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WITHIN the last few months the subject of trial by jury has been discussed in almost all its bearings, and the pros and cons have been stated with great clearness. The letter of Mr. Jelf, which has already appeared in our columns (*ante* p. 435), has been the text upon which many sermons have been preached. The last information received comes from Mexico. In that country the panel is composed of eleven "tried men and true," of whom a majority can convict, subject to review by an appellate court if the majority for conviction be less than eight. In order to provide for a possible vacancy in the panel by death or otherwise, two supernumeraries sit with the eleven throughout the trial. The impression that in many cases a jury might with benefit be dispensed with, appears to be growing in favor; but the idea, deep-rooted as it is in the Anglo-Saxon breast, that a man should be tried by twelve of his peers, will die hard.

OUR *confreres* in the Prairie Province are just now struggling with the intricacies produced by the numerous decisions rendered since the passing of the English "Common Law Procedure Act, 1852." The *Western Law Times* in a recent editorial, piteous almost in its appeal for remedial interference by the legislature, calls attention to anomalies at present existing, which to us in Ontario have been for years unknown. When judgment is signed on a specially endorsed writ, execution cannot issue until eight days from the last day for appearance, thus giving the debtor, as our contemporary laconically remarks, "eight days to abscond with all seizable goods." The creditor can, it is true, bind his debtor's *lands* immediately judgment is signed, but why should a distinction be made in favor of *goods* which so often are all that the unfortunate creditor might realize on? Another absurdity occurs in the case of a writ for service on a British subject out of the jurisdiction, when an order must be served with the writ, allowing the plaintiff to serve the writ, and a subsequent order must be obtained *allowing the service*, under which order a declaration must be *filed in the prothonotary's office*, but need not be served. Of great value this is, forsooth, to the absent defendant! These instances are taken out of many, but they serve to show the necessity of some new code of procedure. Surely our brethren could not do better than adopt our Judicature Act; it has its faults undoubtedly, but it has been pretty well hammered into shape.

WE are promised great light on the new Bills of Exchange Act. Two months ago (*ante* p. 417) we gave some extracts from the forthcoming work of the learned Master in Ordinary, Thomas Hodgins, Q.C. We hear that Mr. Maclaren, Q.C., has also in preparation an annotated edition of the same Act, and we have now before us the advance sheets of Mr. Edward H. Smythe's book. Between them all we surely ought to have all available information gathered for the instruction of the profession. They will doubtless differ in their treatment of the subject. Our readers can judge of Mr. Hodgins' labors by the extracts already given, and we can safely predicate from the past that his work will be fully and carefully done. Mr. Smythe (and we are glad to welcome this contribution from the old capital of this Province, historic Kingston) has committed the publication of his volume to The J. E. Bryant Publishing Company; and we must say that their part of the work, as well as his, so far as it has gone, is admirably done, the paper and printing being first-rate. We do not gather that it is intended by the author to attempt to compete with the standard works on Bills and Notes, but rather to give practising lawyers a convenient hand-book, pointing out the changes introduced by the recent Act and their effect upon the previous state of the law; whilst, at the same time, giving full references to the decisions in our own Courts, and further fortifying his propositions by the citation of leading cases in England.

WE yield to none in our love and admiration of the profession of the law. Its nobility cannot be successfully impugned, and it is because we are perfectly satisfied that it is a noble profession that we do not think that it needs any *ad captandum* arguments to prove it. It is for that reason we must respectfully demur to the argument put forth by Mr. R. Cunliffe, the President of the Incorporated Law Society, in his address at the recent annual meeting of the Society at Nottingham.

Mr. Cunliffe says: "Mr. Lake styled our profession 'noble,' and is it not so? Is it not our duty to advise those who require advice; to help those who are wronged to obtain redress for their wrongs; to assist the weak against the strong, the oppressed against the oppressor; to advise our clients how to keep their own and to recover that which is wrongfully withheld from them; to endeavor to obtain justice for all who seek our assistance in obtaining it; to arrange family disputes, and to endeavor (in matters in which we are consulted) to procure that each person interested in property gets his proper share of it and no more? And these being the duties of our profession, you will, I think, agree with me, that Mr. Lake was right in his choice of the term 'noble,' as applicable to it."

We can fancy some prosaic and level-headed auditor saying, "Mr. Cunliffe, I see you base the claim of your profession to be a 'noble' one on the ground that it is the duty of its members to help the wronged, to assist the weak, and the oppressed; but in all law suits, I have noticed that generally solicitors are employed, not merely on the side which is wronged, or weak, or oppressed. The wrongdoer, the strong, and the oppressor, all have their solicitors. If the claim of your profession to nobility rests on no better ground than this, it does not appear very well founded." And on the whole, we think the prosaic individual would be

somewhat near the truth. According to Mr. Cunliffe's roseate picture, one would imagine that solicitors were a chivalrous class of human beings, like the Knights Errant of old, going through the world with the sole mission of befriending the wronged and oppressed, whereas we know it is nothing of the kind. The nobility of the profession does not consist in its being always on the side of right. There are quite as many solicitors on the wrong side of cases as there are on the right, and probably more—and it must necessarily be so, because it is no part of a solicitor's duty to act as judge. Whether his client is right or wrong, he is entitled to his professional advice and assistance, and it is the solicitor's duty, as far as in him lies, to present his client's case in the most favorable manner consistent with truth to the court, and to see that the law is applied to it correctly no matter whether his client be right or wrong. The honest and faithful discharge of that duty by the profession constitutes, we believe, its true title to nobility.

THE editor of the *Albany Law Journal* has the courage of his convictions and is perfectly able to hold his own against the small canine fraternity who snap and snarl at those whose instincts and thoughts belong to a sphere immeasurably above them. A question arose as to whether one who denied the existence of God should hold the position of judge. The *Albany Law Journal* said no; and its views will be found *ante* p. 462. The writer again refers to the subject in the following manner:—

"Another correspondent, who has *not* the courage to sign his name, but who hails from Chicago, abuses us roundly for saying that no man who 'is so destitute of reason as to deny the existence of God can be qualified to pronounce the law,' calls us a fool, saying we 'make him sick,' and wants to know if Huxley, Tyndall and Spencer are fools. By no means. They are very wise men, but in our opinion, they were in this matter 'destitute of reason,' and blind to evidence. There was once a celebrated advocate in this State who believed that the earth is flat, or at all events, thought that there is no evidence that it is round. If we had said that on this point he was destitute of reason, probably the anonymous Chicago infidel would have agreed with us, and would not have accused us of calling him a fool. And yet, as it seems to us and a good many other people, the evidence in favor of the existence of a supreme intelligence is infinitely stronger than that in favor of the rotundity of the earth. We have no apology to offer for our opinion. It is one which has been held by the great majority of the wisest and greatest and best men who have ever lived. We prefer to agree with Washington and Webster and Napoleon rather than with Huxley, Tyndall, and Spencer on this point. It ill becomes this person to accuse us of uttering 'contemptuous' opinions, when in the same sentence he calls us a 'fool,' and we intend no contempt of his trinity of unbelievers when we reiterate that no man is fit to be a judge who does not believe in God, however clever and fit he may be to gather scientific facts, and however adroit he may be in arranging them in support of an incredulous or know-nothing theory. Such a man lacks the moral sense essential to a judge. Such teachings lead small and weak and

opinionated men to write anonymous letters. Think of a lawyer who will write an abusive and anonymous letter to another lawyer! This person has not even the plea of ignorance to excuse him, for he writes a good hand and spells correctly. But we would not take his stipulation without two witnesses. Make him sick, do we? Glad of it. Such fellows need to be made sick. We shall think we have not lived in vain if we make all of his sort sick enough to throw up their briefs. Bob Ingersoll would agree with us on this point."

