity, as well as for the protection of outside interests, was abundantly recognized and nowhere disputed. The main factor in the present problem on which adverse advocates could rely is that the insurrectionary and anarchical forces had not had time enough to manifest their inherent strength, if they had such strength. But against all this there is to be put the enormous purely Egyptian interests jeopardized—to an extent wholly out of proportion to those suggested by earlier precedents—by every day's delay, and the probability of a recurrence of an organized butchery by soldiers of the revolutionary faction, such as that of the 11th of June. The advent of the fleet, the bombardment, and, as we may hope, the effectual and lasting pacification of the country are a series of consequences demanded by the supreme interests of humanity—the one consideration to which international law, even when most technical in its rules, has always subordinated every other.

The doctrine of restricted hostilities is a time-honoured one in international law, especially in the defensive matters of "embargo," "reprisals," and "retortions," as I have fully explained in the notes to my edition of Manning's "Law of Nations," p. 142. The recent history of the doctrine may be illustrated by that of the closely analogous doctrine of restricted neutrality. This latter doctrine was developed, but not created, by the recognition of the Confederates in the Secession war as *de facto* belligerents. The legal grounds and extent of this recognition are fully explained in a learned note by the late Mr. Dana in his edition of Wheaton. Similarly the doctrine of limited hostility will be developed and elucidated, but not created, by the recent practical application of it at Alexandria.

I am, Sir, your obedient servant,

July 15. SHELDON AMOS.

THE LAW OF DISTRESS

The report has been printed of the Select Committee of the House of Commons appointed to consider "the whole subject of the law of distress, especially as regards agricultural landlords and tenants." After an historical sketch of the law, together with a review of the evidence taken by them and of the arguments for and against the law, the Committee (of which Mr. Goschen was chairman) proceed as follows:—

"Most of the witnesses who expressed themselves in favour of a retention of the law, at the same time advocated considerable modifications in its provisions. Those that desired the total abolition of the law were of opinion that cheaper and more speedy means of re-entry, in the event of non-payment of rent, must be given to the landlord.

"In the opinion of your Committee, a period of commercial and agricultural depression would be very inopportune for the abolition of the law of distress, which would of necessity impair the existing system of credit given by the landlord to the tenant, and cause serious inconvenience.

"There are some special enactments relating to exemptions that require notice. The Lodger Act of 1871 protects goods that are not the property of the tenant; workmen's tools are exempt from seizure; looms and frames used by workmen at their homes are not liable for the rental of those homes. Goods sent to the house for the purposes of trade, as, for instance, a watch for repair, are not endangered by the law of distress. Beasts at the plough are excepted, unless there are not sufficient goods otherwise to distrain upon; and there are some other exemptions.

"The tithe owners can distrain for two years only. Under the Bankruptcy Law the landlord has the privilege of preference with regard to one year's rent only. Upon a careful review of the evidence placed before them, your Committee are of opinion that a law of distress should be retained. The evidence seems to them to favour modification rather than abolition of the law.

"Your Committee recommend the following alterations in the law:—

"That the right of distraint be restricted to one year's rent, and that this right should only be exercised within six months after the said year's rent has become due.

"That with regard to agisted stock, the limit of distress should be the consideration payable for the grazing to the farmer who takes in the stock, in accordance with section 5 of 30 and 31 Vict. cap. 42.

"That provision be made for the protection of machinery not the property of the tenant; also that animals not the property of the tenant, temporarily upon the holding for breeding purposes, be exempt.

"That the limit of £20 distress, regulated by the Act of 1817, 57 Geo. III., cap. 93, be raised to £50, and that the allowance in the schedule of that Act for a man in possession be raised from 2s. 6d. to 5s. a day.

"That, the attention of your Committee having been called to the heavy and unnecessary costs incident to the processes of distress and the sale of effects, the costs and charges relative to distress for rent in cases above the limit regulated by the Act should be subject to taxation by the Registrar of the County Court or other proper officer.

"That the time a bailiff may remain in possession under a distress may, at the request of the tenant and on his giving security for the costs, be increased from five to fifteen days, and that in such case no sale shall take place sooner, except at the request or with the consent of the tenant; also, that at the desire of the landlord, or of the tenant, the goods of the tenant may be removed for sale to public auction rooms or some other fit place.

"That appraisement previous to sale may be omitted, and that bailiffs should be approved by the County Court Judge of the district in which they act, and be subject to removal by him for extortion or misconduct.

"Your Committee are of opinion that, so far as possible, the above recommendations should be embodied in a Bill and laid before Parliament."—*Times.*

RECTIFYING MISTAKES IN WILLS.

The case of *Morrell* v. *Morrell* is of importance, as showing how mistakes occasionally creep into a will, and interesting as an example of the refined distinctions to be found in the law on the subject. The broad result of the case is, that a will by which on the face of it the testator disposed of forty shares in a company was admitted to probate with the word 'forty' omitted wherever it occurred, with the effect of disposing of four hundred shares, being all which the testator had. The decision barely stated is likely to produce some surprise. A will which is not ambiguous in any sense, but which in the clearest words bequeaths one thing has been made to bequeath another. The word 'forty' is held to have found its way into the will by mistake; and although it has all the sanction of the signature of the testator and of the attestation of the witnesses, it has been disregarded. On the other hand, it was clear that the testator meant to deal with all his shares, amounting to 400, and his instructions to his solicitor were express on this head. Sympathy is all on the side of the decision; so that, if the omission of the word 'forty' can be reconciled with general legal principles, the lawyer will have a leaning to adopt that course.