THE letter of Mr. Saunders, which will be found in another column, points out an apparent inconsistency in the law of succession to intestates' estates under The Devolution of Estates Act (R.S.O., c. 108). The object of a law regulating the succession to property in the case of intestacy, ought to be to divide the estate in the way which any good man having regard to the natural claims of his relatives upon him, might reasonably be expected to do. In one sense, no doubt, no class of relatives have any right to claim the estate of a deceased person; it is all a matter of legal regulation, and if one class is included and another left out, the latter have no right to feel aggrieved. But we believe that the law in this respect, as in every other, ought to try and work out what the great majority of mankind looks upon as natural justice. In the case which Mr. Saunders puts of the intestate leaving a father and nephew, as the law now stands it would appear that the father alone will take, whereas if the intestate leave father and brother and nephew (child of a deceased brother or sister), the nephew will be let in to share, and will stand in the place his parent would have done if living. This certainly seems somewhat incongruous. We are disposed to think that this branch of the law is seriously in need of consolidation or codification, more especially since the revolution effected by the Devolution of Estates Act. It affects the estates of everybody in the community, and it is therefore particularly a branch of statute law, which should be included in our own Provincial Statutes, and not be left as at present, embodied in two or three ancient Imperial Statutes. There are one or two other points in connection with the Devolution of Estates Act, which require to be clearly defined on the statute book, and one is, how a devisee is to be deemed to take, whether directly from the testator or indirectly through the personal representative, and whether a formal assent of the personal representative to the devise is necessary, and if so, in what shape that assent is to be manifested; and further, some means should be provided for the protection of *bona fide* purchasers from a devisee, from any claims of the personal representative, or creditors. The scheme of the Act is to place realty on the same footing as the personalty, and it appears to us that the same rules should be made to apply to both classes of property as far as practicable. Then some provision should be made for vesting an intestate's estate in some public functionary in the interval between the death and the grant of administration or probate, so that it may always have a representative *in esse*. There is not much sense in putting creditors to the expense and delay of obtaining administration

to a worthless estate, the only asset of which may be property on which the creditor holds security, and which may be insufficient to pay his claim. We think it should also be made plain what is the duty of an administrator as regards the realty after payment of the debts. The Courts have held that his powers are then at an end, and that he can do nothing in the way of selling the land for the purpose of making a division among the next of kin. Much of the utility of the Act will be lost by this construction. Of course the right of a personal representative to sell for the purpose of division should be surrounded by proper safeguards, but that the personal representative ought to possess this power seems open to little question. As regards personal estate the personal representative has the amplest powers, and no *bona fide* purchaser from him can be disturbed in his rights; the same rule it appears to us should be applied to the realty. All statutes, however, which derogate from the common law, are so construed by the Courts as to restrict their meaning and effect within the words actually used, and the general scheme and principle upon which the Act is based seems in such cases to go for naught. In this way the obvious legislative intention is very frequently frustrated by judicial interpretation. The canon of construction may be a good sort of "rule of thumb," but we venture very much to doubt whether it is a principle altogether abreast of modern ideas.

UNITED STATES LEGISLATION.

We must not lose all interest in our neighbours, notwithstanding their unkindness in passing the McKinley Bill, so we will take a glance at the address delivered by Mr. Henry Hitchcock, the President of the American Bar Association, at the recent meeting of that body at Saratoga Springs, in August last. It was the thirteenth annual meeting, and representatives from forty-two states and territories were present. Under the constitution the president is required to communicate in his opening address the most noteworthy changes in the statute law made in the several states and by Congress during the preceding year. This is truly a herculean task. Mr. Hitchcock tells us that Congress in the eight months preceding August 1st, enacted 219 public acts and thirty joint-resolutions, and 504 private acts, and four private joint-resolutions; while the twenty states and territories, whose legislatures met during the year, enacted 8,294 acts and joint-resolutions. Heaven forbid that any practitioner should be expected to know the whole law! Nor must the reader suppose that the American legislator never slaughters the innocents; the total number of bills introduced into the House of Representatives in Congress, during the period above mentioned, was 11,626, and in the Senate, 4,298 bills; in eleven of the states whose Houses met last year, 10,838 bills were introduced, while the public laws enacted in those same states were only 1,878, the private acts increasing the total by 3,705. The proportion both as between bills introduced and laws enacted, and as between public and private acts, varies very greatly in different states; *e.g.*,

in New Jersey, out of 839 bills introduced, 311 became laws, of which all but nine were public acts; in Kentucky there were 3,014 bills, and 1,926 acts passed, of which only 174 were public acts; and in Iowa, of 947 bills, only 135 blossomed into laws. The Legislators of Montana deserves the hearty thanks of the hard-worked lawyer, for though they sat ninety days they brought forth not a single law; there was a deadlock. How happy the Ontario solicitor would be if deadlocks were common in the Toronto House. *De minimis*, etc., may apply to the courts, but it does not to the Mississippi Legislature. During last session they passed twenty such laws as these—an act to prohibit the sale of liquor within two miles of Ethel school-house, in Attala county; an act to prohibit the sale of liquor within five miles of Mount Nebo Church; another to prevent it within three miles of Artesia; another to prohibit it within half-a-mile of Dunbar's canning factory, Bay St. Louis.

Congress passed acts whereby the new States of Idaho and Wyoming were admitted into the Union; bills were introduced for the relief of the Supreme Court of the United States. The necessity of relieving this Court appears from the fact that at the close of the October term, in 1885, nine hundred and four cases remained on the docket undisposed of; at the end of the same term, in 1886, the number was 948, while in 1889 the number had risen to 1,180. The Dependent Pensions Act, and the act with regard to the World's Exposition of 1892, will assist materially in diminishing the surplus in the treasury.

Georgia goes in for co-education of the sexes, and passed an act requiring all branch colleges of the State University to admit female students to equal privileges with those enjoyed by male students; she also establishes a first-class college in connection with the University, where white girls will be taught, among other things, decorative art, dress-making, and domestic economy; this is an idea for our Provincial legislators. New Jersey directs the display of the Stars and Stripes upon her school buildings during school hours. James the First of England and the Canada Methodist Conference will both be pleased to know that ten states issued counterblasts against the use of tobacco by minors; in New Hampshire a fine of $50, in Virginia one of $100, threatens him who sells cigarettes to youths, the Virginia Act placing that dangerous combustible in the same category with pistols, dirks, and bowie-knives. In the other seven the prohibition includes the sale or gift of the weed in any form, and in Kentucky, the persuading of any child to smoke it. But from this restriction the boys of Maryland and Wyoming are emancipated at the age of fifteen, though the latter denies them the consolation of pistols and bowie-knives until twenty-one; those of the Dakotas and Virginia, after sixteen; of Michigan, after seventeen; and of South Carolina and Kentucky, after eighteen; while in Georgia the herb remains proscribed *durante minore ætate*. Wyoming forbids the sale to any minor of any deadly weapon which may be concealed about the person, and North Dakota, with great wisdom, authorises the expulsion of minors from court-rooms during trials of a scandalous or obscene nature. Our own M.L.As. would do more good by introducing such a measure than by amending the act with regard to Line Fences.

Massachusetts forbids any elevator, running over 200 feet per minute, being operated by any person under eighteen, and any elevator whatever to be placed in charge of any person under fifteen. A statute of Washington declares that every avenue of employment shall be open to women, nor shall any person be disqualified by sex from pursuing any business, profession, or calling; but this shall not be construed to permit women to hold public offices. Michigan and North Dakota forbid the solemnization of marriages except by license, and the latter requires the consent of parents in the case of males under twenty-one, and females under eighteen. New Jersey now allows divorce in the case of desertion for two years, formerly it was three. Numerous enactments have been passed in fifteen states designed to protect the public safety, health, and morals. Kentucky passed several acts forbidding lotteries for the benefit of schools, colleges and similar institutions, and declaring it unlawful to advertise such schemes. The preamble of each of these acts in vigorous terms denounces lotteries as a most demoralizing and odious system of gambling, degrading to the State, inducing idleness and crime, productive of extensive evils and injury to the people of the Commonwealth, injurious to public morals, and immoral in all its tendencies. Michigan adopted high license and local option; Iowa made its prohibitory laws still more elaborate and stringent; North Dakota and South Dakota both adopted severe prohibitory statutes; Georgia makes it a misdemeanor to sell or furnish liquor to any intoxicated person.

Rhode Island, Michigan and Maryland, require safe heating appliances to be substituted for the deadly car stove, while Iowa goes in for automatic safety couplers and automatic power-brakes on all cars after a certain day. Massachusetts, Ohio and Michigan offer bounties for the destruction of English sparrows; North Dakota offers them for wolf scalps, with the ears attached; Wyoming for wolves, bears and mountain lions; while Massachusetts appropriates $50,000 for a special commission charged with the extermination of the gypsy moth. According to an Ohio statute, no cattle, sheep or hogs shall be considered natives of that state unless they have been within it for at least sixty days before being killed.

Considerable attention was given by the learned President to the subject of ballot reform and the so-called Australian Ballot System; he traced the progress of the system, first adopted in South Australia in 1859, soon after in Tasmania and New South Wales, then in New Zealand, Queensland, Victoria, and West Australia; it was substantially adopted by Great Britain in 1872. Thence spreading to British America, it was introduced into British Columbia, Ontario, Quebec, Nova Scotia, Manitoba and the Dominion Parliamentary elections and in Europe in substance at least, into Belgium, the Grand Duchy of Luxembourg, and Italy. Among the American States, Michigan first attempted to adopt it in 1885, but unsuccessfully. In 1887 Wisconsin applied some of the features of the Australian system to elections in the larger cities; in 1888, Kentucky applied it to some municipal elections, while in the same year Massachusetts enacted a law applying it to all elections. During 1889, bills adopting it were introduced into the legislatures of twenty states and the territories of Montana and Dakota, and in Connecticut, Indiana, Minnesota, Missouri, Rhode Island,

Tennessee, Wisconsin and Montana, it became law; and during the past twelve months the system has been adopted in New York, New Jersey, Michigan, Washington and Wyoming. There are thus fourteen states in which, though not in all of them to the same extent or with a like degree of completeness, the Australian system is now in operation. Supplemented by stringent enactments like the Corrupt Practices Act, this system, Mr. Hitchcock thinks, gives an assurance of the absolute purity of elections.

We cannot follow Mr. Hitchcock through the various constitutional amendments made by various states and referred to by him, but must conclude by saying that he does not consider biennial sessions a movement backwards in the march of free government, nor does he object to the constitutional restrictions imposed in various states upon the legislative power in private, special or local legislation, or think that it indicates a growing distrust of representative institutions, but considers such restrictions only "obstacles in the way of the people's whim, not of their will." *R.*

COMMENTS ON CURRENT ENGLISH DECISIONS.

ERRATUM—In paragraph 1, p. 485 for "R.S.O., c. 3" read "R.S.O. c. 111."

The Law Reports for October comprise 25 Q.B.D., pp. 421-484; 15 P.D., pp. 136-184: and 45 Chy.D., pp. 1-86.

BILL OF SALE—PLEDGE OF GOODS—DOCUMENT CONTAINING TERMS OF PLEDGE—POSSESSION.

Mills v. *Charlesworth*, 25 Q.B.D., 421, is one of those comparatively rare instances in which the Court of Appeal fails to come to an unanimous decision. The question was whether a document embodying an agreement for the pledge of certain goods was or was not a bill of sale within the meaning of the *Bills of Sale Act*, 1878 (see R.S.O. c. 125). The goods in question had been seized by the sheriff under a *fi. fa.*; the owner of the goods then agreed with the defendant Charlesworth that he should advance the money to pay off the execution, and that the sheriff's bailiff should hold the goods as security for Charlesworth's advance, and a memorandum was signed by the debtor authorizing Charlesworth to hold possession and sell the goods. The debtor continued to reside in the house where the goods and the bailiff were, and the goods remained undisposed of for over a fortnight. The debtor then in fraud of Charlesworth executed a bill of sale to the plaintiff who took without any actual notice of Charlesworth's claim. This bill of sale was duly registered, and on Charlesworth discovering its existence he removed and sold the goods. Lord Esher, M.R., was of opinion that the defendant had actual possession by the bailiff, but Lindley and Lopes, L.JJ., were agreed that there had been no actual change of possession, that the title of the defendant could not be proved without reference to the agreement, and therefore it was a bill of sale. Lord Esher, however, thought that the transaction was covered by *Re Hubbard*, 17 Q.B.D., 690, and that it was only a pledge because accompanied by an actual delivery of possession, and therefore that the writing recording the pledge need not be registered. The judgment of Day, J., at the trial was therefore affirmed.

HIGHWAY, LIABILITY TO MAINTAIN—FOOTWALKS.

In re Local Board of Warminster, 25 Q.B.D., 450, may be referred to as an authority for the proposition that when a Statute imposes a duty on a municipal authority to maintain a road, it includes the footwalks at the side of the road.

PRACTICE—OFFICIAL REFEREE, JUDGMENT OF—APPEAL—POWER OF COURT TO ENTER JUDGMENT—ORD. XXXVI., R. 52; ORD. LIX., R. 3—(ONT. JUD. ACT, S. 103).

In *Clark* v. *Sonnenschein*, 25 Q.B.D., 464, the Court of Appeal (Lord Esher, M.R., Lindley and Bowen, L.JJ.) affirmed the decision of the Queen's Bench Division, 25 Q.B.D., 226 (noted *ante* p. 452), to the effect that on appeal from the direction of a referee to enter judgment, the Court may order any judgment it sees fit to be entered. It has been already pointed out that under the Ontario practice the referee to whom a cause is referred has no power to direct a judgment to be entered. He can only find the facts, and a motion must be made to the Court for judgment; this case, however, may be taken to settle the point of practice that notwithstanding the wording of Ont. Jud. Act, s. 103, to the effect that the finding of a referee, unless set aside by the Court, is to be equivalent to the verdict of a jury; it does not follow that the Court can only set aside a finding of a referee in the same way and on the same grounds that a verdict of a jury can be set aside. Lord Esher, M.R., lays it down that a finding of the referee is subject to the same rules of appeal as the decision of a judge trying a case without a jury, which is probably to be taken to refer both to the grounds on which the finding may be set aside, and to the tribunal by which it may set it aside. In Ontario, however, the decision of a judge trying a case without a jury can only be set aside by a Divisional Court, or the Court of Appeal, whereas the judgment of a referee may be set aside by a single judge.

PRACTICE—"JUDGMENT" AND "ORDER," DIFFERENCE BETWEEN.

In *Onslow* v. *Commissioners of Inland Revenue*, 25 Q.B.D., 465, it became necessary for the Court of Appeal (Lord Esher, M.R., and Lindley, and Bowen, L.JJ.) to determine what is the difference between an order and a judgment. Following the decision of Cotton, L.J., in *Ex parte Chinery*, 12 Q.B.D., 342, they came to the conclusion that a judgment is a decision obtained in an action by which a previous existing liability of the defendant to the plaintiff is established, and that other decisions were orders. In the present case the decision sought to be appealed from was given upon a case stated under a Statute, and it was held that it not being given in an action, the decision was therefore not a judgment but an order.

HUSBAND AND WIFE—MARRIED WOMAN—SECOND MARRIAGE—DEBTS CONTRACTED BEFORE MARRIAGE—RESTRAINT UPON ANTICIPATION—MARRIED WOMAN'S PROPERTY ACT, 1882 (45 & 46 VICT., C. 75), SS. 13, 19—(R.S.O., C. 132, SS. 15, 20).

In *Jay* v. *Robinson*, 25 Q.B.D., 467, a new point under the Married Women's Property Act arose. By sec. 13 (see R.S.O., c. 132, s. 15) it is provided that

after marriage a wife shall continue to be liable in respect of and to the extent of her separate property for "all debts contracted by her before marriage." By sec. 19 (see R.S.O., c. 132, s. 20), nothing in the act is to interfere with or affect any settlement or render inoperative any restraint against anticipation; but it is provided that no restriction against anticipation contained in a settlement of a woman's own property to be made or entered into by herself shall "have any validity against debts contracted by her before marriage." In this case a judgment for a sum of money was recovered against a married woman, who subsequently obtained a dissolution of her marriage and married again; and by a settlement made on her second marriage, property belonging to her was settled to her separate use without power of anticipation. The question, therefore, for the Court was whether the property thus settled was liable for the satisfaction of the debt so incurred during the first marriage. For the defendent it was contended that the only debts before marriage which were protected and within the saving clause of s. 18 (Ont. Act, s. 20) were debts contracted by a married woman before any marriage at all had taken place and such as create a common law liability. But the Court of Appeal (Lord Esher, M.R., Fry and Lopes, L.JJ.) were unanimous that the liability which a married woman is empowered to incur under the Married Woman's Act is a debt within the Statute, and that the words "before marriage" in s. 13, (Ont. Act, s. 15) are not confined to a first marriage, but relate to the marriage actually existing at the time of the inquiry.

SHIP—BILL OF LADING—EXEMPTION OF SHIP-OWNER'S LIABILITY—NEGLIGENCE.

Norman v. *Binnington*, 25 Q.B.D., 475, is a case on the construction of a clause in a bill of lading whereby the ship-owner was exempted from liability for injury to the cargo arising from *inter alia* "negligence or default of pilot, master, mariners, engineers, or other persons in the service of the ship, whether in navigating the ship *or otherwise*, loss or damage arising from rain, storage, or contact with other goods being excepted, and the ship not being liable for any consequence of the causes herein excepted, however caused or originated." The goods in question after being placed on board were injured by reason of persons, for whose acts the ship-owner was responsible, negligently exposing them to rain and contact with other goods which were wet. Charles, J., before whom the action was tried, was of opinion that the ship-owner was liable, and that the injury was not within the exemption of the bill of lading, but on appeal to a Divisional Court (Cave and A. L. Smith, J.J.) this decision was reversed. It was admitted that the exemption protected the ship-owner from liability for damage by rain or contact with other goods which were wet, but it was contended that the exemption did not apply when such damage was brought about through the negligence of the ship-owner's servants; but the Divisional Court held that the words "or otherwise," which we have italicised above, extended the ship-owner's exemption from liability for the negligence of his servants to all acts of negligence on their part which might result in bringing about any damage from which the ship-owner was to be exempted.

EASEMENT — AIR—PRESCRIPTION—RIGHT TO VENTILATING SHAFT ON PROPERTY OF ANOTHER—LOST GRANT.

Bass v. *Gregory*, 25 Q.B.D., 481, was a rather curious case. The plaintiff claimed an easement by prescription, or lost grant, under the following circumstances: Upon the plaintiff's premises was a cellar hewn out of the rock, which cellar, for the past forty years, had been used for brewing, and which had been ventilated by means of a shaft cut therefrom through the rock into a disused well on the defendant's premises. The opening of this well the defendant had interfered with and the plaintiff claimed an injunction. Pollock, B., before whom the case was tried, held it to be a case in which a lost grant ought to be presumed, and granted the injunction.