John Morrell, the testator, was a Liverpool provision merchant, who had converted his business into a limited company, of which he was the chairman, and in which his four nephews, who had before taken part in the business, were employed. He had 400 'B shares,' fully paid up, and, in instructing Mr. William Alfred Jevons, his solicitor, to prepare his will, he directed that all his B. shares should be given to his four nephews. A draft was prepared in which the words 'all my B. shares' were used in dealing with the shares bequeathed to the nephews. The draft was sent to London to be settled by counsel. The counsel, it is stated, 'inadvertently' inserted the word 'forty' after 'my,' so that the bequest was of 'all my forty shares.' The counsel does not appear to have been called as a witness, and it is difficult to see how he could have put in the word 'forty' by inadvertence. Why 'forty,' of all numbers in arithmetic? In all probability he knew from some source the number of the shares belonging to the testator and confused forty with four hundred. It is remarkable that this matter was not more fully investigated, as, in Sir James Hannen's opinion, much turned upon it. When the will was engrossed for execution Mr. Jevons read it, and noticed the word 'forty;' but it did not occur to him that the insertion was material. Whether he knew the number of the testator's shares does not appear; but he probably did. When the will was executed, it was not wholly read over to the testator. In summing up to the jury Sir James Hannen told them in effect that if words were left out, there was plainly no remedy, and if words were put in by fraud they could plainly be discarded; but the case in which one man employs another to make his will for him, and that person inserts a word by mistake, was intermediate. The main question left to the jury was whether the mistake consisted in putting in the 'forty' or in omitting the 'four hundred,' the judge plainly intimating his opinion that in the latter case the accident could not be cured. The jury in result found that the words 'forty' repeated several times were inserted by mistake; that the mistake consisted in the insertion of the words; that the testator did not know of the insertion of the words; that the will was not read over to him; and, lastly, that he meant his nephews to have all the shares. This last finding was immaterial, as the question was one of form and not of intent, and the learned judge took time to consider his judgment, as it was sup-

posed that a similar case was pending in the Privy Council. Eventually he ordered the will to be admitted to probate with the omission of the word 'forty' wherever inserted. Sir James Hannen does not appear to have had any hesitation as to the right course to pursue. He said that the verdict of the jury had disposed of the whole matter, and referred to the case of *Fulton* v. *Andrew*, 44 Law J. Rep. P. & M. 17, in the House of Lords as an authority. This case cannot, however, be said to settle the law on the subject satisfactorily. It is true the learned lords were of opinion that a certain residuary clause might be omitted from the probate; but their arguments are mainly addressed to some imperfections in the form of proceeding. It is possible that Sir James Hannen thought it best not to attempt to generalize. The subject is one which it is difficult to put in comprehensive language, and which, when so put, is very apt to mislead. At the same time, when all the facts are ascertained by a verdict, it is not very difficult to say on which side of the line the case falls. In this instance the rejection of the words in question seems to have been rightly allowed.

The matter is apt to be a little confused by the fact that a solicitor and counsel were employed to make the will. For any mistake made by them in their art or mode of carrying his intention into legal effect, the testator would, doubtless, be held responsible himself; but in regard to the word 'forty,' they were only in the position of amanuenses? They had no authority to insert the word 'forty' in the will at all. Suppose the testator had dictated his will to his valet, and this worthy, believing he knew the number of shares belonging to his master, wrote 'all my forty shares,' when the testator said, 'all my shares,' would the fact that the testator signed the document without reading it, bring about a result which was very far from the testator's intentions? Suppose the converse case, that the testator dictated 'forty of my shares,' and the amanuensis wrote, through carelessness, 'my shares,' the forty, although it can be abstracted from the will, cannot be inserted. Nothing but the attested signature of the testator can make a word part of a will, but the proof that a word was inserted by mistake may take it out of a will. In other words, the Probate Court cannot make a man's will for him, but it can prevent anything that is not really part of a man's will being given to the world as his, if that part can be severed from the rest. It may be said that in reality it is making a will to abstract words from the signed document, and so it is in a certain sense. The distinction stated in its result is a fine one, but it arises from a conflict between the duty of the Court to allow only a man's true will to be proved and the requirements of the law that certain formalities shall be regarded. Even when these formalities have been duly performed, the Court will sometimes disregard that which has obtained their sanction, but it cannot in any case dispense with those formalities. It can clear a duly executed will of foreign matter which should not be there, but it cannot introduce matter which should be there, when such matter has not had the sanction of due execution. —*Law Journal.*

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

COURT OF APPEAL.

JUNE 30.

THE GRAND JUNCTION RAILWAY CO. v. THE MIDLAND RAILWAY CO.

Railway Company—Right to land—Forfeiture of—Description of Company.

The Peterborough and Chemong Lake Railway Company, which was incorporated in 1855 (18 Vict., ch 194), had acquired the land in question as part of their road-bed, and the charter of that company expired in 1865 by reason of the road not having been put into operation, and in 1866 an Act was passed (29 and 30 Vict., ch. 98) by which the road was to be sold at auction; the Act of incorporation revived, and the time extended five years for completing the road. Within that period a conveyance was made to the defendant company, who took possession, but did not make any use of the land until shortly before the institution of proceedings in this suit. In 1872 the Cobourg, Peterborough and Marmora Railway and Mining Company filed a map and book of reference for proposed extension of their line of road over the land in question, and constructed a part of it thereon, but ceased in 1873. In 1880 the C. P. & M. R. & M. Co. leased to the plaintiff com-

pany these same lands, and the present proceedings were instituted to obtain possession.

Held, [affirming the judgment of the Court below] that the partial construction of the road by the C. P. & M. M. & R. Co. in 1872 was an act of trespass; that the defendant company, under the reviving Act and the conveyance in pursuance thereof, acquired a title to the land; that the authority to sell by the order of the Court of Chancery was permission only; that their right to the land was not forfeited by non-completion of the work within the five years; and therefore that the plaintiff company could not succeed.

The deed to the defendant company described it by its original name, which in fact had been changed.

Held, a sufficient *descriptio personæ* to enable the company to take, though it might not be sufficient to sue in.

H. Cameron, Q.C., and *Moss*, Q.C., for the appellants.

E. Blake, Q.C., and *W. Cassels*, contra.

CHAPMAN v. ROGERS.

Promissory note—Equities attaching to—Partnership—Satisfaction.