PROBATE—LOST WILL—WILL PROVED BY ORAL EVIDENCE.

The only case in the Probate Division which we think necessary to refer to is the important one of *Harris* v. *Knight*, 15 P.D., 170, in which the other branch of the Court of Appeal, presided over by Cotton, L.J., failed to agree with their chief. The case was one in which probate was sought of a lost will. It was proved that a document purporting to be a will had been produced at the testator's funeral by his widow, which she claimed gave her a life interest in a freehold estate which constituted his only property, and after her death it was to be divided among the testator's sons and daughters. The paper was subscribed with three names, one of which purported to be that of the alleged testator, but there was no evidence that there was any attestation clause. The defendant, who was the eldest son, who read the paper at the funeral, said at once it was no will of his father's and that the signature purporting to be his was not. No steps were taken to prove the will, but the widow lived on the property undisturbed until she died, a period of eight years. There was evidence to identify the signature of one of the witnesses to the alleged will. Cotton, L.J., in the absence of proof of there being any attestation clause, or of the due execution of the will, thought the will was not proved, whereas Lindley and Lopes, L.JJ., were of the opinion that the maxim *omnia præsumuntur rite esse acta* ought to be invoked in favor of the will.

PRINCIPAL AND AGENT—BRIBES RECEIVED BY AGENT—INVESTMENT OF MONEYS RECEIVED AS BRIBES BY AGENT—FOLLOWING MONEYS.

In *Lister* v. *Stubbs*, 45 Chy.D., 1, the plaintiffs claimed that the defendant, while in their employment as foreman, took from one of the firms from whom he bought materials for the plaintiffs large sums by way of commission, a portion of which he had invested, and the plaintiffs claimed to recover from the defendant the amounts he had so received, and that they were entitled to follow the money into the investments, and they moved for an interlocutory injunction to restrain the defendant from dealing with the investments, or for an order directing him to bring the money into Court. But Stirling, J., refused the motion, holding that the relation between the defendant and the plaintiffs was

that of debtor and creditor, and not that of trustee and *cestui que trust*, and therefore they had no more right than any other creditor to interfere with the defendant's use and enjoyment of his property before judgment, and his decision was affirmed by the Court of Appeal (Cotton, Lindley, and Bowen, L.JJ.).

COMPANY—DIRECTORS—INVALID ALLOTMENT OF SHARES—RATIFICATION—PRINCIPAL AND AGENT.

In re Portuguese Consolidated Copper Mines, 45 Chy.D., 16, the principle to be deduced from the decision of the Court of Appeal (Cotton, Lindley, and Bowen, L.JJ.) affirming North, J., appears to be this, that when in answer to an application for shares an allotment is made at an invalid meeting of directors, and notice of the allotment is sent to the applicant, such allotment may at any time before the application is withdrawn be ratified at any regular meeting of directors; and a refusal to pay the allotment or an appeal *ad misericordiam* not to press the shares on the applicant; are not equivalent to a withdrawal of the application, neither is a refusal to accept the certificates of allotment, unaccompanied by any distinct repudiation of the allotment; and that where the ratification takes place three or four months after the allotment, and before any repudiation of the allotment, it is within a reasonable time; and, further, that the company bringing an action to enforce payment of the allotment, or a resolution passed at a duly constituted meeting of directors, are both sufficient acts of ratification by the company.

CREDITOR'S DEED—RESULTING TRUST.

Cooke v. *Smith*, 45 Chy.D., 38, presented a neat point for decision, but the Court of Appeal (Cotton, Bowen, and Fry, L.JJ.) came to the conclusion that Kekewich, J., failed to solve it correctly. The point was this, an assignment of a debtor's estate for the benefit of creditors, which provided for the distribution of the estate among the creditors (who released the debtor from liability), but which contained no express provision for the disposal of any surplus which might remain after paying the creditors in full: and the question was, in such a case is there any resulting trust for the assignors which would entitle them to bring an action of account against the trustees. Kekewich, J., said "no," but the Court of Appeal were of the contrary opinion. Kekewich, J., thought the whole of the estate was divisible among the creditors in proportion to their claims, no matter what it might yield. But there was a provision enabling the trustees to pay certain creditors for small amounts in full, in advance of other creditors, and the Court of Appeal laid hold of this circumstance as indicating that the true intention was merely to provide for the payment of the claims in full.

MARRIED WOMEN'S PROPERTY ACT, 1882—(45 & 46 VICT., C. 75) S. 5—R.S.O., C. 132, S. 7)—CONTINGENT TITLE—SPES SUCCESSIONIS—GIFT TO NEXT OF KIN OF PERSON WHO IS SUPPOSED TO DIE AT A FUTURE TIME.

In re Parsons, Stockley v. *Parsons*, 45 Chy.D., 51, a question arose under the Married Woman's Property Act, 1882. A testator died in 1879, and bequeathed

a sum of money to trustees upon certain trusts and subject thereto, in trust for "such person or persons as at the time of the failure of the preceding trusts would be my next of kin, and entitled to my personal estate, under the Statutes for the distribution of the personal estates of intestates, if I had then died intestate." This event happened on 21st May, 1886, and a woman, married in 1857, was one of the persons who would have been next of kin of the testator if he had died on the 21st May, 1886. She made a will disposing of her interest, dated in 1889, and died in the same year, leaving her husband surviving. The question was whether, under the circumstances, the will was valid. This depended on the date at which the title or interest of the wife accrued. Kay, J., was of opinion that up to the 21st May, 1886, the wife had a mere *spes successionis* which was neither an interest or title, and that the maxim *nemo hæres viventis* applied, so as to prevent her having an actual vested or contingent interest prior to that date. That therefore under the Act of 1882, the property having been acquired by her after the Act, it become her separate property under its provisions, free from any marital right of her husband. In arriving at this conclusion, the learned judge found it necessary to consider an Irish case: *Re Beaupres Trusts*, 21 L.R., Ir. 397, in which the Master of the Rolls, the Lord Chancellor, and Lords Justices of Ireland, had arrived at a contrary decision, but which, being in conflict with the English cases, he declined to follow.

WILL—LEGACIES PAYABLE OUT OF PROCEEDS OF SALE—DEFICIENCY—FAILURE OF ONE LEGACY—ABATEMENT—RESIDUARY LEGATEE.

The only case remaining for consideration is *In re Tunno, Raikes* v. *Raikes*, 45 Chy.D., 66, which was for the construction of a will. The testatrix had made a bequest of her diamonds upon trust for sale, and out of the proceeds to pay two legacies of £600 and £700. The £600 was for the repair of a church, "such repairs to be commenced within the period of twelve months from my decease." The repairs were not so commenced. The other legacy was declared invalid. The will contained a residuary bequest, but did not otherwise deal with the surplus, if any, derived from the diamonds. The diamonds realized £900, and the questions Chitty, J., was called on to decide were (*a*) Had the £600 legacy failed by reason of the repairs not having been commenced within twelve months; (*b*) Was that legacy entitled to be paid in full, or was there to be an abatement proportioned to the deficiency of the fund to pay the two legacies. Chitty, J., held that the clause as to the commencement of the repairs did not amount to a condition precedent, and that the residuary legatee was only entitled to what was left after payment of the £600 legacy in full.

Correspondence.

THE DEVOLUTION OF ESTATES ACT.

To the Editor of THE CANADA LAW JOURNAL:

SIR,—Few people will, I think, be disposed to deny that the Devolution of Estates Act was a step in the right direction. I, however, desire to call attention to a point which, I think, may have been overlooked. Section 6 provides that "when a person shall die without leaving issue and intestate as to the whole or any part of his real or personal property, his father surviving shall not be entitled to any greater share under the intestacy than his mother, or any brother or sister surviving."

Now equitable as is this provision, it does not appear to me to be sufficiently comprehensive to meet a contingency very likely to arise.

Under the English Statutes of Distribution, if the intestate leave neither wife, nor child, nor the descendants of any child, then, if the father be dead, the mother, brothers, and sisters of the intestate take the personalty in equal shares; but if any brother or sister shall have died in the lifetime of the intestate leaving children, such children shall stand *in loco parentis*, provided the mother or any brother or sister of the intestate be living at his decease, but not otherwise.

Now let us suppose that since the Devolution of Estates Act became law, a person in Ontario dies intestate without leaving any wife, child, or children, or their descendants, but leaving him surviving his father, mother, brothers, and sisters, and the descendants of a deceased brother or sister. As the law stood prior to the 1st August, 1886, the father would, in the case put, have taken the whole of the personalty; but since that date he will very justly be allowed to take only a distributive share of the estate, and the descendants of the deceased brother or sister may, it is thought, be permitted by virtue of the Statutes of Distribution to stand *in loco parentis*, and in this way justice would be done all round.