T. was carrying on business with others under the name of W. R. R. & Co., and having discovered that one of the firm (R.) was improperly making use of the name of the firm, dissolved the partnership, and thereupon entered into an agreement with R. that he should take all R's effects, including his interest in the said firm; and in consideration thereof T. covenanted to pay all debts due by the firm, including all the obligations that R. had created in the name of the firm, rightly or not; also certain debts of R.'s set forth in a schedule. Two notes made by the plaintiff for R.'s accommodation, and indorsed by him in the name of the firm, were held by a bank where they had been discounted, all of which circumstances T. was fully aware of, and with that knowledge he retired the notes at maturity.

Held, affirming the judgment of the Court below [BURTON, J. A., dissenting] that the payment must be considered as satisfaction within the meaning of the agreement, and that T. when he received the notes took them subject to all equities attaching as accommodation notes, and consequently T. could not enforce payment of them from the plaintiff.

Bethune, Q.C., and *Walkem*, Q.C., for the appellants.

Britton, Q.C., *Black*, and *Machar*, contra.

JELLETT v. ANDERSON.

Disturbance of ferry—Construction of—License to ferry.

Held, affirming the decree of the Court of Chancery as reported in 27 Gr. 411, that the plaintiff was entitled to restrain the defendant from disturbing him in the exercise of his franchise, [HAGARTY, C. J., dissenting].

Bethune, Q.C., and *Moss*, Q.C., for appellant.

Robinson, Q.C., and *J. K. Kerr*, Q.C., contra.

REPORTS.

RECENT ENGLISH PRACTICE CASES.

(Collected and prepared by A. H. F. LEFROY, ESQ.)

ORMEROD v. TODMERDEN JOINT STOCK MILL CO.

Imp. Jud. Act 1873, sec. 57—Ont. J. A., sec. 48—Compulsory reference—Appeal from judicial discretion.

The Court of Appeal has jurisdiction to review an order made by a Judge under the above section referring to a referee, as therein mentioned, any question or issue of fact—(Lord COLERIDGE, C. J., *dubitante.*)

Per BRETT, L. J.—"Prolonged examination of documents" means of such documents as it is necessary to enquire into in order to enable the Judge to leave questions of *fact* to a jury.

April 3, C. A—L. R. 8 Q. B. D. 664.

The principal question before the Court was whether or not there is an appeal against an order of a Judge ordering the mode of trial referred to in the above head-note. The order in question was made by Mr. Baron Pollock.

BRETT, L. J.—The first and most important question which I will consider is whether, assuming the conditions named in the 57th section (Ont. sec. 48) to have existed, this Court has jurisdiction to review the discretion of the learned Judge in such a case. I am of opinion that the Court has that jurisdiction. . . It is said that we (the Court) have not, because sec. 57 states the existence of these conditions precedent, which it goes on to say, "cannot, in the opinion of a Court or a Judge, conveniently be

made before a jury," and it is said that if the Judge has that opinion then we cannot say that it appears he has not that opinion, and therefore from the nature of the thing there is no appeal. I cannot give that force to the phrase I have just referred to. The words "in the opinion of the Court or a Judge" seem to me to be equivalent to "according to the judgment of the Court or a Judge," and inasmuch as there cannot be any positive rule of law applicable to the particular case, for that reason it is that this opinion is an opinion of discretion as distinguished from an absolute rule of law.

HOLKER, L. J.—After a reference to the sections of the Judicature Act and to the orders, I have now come to the conclusion that it was the intention of the legislature to give, and that the legislature has given, an appeal from the exercise of the discretion of a learned Judge who either makes or refuses an order for an alteration in the mode of trial. By giving an appeal I do not mean that the legislature has enacted that there should be an appeal in the strict sense of the word, but where a learned Judge has, in making such an order, not exercised his discretion properly, that there the Court of Appeal should exercise its discretion in lieu of the discretion of the learned Judge.

LORD COLERIDGE, C. J.—Although I certainly should not have made the order myself, I must decline to interfere with it when made, on two grounds: First—I think Mr. Baron Pollock had jurisdiction to make the order, and that we ought not to interfere with his discretion: Secondly—I am by no means satisfied that we have jurisdiction to review this particular kind of order, and if it were necessary, and I think it is not, to decide the case on this ground, I am prepared, as at present advised, to hold that we have not.

BRETT, L. J.—The only power given to the Court or a Judge under this section is to order that the issues of fact shall be referred. There is no power to refer issues of law; and I am very much inclined to think that the prolonged examination of documents, which is intended in this section, is a prolonged examination of such documents as it is necessary to enquire into in order to enable the Judge to leave the questions of fact, and where the examination is not so required, but only to enable the Judge to determine a question of legal right, I doubt very much whether it is an examination within this section.

[NOTE.—*The Imp. and Ont. sections appear to be virtually identical. The general subject of appeal from the discretion of a Judge is discussed in the judgments, which are of considerable length.*]

ONTARIO.

ELECTION CASE.

IN THE MATTER OF RECOUNT—ELECTORAL DISTRICT OF MUSKOKA AND PARRY SOUND ELECTION (DOMINION).

Recount by County Judge—Dominion Elections Acts of 1874 and 1878 (consolidated), ss. 55, 67—Effect of irregular acts or omissions by D. R. O.—Written ballots.

Held, that irregular acts or omissions by a deputy returning officer in dealing with a ballot before or after it has been cast by a voter do not warrant its disallowance for the candidate indicated by the voter.

Where there appeared, along with the ordinary printed forms of ballots, certain written ballots, giving little more than the names of the candidates, but apparently supplied by the D. R. O.'s and counted by them; *held*, that, on a recount, the County Judge was not justified in rejecting the written ballots.

[July 24, GOWAN, Co. J.

We give below the interesting judgment delivered by Judge Gowan in connection with the recount of votes in the recent Muskoka election, the result of which left Mr. O'Brien still in a majority of three over his opponent, Mr. Miller. The facts of the case sufficiently appear from the judgment.

Pepler, for Mr. O'Brien.