But let us see what will be the effect under a different state of facts. Supposing the intestate leave only a father and the descendants of a brother or sister, what will happen then? The Devolution of Estates Act is silent as to the children of a deceased brother or sister standing *in loco parentis*, and the English Statutes of Distribution, and the cases decided thereunder, show that the children of a deceased brother or sister can only stand *in loco parentis* provided the mother or any brother or sister of the intestate be living at the time of his decease. And, therefore, as between the father and the descendants of a deceased brother or sister, the whole of the personalty would go to the father and sub-sec. 1 of sec. 4 of the Devolution of Estates Act at once comes to his aid and gives him the whole of the realty, thus completely excluding the children of the intestate's deceased brother or sister.

The Legislature could hardly have intended any such result, and if my view of the law as it now stands be correct, the Act ought to be amended, as if the descendants of a deceased brother or sister are entitled to share when the father, mother, and a number of brothers and sisters of the intestate are alive, they are surely equally entitled when the father only is alive.

E. SAUNDERS.

Kemptville, Oct. 8, 1890.

OUR SCHOOL SYSTEM.

To the Editor of THE CANADA LAW JOURNAL:

SIR,—Your journal is not an educational publication; but as it is certainly the best we have for the discussion of questions concerning the education laws of Ontario, I venture to call your attention to the following little article which, with the aid of Mr. Punch and the authorities therein mentioned, I wrote, and the Editor of *The Week* kindly printed in the number of his paper for the 25th July, now past, and with the spirit of which I am glad to see, by his late address to a large audience at Guelph, the Minister of Education cordially agrees, and has foreshadowed his intention of proposing certain amendments in which I feel confident you and your readers will agree with like cordiality, and wish him success. The following is the letter referred to:—

"I read with much pleasure the paragraph in the leading article of *The Week* of the 25th July last, in which you remark and refer to *The Bystander* as agreeing with you—that three-fourths of those who use the Public schools are just as well able to pay for the schooling of their children as for their food and clothing, and are equally bound to do so: that there is reason to fear the very class for which gratuitous education is needed don't avail themselves of the provision; that if the state of the law is such that we are unable to get the children of the poorest educated, it should be altered for that purpose; and that the free education of all classes which is in many cases given in the high schools is something still more unreasonable; in all which I most cordially agree, as I do also with your concluding remark that the provision last mentioned is not merely unjust to those who make no use of these schools, but is frequently injurious to those who are induced to use them, when they might be better employed in manual labor. With reference to this last remark, I think it would do no harm to call the attention of your readers to the following extract from Mr. Punch's sensible and dramatic illustration of the case as respects the Public schools in England:—

TOO CLEVER BY HALF.

Being questions and answers cut on the straight.

Question.—So you have finished your education?

Answer.—Yes, thanks to the liberality of the School Board.

Q.—Do you know more than your parents?

A.—Certainly, as my father was a sweep and my mother a charwoman.

Q.—Would either occupation suit you?

A.—Certainly not; my aspirations soar above such pursuits, and my health, impaired by excessive study, unfits me for a life of manual labor.

Q.—Kindly mention what occupation *would* suit you?

A.—I think I could, with a little cramming, pass the examination for the Army, the Navy, or the Bar.

Q.—Then why not become an officer in either branch of the United Service, or a member of one of the Inns of Court?

A.—Because I fear that, as a man of neither birth nor breeding, I should be regarded with contempt in either the Camp or the Forum.

Q.—Would you take a clerkship in the city?

A.—Not willingly, as I have enjoyed something better than a commercial education; besides city clerkships are not to be had for the asking.

Q.—Well, would you become a shop-boy or a counter-jumper?

A.—Certainly not; I should deem it a sin to waste my accomplishments (which are many) in filling a situation suggestive of the servants' hall rather than of the library.

Q.—Well, then, how are you to make an honest livelihood?

A.—Those who are responsible for my education must answer that question.

Q.—And if they can't?

A.—Then I must accept an alternative and seek inspiration and precedents from the records of success in another walk of life, beginning with the pages of the Newgate Calendar!—*Punch, July 12, 1890.*

Punch is a moralist and philosopher of the laughing school; but our English proverb tells us, there is many a true word spoken in jest. The Roman philosopher and poet asks: *Ridentem dicere verum,—Quid vetat?* "What hinders a jester from speaking the truth?" Common sense answers, Nothing hinders, and *Punch's* illustration is apposite to his case in hand. It is not right that boys should receive *at the public expense* an education that unfits them for manual labor; and those who make the laws, which give them such education at the cost of the tax payer, are responsible and must answer the question *Punch's* examiner puts. Education at the public expense should be given only to those whose parents cannot pay for it, and should apply to such subjects as will be of use to them in such callings and employments as they may reasonably be supposed likely to be engaged in, and should certainly not be such as would unfit them for manual labor, the independence and respectability of which, especially in agricultural persuits, should be always strongly insisted upon. Institutions for higher education should be supported by voluntary contributions, or if aided from the public purse should only be so to a very moderate extent, and for purposes in which the state has a direct interest, or which are connected with the scholar's probable calling and means of support. No one should be placed at the cost of the taxpayer, in the position in which *Punch's* examinee finds himself by being *too clever by half.*"

You may be sure that I perfectly agree with the Minister in all he is reported as having said in his address, touching the injustice of taxing the whole people for the support of schools without providing for the attainment of the end for which the taxes are imposed, and as to the qualification and adequate remuneration of the school teachers, and his plan of switching pupils off the usual track of education in the High Schools to lines of commercial, industrial, and agricultural training. He might perhaps allow a similar switching off between the ordinary Public School and the High School, for there must certainly be a majority of passengers in the educational train who do not need to proceed beyond the end of the Public School track; all could not with advantage avail themselves of through tickets, and should certainly not be provided with them at the cost of the taxpayers. Anyone who desires further information and fuller arguments in support of the Minister's views, may read with advantage the article on "Over Education" in the *Westminster Review* for September last, (1890), the writer whereof holds a university education by no means necessary to success, even in some professions for which it has heretofore been deemed essential, and hints that the name of Mr. Gladstone may possibly close the list of great scholarly statesmen.

W.

[We agree in the main with the views expressed by our valued correspondent. The subject is one which doubtless will receive more attention as time goes on and the objections to the present system develop themselves. But while we gladly open our columns to the discussion of this subject, to the above extent, we have not space to pursue it further, even were it strictly within the field of our labors as a legal journal, which it can scarcely be said to be.—Ed. L.J.]

Notes on Exchanges and Legal Scrap Book.

CARRIERS—LIABILITY FOR BAGGAGE.—Plaintiff, having bought tickets of defendant railroad company for himself and family, pointed out to the baggage-master their baggage, consisting of three trunks and two boxes, and they were all checked except one box, a small, rough, pine box, such as is used for merchandise. This box was not checked for the sole reason that it had no handle or place to which a check could be fastened, but the agent received it, saying that he would place it in the baggage-car, and that it would go just as safe. Plaintiff made no misrepresentations, and was not asked as to the contents or value. For some reason it was not placed in the baggage car, but was left behind on the platform, and afterwards put in the baggage-room. That evening the night baggage-master, who knew that plaintiff intended to have the box go on the train with him, delivered it to one who falsely claimed to have authority to receive it, and at his request it was checked as baggage for him to a place other than that plaintiff had gone to. *Held*, that the railroad company was liable to plaintiff for the contents of the box. As a carrier of passengers the company was bound, unless there was reasonable ground for refusal, to take all persons who applied for passage, and their baggage, not exceeding one hundred pounds of weight to each passenger, and, as a carrier of such packages of freight as above described, to take them when offered for transportation by the accompanying passenger; and it was responsible, when duly delivered and accepted, for the safe conveyance and delivery of such baggage, and of such packages, to and at the point for which they were destined, unless prevented by an act of the public enemy, by act of law, or by an irresistible, superhuman cause. A delivery to a duly-authorized agent of a common carrier, who is in the habit of receiving packages, is undoubtedly a sufficient delivery. In this case the delivery to Barstow, the agent of the company, was to one intrusted to receive baggage and packages, and not to one engaged in other duties. A rough pine box, such as is used for merchandise, was presented for transportation, and exposed to the view of the proper agent. It was of small dimensions, and of a kind rarely if ever used for packing wearing apparel. If it was not properly baggage, it was a package of freight to go with the passengers. The property in the box was evidently not so packed as to assume the outward appearance of ordinary baggage, or so as to deceive or conceal. It was within the scope of the agent's business and duty to decide whether the company would receive and carry the box as baggage or as an article of freight. If the latter, it should have been so stated, and the terms made known and insisted upon, if the company was desirous of avoiding any sort of responsibility for it as baggage. This principle is, we think, fully sustained by what is stated in the opinion of the Supreme Court, in the case of *Railroad Co.* v. *Swift*, 12 Wall. 274, to-wit: "But if property offered with the passenger is not represented to be baggage, and it is not so packed as to assume that appearance, and it is received for transportation on the passenger train,