Lash, Q.C., for Mr. Miller.

GOWAN, Co. J.—In the course of this recount a large number of ballots cast were objected to by counsel for the candidates respectively, because Deputy Returning Officers in dealing with these ballots did something not in accordance with the direction of the Election Act, or omitted doing something directed by that Act, as an inspection of the ballots cast, it is contended, shows. It is urged that these ballots should now be disallowed, though counted and allowed for the candidates for whom they were given. In the view I take I need not enter on the details of these objections. But there is one class

of these ballots unique and exceptional—written, not printed ballots, giving little more than the names of the candidates—which appeared with the ordinary printed form of ballots in two divisions, and all these Mr. Lash, on behalf of Mr. Miller, urges should be struck out as entirely void—not being ballots at all—wanting in the full name of candidates and in other particulars set forth in the nomination paper. It is urged that the objection goes to the very essence of the requirements of the Act, that the use of such ballots would militate against the chief object of the ballot system, secresy in vote—would be dangerous as giving facilities for fraud in voting, and that the Act is imperative, making a certain paper a ballot and nothing else—imperative in respect to the voter as well as officers. I am pointed to the various sections in the Election Act showing the particular kind of ballot required to be used, and I am referred to a case going to show that an omission in an Act cannot be supplied. The fact of provision being made that the deputy may supply a ballot box, and no provision being made for supplying ballots not supplied by the R. O., is urged as showing clearly the utter absence of power in the D. R. O. to supply them upon the well known axiom of interpretation, *expressio unius*, etc. I have had the experience of three previous recounts with the assistance of able counsel, and had formed and acted upon a judgment not in accordance with the view urged upon the point first referred to, but I was desirous also to hear Mr. Lash and Mr. Pepler, in order that I might have all the assistance I could towards reaching a right conclusion on the matter now before me, and the second point Mr. Lash takes is the first of the kind I have been required to deal with. I have now had the benefit of having both points very ably argued, and it is thought convenient that I should pass upon these two general objections before taking up the other ballots which have for the most part little in common and involve a separate examination and decision upon each. Indeed, if I arrived at the conclusion that Mr. Lash contends for, the matter of these ballots would practically be of minor importance, for one candidate or the other would have a decided majority by striking out all the ballots coming within the general objection referred to. I desire to say a few words which I have hastily thrown together since the afternoon adjournment, for my first opinion has not been shaken; I am unable to come to the view Mr. Lash contends for. In examining the provisions of sect. 67 of the Election Act the first consideration that occurred to me was the object and purpose of the enactment—what was in contemplation in engrafting it upon the Election laws. The duty assigned to the judge seems to me to be of a very humble character, and especially limited and restrained. In examining the machinery for carrying out the vote by ballot, it is obvious enough that a great number of agents would necessarily be employed in the several electoral districts (42 D. R. O.'s in this district), and that many of them would probably be of limited education, certainly not accustomed to the work, of varied intelligence, and some possibly not without prejudice; in any case uniformity of decision could scarcely be expected from a number of men of ordinary ability, acting singly, in dealing with the variety of questions which might and probably would arise in reference to the marking of ballots—one rule might be applied by one D. R. O. and another by another elsewhere in the same electoral district. This, I think, the Legislature must have had in view, and as some corrective to the possible evil, deemed it essential that in respect to each particular election at least there should be some method by which a uniform rule, so far as possible, should be applied to all the ballots cast in every division of the same electoral district, and so certain judges conveniently resident were empowered to recount—one mind in place of each and all of the D. R. O.'s. Again, one can understand that in the hurry and possible excitement of dealing with and distributing a number of ballot papers, a mistake in numbers might easily be made, and that from pure inadvertence the ballot account or statement and the ballots cast might not agree, or wilful misrepresentation might occur. The returning officer would only have the statements to go upon and could not test their accuracy; this consideration may also have operated with Parliament in providing for an inspection of the ballots actually cast and a summing up of the vote in presence of parties interested, and with appropriate provision for the safe keeping of the ballots. Another reason may have prevailed. It is noticeable that not merely the parcels containing used and rejected ballots are to be opened, but the spoiled ballots as well, and I strongly incline to think it may

have been in the mind of the Legislature to enable a full inspection to be made under the supervision of an agent of the law whose position and habitual engagements would give assurance that the ballots would be carefully guarded and preserved in the condition in which they came; that is, an inspection that those interested might think it expedient to make in view of the ulterior proceedings to question an election return on petition. However that may be, there is the enactment, and I repeat that in my judgment the duty assigned to the judge is of a very humble character. The judge's authority is special—to act in the matter of the recount—the particular agent is designated by his name of office. He has no office in the matter, no general authority accrues to him; such as he has arises only from the mandate in the statute and to the extent set down A mere statutory agent, he acts as and within the limits pointed out. If it had been intended to give anything like a general authority to deal with the matter so as to accomplish complete justice or reach the very truth of the matter, the judge would have received power for examination into the facts involved, to secure and receive evidence necessary to a complete enquiry, and all the papers connected with the election would have been ordered to be produced before him. As it is he is simply to recount upon the material required to be laid before him, and the only material is the ballots used as contained in the parcels returned by the D. R. O. This is the sole material, in the shape of evidence, upon which the judge can act, and he is directed to recount the ballots and VERIFY—prove to be true —or CORRECT—make right—the ballot paper account.

In this recount he is limited and restrained by the rules in sec. 55, he has only the intrinsic evidence furnished by the ballots themselves, and he must form his judgment by simple inspection of the only material the statute has provided in the way of evidence. I believe this to be the proper view to take of the enactment. I feel that as a mere statutory agent I must keep strictly within the limits assigned to me. I have said the parcels of ballots are the sole material upon which the Judge can act—the only evidence before him. The 67 sec. after providing for the appointing of time and place for a recount of votes by the Judge and notice thereof to the candidates, directs that the Judge shall command the R. O. and election clerk to attend at the time and place appointed with the parcels containing the ballots used at the election, which command the R. O. and his election clerk shall obey. The "parcels." What are these parcels? It is argued that the clause in certain instructions to Returning Officers concerning the direction to their deputies to enclose the ballots, voters' list and other documents to form one parcel, shows that all the papers are put together in this parcel, and that it is the parcel to be brought before the County Judge. How can I look at any instructions to R. O. not properly before me? But even if I could I do not see how instructions subsequently framed could give any clue to the interpretation of the terms used in the Act. Looking at sec. 55, we see that the D. R. O. after making his count, shall put into "separate envelopes or parcels" all the ballot papers—those given for each candidate, those rejected, and all being endorsed to indicate their contents, and to put them in the ballot box. In sec. 57, he is directed to make out a statement of results, and enclose such statement in the ballot box, together with other election papers. These are all open and for use by R. O's. The four envelopes or parcels containing the ballots alone are sealed and these the R. O. is not to open. The R. O., having received all the ballot boxes, opens them, and from the statements contained sums up the votes. That the parcels containing the ballots only are the parcels referred to in sec. 67 seems to me most obvious. The R. O., whose summing up is challenged—if the question was one of mere "summing up"—must, of necessity, produce the material upon which his summing up was made. It is not of necessity in case of recount that the statements should be under the Judge's eyes. I think he could open the ballot parcels if they were not. But however that may be, although not required in express words to produce it the R. O. is required to be present and with his election clerk, and for what purpose I know not, if it is not for exhibiting the statements on which he acted. The things to be proved true or corrected are these statements. They are accounts assailed as incorrect, and probably it might be going too far to say the Returning Officer is not by implication bound to produce THEM—that it was an omission in the statute—he is certainly not expressly required to do so. But if he produce them, they are nothing more than the *prima facie* proof on which he acted.

But the statements are not evidence to guide to a decision as to the number of votes; and suppose the statute contemplates these being before the Judge, it is for a different purpose, and I do not see how that touches the matter of the voters' lists. The R. O. is not required to produce voters' lists, list of voters, poll book, or other matter, but merely the parcels containing the ballots used, and if the former were produced, I see no power to receive them in evidence. Outside of these ballot parcels I do not think the Judge can go for evidence as to the ballots. If it was intended to make other matter evidence it would have been specified, and the Judge empowered to order its production before him. I have said the Judge's authority is special, limited and restrained. Sub-sec. 2 of sec. 67 says that "at the time and place appointed for the recount, the Judge shall proceed to recount all the votes or ballot papers returned by the D. R. O." In doing this he is to open certain packets and no others, and sub-sec. 4 says, "he shall proceed to recount the vote according to the rules set forth in sec. 55, and verify or correct the account of the number of votes given for each candidate." Looking to sec. 55 for these rules we find them laid down for the guidance of D. R. O.; but, as already said, sec. 67 makes them the rule by which the Judge is to govern himself. These rules are as follow:—

In counting the number of votes for each candidate, the Judge is—

(A) To reject all ballot papers which have not been supplied by the D. R. O.

(B) To reject all ballot papers by which votes have been given for more candidates than are elected.

(C) To reject all ballot papers upon which there is any writing or mark by which the voter can be identified.

Rule B need not be noticed, it does not touch this case. In applying the Rules A and C to the present matter, A covers most of the ballots to which objections are taken, and I will first notice it.

Nearly 600 ballots cast at this election are questioned by reason, apparently, of some act or omission by the D. R. O. I know not if objections of the kind apply elsewhere, but some two weeks ago I had another recount wherein between 500 and 600 ballots were similarly assailed, and I think it highly probable every electoral district in the Province would be open to these objections; and the serious character of the action invoked from the agent for recounting is apparent. An election might be determined not according to the intention of the electors, but contrary to their intention, the majority disfranchised because a sworn public officer had failed to perform his duty in all its details. Moreover, if he was disposed to pervert his office it would be quite in the power of any D. R. O. in localities where opinions were pretty equally divided, to mould the result according to his wishes, and then we should have others playing at the same game. It would lead to incalculable evils. [Reference was here made to the views expressed by V. C. Blake in his judgment in the Monck case, reported 12 C.L. J., N.S., 113.] If a judge acting in a court capable of getting at the root of the thing, and scanning all the circumstances, so viewed the matter, one acting under the limited power sect. 67 gives may well decline to punish a body of voters by disfranchisement for any act or omission of the D. R. O.—a sworn officer under the Election Act.

Looking into the duties of D. R. O., they are, to my mind, capable of being viewed in two distinct stages. First, the duties *up to the time the ballots are cast;* then the duties afterwards *in opening the ballot-box and counting the votes.* (It is quite possible that the first of these duties may be done by one person, the second by another.—Sect. 32.) The first may doubtless be enquired into and dealt with in an election court, but it seems to me that the judge, under sect. 67, has neither the power nor the means of enquiring into them. If he assumes *anything* respecting them, he assumes all things rightly done by the appointed officers. It will be observed that two oaths are required, the first, K, general, and the second, Q, with a special clause vouching the correctness of the number of votes and the correctness of the count from the ballots.

If it was necessary to the sufficiency of a ballot that all the D. R. O. is required to do under the Stutute was done as prescribed, it would involve an enquiry going back upon what the D. R. O. had done, what he had omitted doing from the first, which surely could not be conducted or decided outside of an Election Court. The more I consider the question, the more I am satisfied