there is no reason why the carrier shall not be held equally responsible for its safe conveyance as if it were placed on the freight train, as undoubtedly he can make the same charge for its carriage." To the same purport is the case of *Railway Co.* v. *Shepherd*, 7 Eng. Ry. Cas. 310: "If the traveller takes with him other articles, which do not come strictly within the denomination of baggage, and exposes them to view, so that no concealment is practiced, and the carrier chooses to treat them as personal baggage, and carries them accordingly, and a loss occurs, he will be responsible therefor." The company had given to its agent authority to receive and check baggage, and had also given him power to determine what property came within that class or description of property. He had similar power with regard to freight to be placed in the baggage-car. In the usual and ostensible scope of his employment he received the box without hesitation, and said he would place it in the baggage-car, and it would go just as safe as if checked. But although thus delivered and accepted it was not transported at all. Yet it was taken into the custody of the company by its proper agent, and the company's liability as a carrier commenced at the instant of the acceptance. In Ang. Carriers, sec. 129, it is said that "the entire weight of the responsibility rigorously imposed by law upon a common carrier falls upon him contemporaneously [*eo instante*] with a complete delivery of the goods to be forwarded, if accepted, with or without a special agreement as to reward; for the obligation to carry safely on delivery, carries with it a promise to keep safely before the goods are put *in itinere*." And again, sec. 131: "A person who is a common carrier may at the same time be a warehouseman, and after he receives the goods, and before they are put *in itinere*, they may be lost or injured. In such case, if the deposit in the warehouse is a mere accessory to the carriage, or, in other words, if the goods are deposited for the purpose of being carried, such person's responsibility as a common carrier begins with the receipt of the goods; that is, he then becomes responsible for all losses not occasioned by inevitable casualty; whereas, if he were a mere warehouseman, he is not liable unless he has been guilty of ordinary neglect." In *Railway Co.* v. *Belknap*, 21 Wend. 354, it was considered that where the baggage was received, but lost before transportation, the railway company was answerable, as a common carrier, for the safe-keeping of the property; and that its liability existed independent of any other contract, express or implied, for the safe-keeping of the property, and without regard to any question of negligence, and that the judge would have been well warranted in instructing the jury that the owner was entitled to their verdict. See also *Hickox* v. *Railway Co.*, 31 Conn. 281. If a trunk is delivered at a railroad station at 11 a.m. to go in a train at 3 p.m., the railroad is liable as a carrier from the time of delivery. About ten hours after the reception of the box, and the departure of the plaintiff and his family on the train, the night baggage-master, Staibler, who had been present at the delivery, undertook to surrender it to a third party, and did so. The question of fact as to Truesdell's authority to receive it as agent of plaintiff was determined in the negative by the jury, under careful and accurate instruction from the court, and upon sufficient evidence. Where the defence is that a delivery was made to an agent of the owner

or consignee, it must be clearly proved that the person to whom the goods were delivered as agent was duly authorized as such. The carrier is under as much obligation to deliver property to the right person as he is to deliver it in a reasonable time at the proper place. Although Truesdell had before been an "advance agent" of plaintiff for the purpose of posting advertisements, etc., it by no means follows from this alone that he had any authority to receive and take away to State Centre property just consigned by the owner himself into the custody of the company for transportation to Missouri Valley Junction, and which the owner, to the actual knowledge of both of the defendant's agents, intended to take in the same train with him to the latter place. If Staibler had not what was almost equivalent to actual notice of the dissolution of all business relations between the plaintiff and Truesdell, yet he certainly had enough in the acts and statements of the latter, under all the circumstances, to put a person of ordinary prudence and care upon guard and inquiry. If the delivery by a carrier be to the wrong person, although it be entirely by mistake, or by gross imposition, or upon a forged order, the carrier will nevertheless be responsible for the value of the goods so lost. Story Bailm., sec. 545*b*, also sec. 450; Ang. Carr., sec. 324; *Winslow* v. *Railroad Co.*, 1 Am. Rep. 365. In *Stephenson* v. *Hart*, 4 Bing. 476, the delivery was, as in this case, to a person who showed that he had a knowledge of the contents of the box. And in *Duff* v. *Budd*, 3 Brod. & B. 177, the delivery was to a person to whom the defendant had before delivered parcels. Burrough, J., said: "Carriers are constantly endeavoring to narrow their responsibility and creep out of their duties, and I am not singular in thinking that their endeavors ought not to be favored. The question here is whether there was gross negligence. I think there was, and I am of opinion that the case was properly left to the jury, and that they have given a proper verdict." Moreover, even if this defendant were not liable as a carrier, but simply as warehouseman, yet this would follow, that warehousemen are not only responsible for losses which arise by their negligence, but also for losses occasioned by the innocent mistake of themselves and of their servants in making a delivery of the goods to a person not entitled to them. For it is a part of their duty to retain the goods until they are demanded by the true owner, and if, by mistake, they deliver the goods to the wrong person, they will be responsible for the loss, as upon a wrongful conversion. Dak. Sup. Ct., Dec. Term, 1876. *Waldron* v. *Chicago & N. W. R. Co.* Opinion by Shannon, C.J.—*Albany Law Journal.*

TRUST—FRAUD BY AGENT—SECRET COMMISSION—INVESTMENT—FOLLOWING FUNDS.—A foreman employed by a firm was in the habit of receiving a secret commission on all goods ordered by him on behalf of his principals from a certain firm. The sums so received had been invested by him in the purchase of certain land and houses. *Held*, that although the employers would be entitled to recover from the foreman the sums so received from him by way of commission, yet they were not entitled to follow the money into its investments. No case has been cited which precisely decides the point. Two cases, however, were referred to,

namely, *Morison* v. *Thompson*, L.R., 9 Q.B., 480, and *Metropolitan Bank* v. *Heiron*, 5 Ex. Div. 319. In *Morison* v. *Thompson* the plaintiff purchased a ship through the defendant, who was his broker, for £9,250. An arrangement had previously been made between the vendor and his broker that if the ship was sold for more than £8,500, the broker might retain the excess; an arrangement was also made between the vendor's broker and the defendant, that a portion of such excess should be paid to the defendant, and the defendant received from the vendor's broker £250. It was held that the plaintiff, the purchaser, could maintain an action in respect of the £250 for money had and received. Cockburn, C.J., in delivering the judgment of the Court, said (at p. 486): "In our judgment the result of these authorities is, that whilst an agent is bound to account to his principal or employer for all profits made by him in the course of his employment or service, and is compelled to account in equity, there is at the same time a duty, which we consider a legal duty, clearly incumbent upon him, whenever any profits so made have reached his hands, and there is no account in regard to them remaining to be taken and adjusted between him and his employer, to pay over the amount as money absolutely belonging to his employer. This was precisely the case in regard to the money in question acquired by the defendant in the course of his employment without the knowledge or sanction of the plaintiff; it was actually in his hands subject to an immediate duty to hand it over to his employer. Under such circumstances the money, being the property of the employer, can only be regarded as held for his use by the agent, and must, consequently, be recoverable in an action for money had and received." The facts of that case were very similar to those of the present. There was no statement there that the money ever came to the hands of the defendant from the plaintiff. The case decided that the legal right of the master was not merely to obtain damages, but to recover the money received by the servant as an ascertained sum in an action for money had and received. The case of *Metropolitan Bank* v. *Heiron* is different in its facts, but the judgments of the Court of Appeal throw great light on this class of cases. The judgment of Cotton, L.J., in that case is particularly important. He says: "It was urged that no time runs against a breach of trust; but that argument was founded on an insufficient definition of what is meant by a breach of trust. Where a trustee has a fund in his possession, and wastes it, either by neglect of duty or by doing an act not justified, and the *cestui que trust* comes to recover his money, no time will bar his suit, for it is a claim by the *cestui que trust* against his trustee for money or property, which was in the possession of the trustee for the benefit of the *cestui que trust* until the trustee duly discharges himself. To such a case there is no bar by statute. * * * This case is a suit founded on breach of duty or fraud by a person who was in the position of trustee, his position making the receipt of the money a breach of duty or fraud. It is very different from the case of a *cestui que trust* seeking to recover money which was his own before any act wrongfully done by the trustee. The whole title depends on its being established by a decree of a competent court that the fraud of the trustee has given the *cestui que trust* a right to the money." The question then is under which head does

the present case fall? Is it "a suit founded on a breach of duty or fraud by a person who was in the position of trustee, his position making the receipt of the money a breach of duty or fraud?" Or is it the case of "a *cestui que trust* seeking to recover money which was his own before any act wrongfully done by the trustee?" It seems to me that the case of *Morison* v. *Thompson* does not settle this question. It may be assumed in favor of the plaintiffs that they can recover the money in an action for money had and received, but it does not follow that they can follow it. It is not true to say that in every case in which an action for money had and received would lie, the money can be followed. Take the case of a contract for the sale of real estate. and a deposit paid to the vendor; there, if it is discovered that the vendor has no title, the purchaser is entitled to recover his deposit as money had and received. Suppose, however, that the vendor, believing himself entitled to the money, has invested it in business and made profits. It has never been held that the purchaser can follow it into the investments. There is no case in which it has been decided that money received under such circumstances as exist in the present case can be followed. All that *Morison* v. *Thompson* decided was that there was a legal right to recover the money. The true test appears to me to be that laid down by Cotton, L.J., in the judgment which I have read. "Is this the case of a *cestui que trust* seeking to recover money which was his own before any act wrongfully done by the trustee?" The orders given by the defendant to Messrs. Varley were given, no doubt, in the expectation that a commission would be paid. But there was no legal obligation on Messrs. Varley to pay it. If it had not been paid the defendants would have had no remedy in a court of law. The wrongful act was the receipt of the money in breach of duty. But the money was not money of the plaintiffs but of Messrs. Varley. Applying that test, I come to the conclusion that the plaintiffs are not entitled to follow the money; and the application so far as it seeks to restrain the defendants from dealing with the land and houses, must fail. Chan. Div., April 25, 26, 1890. *Lister* v. *Stubbs*. Opinion by Stirling, J. 62 L.T. Rep. (N.S.) 654.—*Albany Law Journal*.