that no act or omission of the D. R. O. in dealing with a ballot before or after it has been cast by a voter, would warrant me in disallowing it for the candidate indicated by the voter. But just look at it! The voter comes to the poll, it is found he is entitled to vote, he asks and receives a ballot paper from an officer appointed to issue it. The voter marks the ballot with an X for the candidate of his choice. He folds it up and gives it again to the same officer, who drops it into the ballot box then and there. The same day, at the close of the poll, and when everything is fresh in the mind of the officer, the ballot box is opened, and surely it would be a monstrous thing if the same officer could (in effect) say, "True, I supplied that bit of paper as a ballot, true you marked it properly, but I did not comply with the requirements of the statute; I must reject it." Yet that is just what I am asked to do. The law never could have contemplated anything so unjust. My finding, acting under the Rule A., so far as this enquiry is concerned, is that all the ballot papers in the several ballot parcels opened by me were supplied by the several D. R. O., and I include the written ones, of which I say more presently. If substantial injury has been caused by neglect of the D. R. O., there is a proper tribunal to rectify it. There is one particular act of the D. R. O. I might have referred to before; it is alleged that the number put on the ballots is the number on the voters' list, and so furnishes the means of knowing the voter, and that this vitiates the votes. Assume for the sake of argument that the voters' list number would be a means of identification. How can I know, as a matter of fact, that the number on the ballot and that on the voters' list correspond. The voters' list is not before me. As I have already said, it forms no part of the material committed to me as evidence, and the argument being based on a fact I cannot assume and have no means of "finding," seems to me to fall to the ground. Very possibly the fact is as alleged; but the parties are standing on their strict legal rights, and I cannot go beyond my authority in dealing with them. I think the case before me is different from that which my brother Clark dealt with in a very able judgment. I judge that he thinks with me that it is not permitted to look at the voters' list as evidence.

But for some reason disclosed to him in the examination of the ballots, he saw in *certain* ballots with numbers, not in all, sufficient to warrant him in coming to the conclusion that the numbers furnished marks by which the voter could be identified. I do not see any such indication in the numbered ballots before me; there is nothing to show me when they were numbered —nothing that would make the fact reasonably clear to my mind on the mere inspection. I should certainly say they do not appear to have been put there by the voter. As I understand the learned Judge Clark, we are at one as to guiding principles; if we differ it is in the application of these principles. I can only hope I am right in the strong view I entertain as to no act of the D. R. O., as I have stated, disfranchising a voter. With regard to the written ballots, I have a word or two to add. In two of the polling divisions, namely, No. 15, Huntsville, and No. 21, Huldum Hill, the parcels when opened contained both written and printed ballots. [The particulars in these were then given.] How this happened, or why written ballots were used, I know not; I can see that all were counted. The voting with these papers was extensive on both sides. They appear to have been deliberately prepared, cut into the usual size of printed ballots. All were of the same general character, and I would say prepared on a uniform plan, the writing being the same in one of the polling sub-divisions. All, or nearly all, appeared to have the initials of the D. R. O., and as far as I could judge, nothing showed any indication of fraud or corrupt intention. Now when the D. R. O. opened their ballot boxes and found these written ballots, they would, if they had not supplied them, be at once attracted by their appearance; but they passed and counted them for both candidates. They, in effect, found that these ballots had been supplied by them, and I have no ground to doubt the fact that they were. They were wanting in the full particulars of the printed ballots, but they were supplied to voters as ballots and used as such, and I think I should consider and count them as good. It may be as contended, the ballots are wanting in essential details required by the Election Act, and there is a great deal of force in what Mr. Lash urges on many points. I cannot accept the contention that the act of giving these papers by the D. R. O. was an absolutely *void* act, though an Election Court might *avoid* the election by reason of the act, considering it went to the merits and ran counter to the Elec-

tion Law; but I do not think I can properly do so. Looking at the ballots there could be no question as to whom the voter intended to vote for. The intention was manifest enough. A number of very important points are urged, and struck me as most worthy of mature consideration by a competent tribunal, but these are questions which on the ground I have before referred to, I think must be left to the decision of such a tribunal. I found the ballots in the parcels, and they were recognized as issued by the D. R. O. If, as suggested, the ballots were supplied because the R. O. had not sent sufficient printed ballots, I see that under sec. 30 the D. R. O. *can cause a ballot box to be made* if the R. O. has failed to supply one. Is this a less important act? But the Statute made no provision in respect to such contingency of ballots running short, and having provided in the other case, the maxim already referred to may well be urged; however, I am not concerned with the solution of this question with the view I have taken. In leaving this branch of the subject, I must say that while I feel strongly with regard to the other ballots challenged on the other general objections, I am by no means so confident with regard to these written ballots; but the very able argument on the subject by Mr. Lash is, I think, for a court capable of entering fully into the question, and not for me on a recount; and so I have allowed the written ballots. There are still left some sixty-eight ballots to be dealt with separately, to which special objections are taken. Some of these objections are remarkably minute and astute on both sides. If such objections are entitled to prevail, and people are held to pedantic accuracy, and the directions for voting must be followed so closely that every minute deviation will be held to vacate a vote, "the art of marking ballots" should have a place in our public school system, so that the rising generation may be taught how to vote, and a course of ballot drill might be necessary for the present race of voters before every election. I cannot think the law demands this extreme exactness in marking ballots.

The remarks in the Monck case upon this point must commend themselves strongly to every thinking mind. A large experience in examining ballots assures me of their truth. And when the ballot discloses with clearness for whom the voter intends to vote, and there is a reasonable compliance with the requirements by which a voter is to indicate on his ballot paper his final intention as to voting, I think it should be allowed. In rural constituencies especially, the wonderful variety of expression, so to speak, in the X is very striking—due, as suggested by V. C. Blake, doubtless to nervousness, awkwardness, or a desire to embellish, and I would add also, due in many cases probably to feeble or imperfect sight, marking on a rough table or bench, and sometimes, perhaps, to a whiskeyfied condition of the delineating voter.

CORRESPONDENCE.

Were ballots used in the late elections void if numbered by Deputy Returning Officers?

To the Editor of the LAW JOURNAL.

SIR,—Within the last few weeks opposite opinions on this question have been given by local judges and by counsel, as well as in newspapers. The question is not whether the Dominion Statute is the best law that could be framed on the subject, but what is the true interpretation of it as it stands.

Some contend that though this act expressly directs ballots to be rejected if they have on them identifying marks, nevertheless the general intendment of that law requires them not to be rejected if the mark has been made by a deputy returning officer. I oppose this contention.