One of the greatest characters at the Bombay Bar was a man named Anstey, very clever and equally eccentric. Many are the stories current about him here. Once, when a judge had, in his opinion, delayed too long in giving judgment in a case in which he was concerned, he moved the Court for a new trial. "But, Mr. Anstey," said his Lordship, "I have not yet given judgment. How can you move for a new trial?" "Quite so, me Lud," replied Anstey, "but the case was tried so long ago that you Ludship must have forgotten all about it, and it's quite right that it was tried over again to refresh your Ludship's memory." The eccentric motion had its desired effect, and judgment was given very shortly afterwards.

Another yarn of Inverarity. Once at the close of a trial, the judge said: "That decides the case, Mr. Inverarity, and there now only remains the question of costs to be argued." "*Only*, me Lud!" replied Inverarity; "costs are the one thing that are worth fighting about.'—*Jurist*.

DIARY FOR NOVEMBER.

1. Sat.....All Saints' Day. Sir Matthew Hale born, 1609. Last day for filing papers and fees for final examination.
2. Sun.....*22nd Sunday after Trinity.* O'Connor, J., Q.B. D., died, 1887.
7. Fri .....Battle of Tippecanoe.
9. Sun.....*23rd Sunday after Trinity.* Prince of Wales born, 1841.
11. Tues ....Court of Appeal sits. Battle of Chrysler's Farm, 1813.
12. Wed.....W. B. Richards, 10th C.J. of Q.B., 1868. J. H. Hagarty, 12th C.J. of Q.B., 1878.
14. Fri .....Falconbridge, J. Q.B.D., appointed 1887.
15. Sat.....Sir M. C. Cameron, J. Q.B., 1878. Macaulay, 1st C.J. of C.P., 1849.
16. Sun.....*24th Sunday after Trinity.* Erskine died 1823, æt. 73.
17. Mon.....Mich. Term commences. High Court Just. Q. B. & C.P.D. Sittings.
19. Wed.....Armour, J., gaz. C.J. Q.B.D., 1887. Galt, J., gaz. C.J. C.P.D., 1887.
21. Fri .....J. Elmsley, 2nd C.J. of Q.B., 1796. Princess Royal born, 1840.
22. Sat.....Lord Clive, 1774.
23. Sun.....*25th Sunday after Trinity.*
25. Tues ....Marquis of Lorne, Governor-General, 1878.
30. Sun.....*Advent Sunday.* St. Andrews. Moss, J.A., appointed C.J. of Appeal, 1877. Street, J. Q.B.D., and McMahon, J. C.P.D., appointed 1887.

Reports.

UNITED STATES.

ILLINOIS SUPREME COURT.

HEALEY *v.* MUTUAL ACC. ASS'N.

Insurance—Accident—Death by poison.

Death resulting from the accidental taking of poison creates a liability under a policy insuring against death caused by "external, violent, and accidental means."

[June 12.

Appeal from Appellate Court, First District. Action by Emma T. Healey against the Mutual Accident Association of the North-West upon a certificate of membership in favor of her deceased husband, John Healey, by which he was insured against death occasioned by "external, violent, and accidental means." The Circuit Court gave judgment for defendant on demurrer to the declaration, and the Appellate Court affirmed the judgment. Plaintiff appeals.

Miller, Leman & Chase, for appellant.

Albert H. Veeder and Mason B. Loomis, for appellee.

CRAIG, J.—The question presented, although one of pleading, involves a construction of the policy upon which the action was brought; and in placing a construction on the contract, and in arriving at the intention of the contracting parties, regard must be had to the object and purpose which was intended by the contracting parties. A policy of accident insurance is issued and accepted for the purpose of furnishing indemnity against accidents and death caused by accidental means, and the language of the policy must be construed with reference to the subject to which it is applied: *Insurance Co.* v. *Nelson*, 65 Ill. 420. Thus a provision in a policy against loss by fire avoiding the policy if the property becomes incumbered has been held not to include incumbrance by judgment, although within the terms used: *Baley* v. *Insurance Co.*, 80 N.Y. 21. Again, policies of insurance being signed by the insurer, the language employed being that of the insurer, the provisions of the policy are usually construed most favorably for the insured in case of doubt or uncertainty in its terms: *Insurance Co.* v. *Scammon*, 100 Ill. 664. "No rule in the interpretation of a policy is more fully established or more imperative and controlling than that which declares that in all cases it must be liberally construed in favor of the insured, so as not to defeat, without a plain necessity, his claim to the indemnity, which in making the insurance it was his object to secure. When the words are without violence susceptible of two interpretations, that which will sustain his claim and cover the loss must, in preference, be adopted": May Ins. (2d ed.), sec. 175.

Keeping in view these well-settled rules of construction, the question to be determined is whether the death in this case is one falling within the spirit of the policy. The death of John Healey, the assured, is a conceded fact, but it is said the policy is an assurance against death by external, violent, and accidental means, and that death did not ensue from external, violent, and accidental means within the meaning of the policy. Under the averments of the first and second counts it is manifest that death ensued by accidental means, as it is expressly averred that death was produced by accidentally taking and drinking poison. The demurrer admits this averment of the declaration, and the fact that death ensued from accidental means stands admitted by the record. But to bring the case within the terms of the policy it devolved upon the plaintiff to aver and establish not only that death ensued from accidental means, but also from external and violent means. The next enquiry, therefore, to be determined is whether, within the meaning of

the policy, death resulted from external and violent means. While the authorities in cases similar to the case before us are not entirely harmonious, yet we think that the decided weight of authority is in support of the view that death in this case was caused by external and violent means. In *McGlinchey* v. *Casualty Co.*, 80 Me. 251, the insured was riding in a covered carriage. The horse became frightened and ran some distance before he could be controlled. In running, the horse came near collision with other teams, but no collision occurred, nor was the carriage upset or any one injured. However, immediately after the runaway, the insured became sick, and died in an hour after the accident. The question arose whether death was caused from bodily injuries through external, violent and accidental means within the meaning of the policy, and the court held that it was. In the case cited the body of the deceased bore no marks of physical injury, nor did the body come in contact with any physical object during the time of the accident, but death no doubt resulted from physical strain and mental shock. In *Insurance Co.* v. *Crandall*, 120 U.S. 527, it was held that an insane man who takes his own life dies from an injury produced by external, accidental and violent means. In the cases of *Trew* v. *Assurance Co.*, 5 Hurl. & N. 211, and on appeal 6 id. 839; 7 Jur. (N.S.) 878; *Reynolds* v. *Insurance Co.*, 22 Law T. (N.S.) 820, and *Winspear* v. *Insurance Co.*, 42 id. 909; 43 id. 459; affirmed 6 Q.B.Div. 42, it was held that death from drowning was caused by external and violent means within the meaning of an accident policy. In the *Trew Case*, which may be regarded as a leading one on the subject, it is argued: "Whereas from the action of the water there is no external injury, death by the action of the water is not within the meaning of the policy." In reply to the argument the court said: "That argument, if carried to its extreme length, would apply to every case where death was immediate. If a man fell from the top of a house, or overboard from a ship, and was killed, or if a man was suffocated by the smoke of a house on fire, such cases would be excluded from the policy, and the effect would be that policies of this kind in many cases where death resulted from accident would afford no protection whatever to the assured. We ought not to give those policies a construction which will defeat the protection of the assured in a large class of cases:" 6 Hurl. and N. 844. In *Paul* v. *Insurance Co.*, 112 N.Y. 472, the policy was substantially like the one in question here, indemnifying against injuries caused by external, violent and accidental means. The insured died from inhaling illuminating gas. He was stopping at a hotel in New York city. He was found dead in his bed, the room being filled with gas. When found the deceased lay on his bed like a man asleep, without any external or visible signs of injury upon his body. An action on the policy was sustained, and in disposing of the question whether the injuries were caused by external and violent means the court said: "As to the point raised by the appellant that the death was not caused by external and violent means within the meaning of the policy, we think it is a sufficient answer that the gas in the atmosphere, as an external cause, was a violent agency, in the sense that it worked upon the intestate so as to cause his death. That a death is the result of accident, or is unnatural, imports an external and violent agency as the cause. The cases collated on the respondent's brief sufficiently establish that as a proposition: *Trew* v. *Insurance Co.*, 7 Jur. (N.S.) 878; *Reynolds* v. *Insurance Co.*, 22 Law T. (N.S.) 820; *McGlinchey* v. *Casualty Co.*, 14 Alt. Rep. 13." If, as held in the case last cited, death from inhaling poisonous gas is to be regarded as caused by external and violent means, upon the same principle death resulting from the accidental taking of poison must be regarded as resulting from external and violent means. Again, where a person is drowned, having been suffocated by the action of the water in the lungs, if a death in such a case is to be regarded as caused or produced by external and violent means, as held in the cases heretofore cited, for the same reason a similar rule must be applied where death resulted as alleged in this case. Here the death arose from accidentally taking and drinking poison, and we are constrained to hold, when such is the case, the injury resulting in death may be regarded as received through violent means. If a person should receive a gunshot wound in the body resulting in death, it would be conceded that death ensued from violent and external means. For a like reason poison taken into the stomach producing death may also be treated as an external, violent