I admit that the literal construction of any portion of a statute is no ground for deciding contrary to the general intent of the enactments as a whole, but there is danger in the ease with which one can persuade himself that he sees this intent, unless he will be guided by the ordinary meaning of the language which the legislature has selected to express its will.

As to the intent:—While listening to the arguments that the statute means each of these marked ballots to be counted if the purport of the vote can be ascertained, one might fancy that before the days of the ballot oppressed voters had been labouring under some difficulty in getting a vote recorded for their respective candidates, and that the ingenuity of legislators had been taxed to devise machinery which would make that more easy.

CORRESPONDENCE.

We know, however, that it was the country which had been suffering from the too ready reception of votes recorded really for corrupt purposes, and that the publicity of each elector's choice (a main element in that evil) was sought to be removed. I read the election act as a restraining, not an enlarging, statute.

It is true the end to be attained is to learn and give effect to the vote of the electors, but it is the electors as a whole, at the expense if necessary of individuals of them; the work to be done by the statute is principally to *confine* the receipt of votes to those tendered according to a prescribed method, to surround them with such strict regulations, that individuals, or even bodies of electors, shall lose their votes unless they conform to the conditions described by the legislature as necessary in the public interest; this I submit as the true *general intent* of the election law.

Different legislatures may hold different views concerning the length to which the principle of secrecy should be carried. One may think it expedient to ignore every ballot so marked as to lead to identification, and if this strict rule should be found sometimes to interfere with the will of the majority, then to bear the expense of a new election. By such a course the public might be convinced that without regard to cost or other consequences, secret voting would be maintained; and it may be argued that this method would eventually remedy the evil, more surely than by making exceptions.

Another legislature, however, may believe that wrong doing by deputy returning officers will be so rare that the principle of secret voting will not be seriously impaired by counting those votes which are made open votes through the fault of these officials.

Legislatures entertaining these different views would frame their respective statutes accordingly.

The present Dominion Election Law, sec. 55, enacts that the officer is to "count the number of votes given for each candidate. In doing so, he shall reject all ballot papers . . . upon which there is any writing or mark by which the voter could be identified."

Considering the mischief to be remedied, is it in the mouth of a judge to say, the object of that act can be accomplished by counting those votes under some circumstances better than by rejecting them?

In *Heydon's* case (3 Rep. 7) it was resolved by the Barons for the sure interpretation of all statutes that "the office of all the judges is always to make such construction as shall suppress the mischief and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief and *pro privato commodo*, and add force and life to the cure and remedy according to the true intent of the makers of the Act *pro bono publico*."

Very able jurists have over and over again pointed out the evil of disregarding express enactments—one laments "that in so many instances the courts have departed from the plain and literal construction of statutes." Lord Coke said "the good expositor . . . gives effect to every word in the statute," (11 Rep. 34).

Lord Tenterden said, "Our decision may perhaps in this particular case, operate to defeat the object of the statute, but it is better to abide by this consequence than to put upon it a construction not warranted by the words of the Act in order to give effect to what we may suppose to be the intention of the legislature."—(*Rex* v. *Barham*, 8 B. & C. 104).

Chief Justice Moss said the principle of the Ballot Act was "the securing of secrecy and the non-identification of the voter, but in working out this principle we are obliged to look at the precise machinery which the Act has devised and employed."—(*The Russell Case*, Hodgins 520). These rules of interpretation are so familiar to lawyers that the mention of them here almost requires an apology; the excuse is that they seem to have been overlooked lately in contending for a construction contrary to the express enactments of the statute in question.

So far I have dealt only with principles, but the authorities are, according to my understanding, entirely with me, or rather my view does but follow in their wake. It is not to be expected that the wording of the statutes of different legislatures would be exactly similar. I know of only one judgment (*The East Hastings Case*) on the very wording of the Dominion Act concerning these ballots, but there are others on enactments substantially the same.

In *Woodward* v. *Sarsons* (L. R. 10 C. P. 749) it appeared that the presiding officer at polling station number 130, improperly placed on every ballot (294 in all) the number of the voter as it appeared on the Burgess Roll. The

judgment of the Court (Brett, Archibald and Denman, JJ.) was read by Coleridge, C. J. After referring to the different sections touching the admissibility of ballots which did not conform to the requirements of the Act, and those sections are certainly not more positive in their terms than section 55 of our Act, he formulates the substance of them as follows:—"The paper must be marked so as to show that the voter intended to vote for some one, and so as to show for which of the candidates he intended to vote. It must not be marked so as to show that he intended to vote for more candidates than he is entitled to vote for, nor so as to leave it uncertain whether he intended to vote at all or for which candidate he intended to vote, nor so as to make it possible, by seeing the paper itself, or by reference to other available facts, to identify the way in which he has voted;" and he proceeds to say:—"Applying these views to the votes in question before us, it is clear that the 294 ballot papers marked by the presiding officer at the polling station number 130, were void and ought not to be counted. There is a mark on them by which, on reference to the Burgess Roll, the way in which the voter had voted could be identified."

Inasmuch, however, as the rejection of these ballots did not alter the main result of the election, but only changed the majority by which the candidate was returned, a new election was not ordered.

In the *East Hastings Case* (not yet reported) our present question came up before Armour, J., for judgment.

There a deputy returning officer had endorsed on every ballot issued by him a number corresponding to the number of the voter on the voters' list; these ballots were counted, and the result was that the appellant was at first declared elected. On a recount before the local judge these ballots were rejected, and the majority of valid votes being for the other candidate he was accordingly declared by the returning officer to be entitled to the seat. All these facts were proved in court, and his Lordship held that the ballots could not be counted; though the improper act was not that of the voters or of either candidate, but only of the deputy returning officer.

The effect of the statute being to cast out these votes and so to thwart the wish of the majority of voters, a new election was ordered.

The most instructive case, however, is *The Russell Case* before alluded to, the more especially as the remarks af one of the judges (Blake, V. C.) in another case (*The Monck Case*, reported volume 12 of this journal, p. 113,) are sometimes referred to as supporting a view contrary to that which I am advocating. This *Russell Case* arose out of an election held after the Ontario Act of 1879. The evidence showed that the deputy returning officers of these sub-divisions had put numbers on the backs of the ballot papers corresponding with the numbers on the voters' list, believing it was their duty so to do. Separate judgments were pronounced by Moss, C. J., and Blake, V. C., each one stating the effect of thus numbering the ballots, both as it would have been under the Act of 1874, which is (on the point here discussed) substantially similar to the present Dominion Act, and as it actually was under the amending Act of 1879, which created a clause expressly for the purpose of keeping alive ballots, which under the former law would have been rejected in consequence of some fault of the deputy returning officer.

Moss, C. J., says: "In these cases it appears that the deputy returning officers endorsed upon the back of the ballot paper not merely their initials, but the numbers which appeared upon the voters' lists . . . Under the Act of 1874 (R. S. O. c. 10) that would, I apprehend, have been a fatal objection to the validity of the votes, but the Act of 1879 (42 Vict. c. 4) was passed for the very purpose of remedying that difficulty." And again he says: "It is only by virtue of the saving clause contained in that statute that he (the petitioner) is enabled, notwithstanding the mistake of the returning officer, to receive that seat to which the votes of the people entitled him."

In the same case Blake, V. C., uses this language: "The deputy returning officers are independent officers selected under the statute for the purpose of this duty. Unfortunately, ignorantly but honestly they so dealt with the ballots as that, except for the Act of 1879, these votes must necessarily have been rejected, while neither the petitioner nor the respondent is responsible for that."

I know of nothing in any judgment of a Superior Court which weakens either of these decis-

ions. They strike me as direct and conclusive on the question now discussed.

One word more on *The Monck Case*, the earlier exposition of the ballot law by Blake, V. C.

The Dominion Act of 1874, sec. 55, required the deputy returning officer to reject all ballot papers not similar to those supplied by him or contained in envelopes not similar to those supplied by him. A previous section, 53, directed him to put his initials on each ballot paper before giving it to the voter—that was evidently one method by which the officer, before counting the ballot, could know whether it had been issued by him, but it was not necessarily the only method; and the statute did not direct a ballot to be rejected in the absence of his initials; to do so would therefore have been going *beyond* the letter of the statute. The Court was asked to do this, but the learned Vice Chancellor gave convincing reasons for not doing so—for not *lightly* disfranchising electors. That was, however, a different matter from counting votes which the statute in plain language directed to be rejected, and on the duty of a court on that subject, his later judgment gives no uncertain sound—"*Except for the Act of 1879 these votes must necessarily have been rejected.*"

There is no "Act of 1879" to save such ballots cast at the late election.

Your obedient servant,

N. A. D.

August 8th, 1882.

[We willingly give space to the communication of our correspondent, without, of course, endorsing his views on its subject, as we think that it presents a carefully considered view of a question which has public, as well as professional interest, as is evidenced by numerous articles and letters which appeared in leading journals after the holding of the recent Dominion elections.—EDS. L. J.]

ARTICLES OF INTEREST IN COTEMPORARY JOURNALS.

Rectifying mistakes in wills.—*Eng. L. J.*, July 15.

The liability of building owners.—*Ib.*, July 29.

Distress for rent.—*Ib.*

Restrictive covenants as to land.—*Irish L. T.*, July 22. (From *Justice of the Peace.*)

Presumptions of life and death.—*Irish L. T.*, July 29, Aug. 5.

Cruelty warranting divorce—Accusing wife of unchastity.—*Albany L. J.*, July 29.

A reverie on a warranty deed.—*Ib.*

Ordinary prudence in false pretences.—*Ib.*, Aug. 5.

Alteration of written instruments.—*Central L. J.*, July 28.

Books of science as evidence.—*Ib.*, Aug. 4.

The rights of pew-holders.—*Ib.*, Aug. 11.

Expert testimony—Examination of written documents.—*American Law Register*, Aug.

Malicious prosecution.—*American Law Mag.*, Aug.

Lawyers *vs.* Bookmakers.—*Ib.*

FLOTSAM AND JETSAM.

QUOTATIONS IN COURT.—It is dangerous to quote in Courts of law, even when the quotation is familiar. In the course of the trial of *Doherty* v. *Lowther*, Baron Huddleston remarked that he would have to interpret the rules of racing and of the Jockey Club, however incompetent to do so. Whereupon the defendant's counsel said gallantly, "'I would not hear your enemy say so,' my lord," quoting Hamlet's protest against Horatio's self-imputed "truant disposition." This was reported as "I do not hear, my lord, your enemies say so;" as if the judge had enemies who went about saying that he knew too much about racing, whereas, in truth and in fact, the learned baron has no enemies at all. Next day the report was corrected by substituting, "I would not hear your enemies say so," which scarcely mends the matter. It is hard that misquotations shoud be suffered at the hands of brother reporters by an eminent law reporter; for such Shakespeare, amongst other things, appears to have been, as one, at least, of his cases is preserved, and is confirmed by the report of Plowden.—*Law Journal.*

The appointment of Mr. Thomas Hughes to a County Court judgeship may perhaps do something to weaken the prejudice that literature is incompatible with law. It was proof against the practical test of a man of letters becoming Lord Chancellor, which produced the sarcasm that Lord Brougham would know a little of everything if he knew a little law. When Samuel Warren brought out his 'Ten Thousand a Year' his friends professed to be anxious to know who wrote the law in it. Yet Brougham was a good though not a great, lawyer; and Warren, at least, made an efficient master in lunacy. Probably Sir Walter Scott, who never rose in the law beyond a subordinate post in the Court of Session suffered through his fame as a writer. The County Court bench has hitherto been free from the suspicion of letters, but the author of 'Tom Brown' may find a precedent in the case of the author of Tom Jones.' Fielding was an admirable police magistrate, and his novels gained from his experience in Court, while his law was probably not the worse for his having an imagination.—*Law Journal.*