means. Indeed we are inclined to concur with what was said by the Court of Appeals of New York in the case last cited, "that a death is the result of accident, or is unnatural, imports an external and violent agency as the cause." We have been cited to a few cases holding a different rule: *Hill* v. *Insurance Co.*, 22 Hun. 187. This case was overruled by the later case of *Paul* v. *Insurance Co.*, cited *supra*. *Pollock* v. *Association*, 102 Penn. St. 230, is a case sustaining the position of the defendant. But while we recognize the high ability of the court in which the case was decided, we are not disposed to follow the rule there adopted. We think the rule established by the Court of Appeals of New York is better calculated to carry out the true intention of the parties where the contract of insurance was entered into, and one too more nearly in harmony with the current of authority bearing on the question. The judgment of the Appellant and Circuit Courts will be reversed, and the cause remanded to the Circuit Court for further proceedings in conformity to this opinion.

ONTARIO.

FOURTH DIVISION COURT, COUNTY OF ONTARIO.

WHITNEY *v.* WHITNEY & ROSE.

Mercantile Law Amendment Act—Payment by defendant's surety—Form of summons, order and execution.

A defendant who is surety for his co-defendant, but which does not appear upon the proceedings, is not entitled, as of course, to an order for execution against his co-defendant; but must issue and serve a summons upon his co-defendant and the plaintiff, setting forth the facts, and calling upon him to show cause why execution should not issue against such co-defendant as prayed. Form of such summons, judgment, and execution thereon.

[WHITBY, Nov. 8.

Application for leave to issue execution by a defendant against his co-defendant for whom, he alleges, he was only a surety, he having paid the judgment herein.

DARTNELL, JJ. This judgment is, on the face of the proceedings, paid and satisfied. To render a transcript to the County Court of any value, the right to execution and the facts must appear upon the proceedings in the the inferior Court. The other defendant and the plaintiff should have an opportunity of controverting the alleged facts. There must be a summons, in the nature of a "Summons to Revive," served upon him, and an adjudication that he is shown to be entitled to the benefit of "The Mercantile Law Amendment Act."

This was subsequently done, and the above facts duly proved.

The following forms were settled by the Judge.

SUMMONS—(Original style of cause.)

To the above named plaintiff, defendant.

Whereas, on the 28th day of May, 1889, the plaintiff recovered judgment against the defendant in the said Court, holden in and for the said division, for $ debt and $ costs; and whereas execution upon the said judgment was duly issued and the defendent, E.R., has paid and satisfied the same; and whereas the said E.R. was surety only for his co-defendant, A.W., and as such is entitled to the benefit of sections 2 and 3 of "The Mercantile Law Amendment Act," and to have execution issued against his co-defendant; and whereas by an instrument in writing, dated the day of 1889, the said plaintiff did assign and transfer to the defendant, E.R., the said judgment and all his right, title, and interest therein; you, the defendant, A.W., and you the above named plaintiff, are hereby summoned to appear at the sittings of this Court, to be held on the 20th day of November, 1889, to show cause, if any you have, why the said defendant, E.R., should not have execution of the said judgment against you and the said A.R., to be levied of you the said A.W., and, in the event of your not appearing, judgment will be entered against you by default.

ORDER.—(Endorsed upon summons to revive.) The plaintiff and the defendent W., having been duly served with the within summons, and the facts alleged therein having been proved to my satisfaction, I do order that this cause be, and the same is hereby revived in the name of E.R., as plaintiff, and the said A.W., as defendant, and let execution issue against the said A.W. in favor of the said E.R.

EXECUTION.—(Style of cause)—(as revived.) Whereas, on the day of , 1889, one, A.W., duly recovered in said Court, holden in and for said division, judgment against the above named plaintiff and defendant for $ for debt and $ for costs of suit, which has been satisfied by the plaintiff, who was surety

for the defendant; and whereas, the said action was on the day of 1889, revived by order of the Judge of this Court, in the name of E.R. as plaintiff, and A.W. as defendant, with power to issue execution against the said A.W.,

You are hereby required to levy of the goods and chattels of the defendant in this county (not exempt from execution) the said moneys, amounting together to the sum of $ and your lawful fees; so that you may have the same within thirty days from the date hereof, and pay the same over to the Clerk of the Court for the plaintiff. Given etc.

T. W. Chapple, Uxbridge, for the applicant.

Early Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

COURT OF APPEAL.

From STREET, J.] [Oct. 3.

IN RE FLATT AND THE UNITED COUNTIES OF PRESCOTT AND RUSSELL.

Municipal corporations — By-law — Petition — Freeholder — R.S.O. (1887), c. 184, s. 9.

By the term "freeholder" as used in R.S.O. (1887), c. 184, s. 9, is meant a person actually seized of an estate of freehold, legal or equitable, and it does not include persons in possession of land under contracts for the acquisition of the freehold thereof upon the fulfilment of certain conditions.

Judgment of STREET, J., reversed, MACLENNAN, J.A., dissenting.

G. F. Shepley, Q.C., and *J. Bicknell* for the appellants.

J. H. Ferguson, Q.C., and *J. B. O'Brian*, for the respondents.

WRIGHT *v.* BELL.

Will — Construction — Per stirpes or per capita — Trusts — Infant trustee — Disclaimer — Statute of Limitations.

A testator, who died in 1840, by his will, made in that year, devised all his property to certain persons as executors and trustees upon trust for the maintenance and support of his wife and unmarried daughters as long as they should continue unmarried and live with his widow, and then directed that "when my beloved wife shall have departed this life, and my daughters shall all have married or departed this life, I direct and require my trustees and executors to convert the whole of my estate into money to the best advantage by sale thereof, and to divide the same equally among those of my said sons and daughters who may be then living, and the children of those of my said sons and daughters who may have departed this life previous thereto."

Held, reversing the judgment of FERGUSON, J., that the division must be per stirpes and not per capita.

One of the executors and trustees, a son of the testator, was fifteen years of age at the time of the testator's death. He did not, upon coming of age, apply for probate of the will, though when probate was granted to the other executors leave was reserved to him to so apply, nor did he act in the execution of the trusts. He did not, however, in any way disclaim, and he knew of the will. In 1861, with the knowledge and consent of the acting trustee, he went into possession of certain lands that had belonged to the testator in his lifetime, believing, as he said, that the lands had been devised to him, and he remained in possession thereof for twenty years until the period of conversion and distribution.

Held (BURTON, J.A., dissenting), affirming the judgment of FERGUSON, J., that he was in law necessarily affected with notice of the provisions of the will and of the express trust thereby created, and that he must be held to have entered as trustee and not tortiously, and could not invoke the Statute of Limitations.

McCarthy, Q.C., and *H. S. Osler*, for the appellant.

S. H. Blake, Q.C., *J. K. Kerr*, Q.C., *W. N. Miller*, Q.C., *J. Reeve*, Q.C., *Hoyles*, Q.C., *H. T. Beck*, and *A. H. F. Lefroy*, for the several respondents.

BALDWIN *v.* KINGSTONE.

Will — Construction — Heir-at-law — Change in law after will made — Primogeniture — Mistake — Laches — Acquiesence — Family arrangements — Tenants in common — Statute of Limitations.

A testator by his will, made on the 14th of August, 1850, devised certain land to his widow

for life, and after her death to two nephews, and in the case of the death of them or either of them in his own lifetime he devised the share of such deceased to the heir-at-law or heirs-at-law of such deceased, his heir or their heirs and assigns. The Act commonly known as the Act Abolishing Primogeniture, 14 and 15 Vict., c. 6, was passed on the 2nd of August, 1851, and came into force on the 1st of January, 1852. One nephew of the testator died in 1858, leaving him surviving two sons and two daughters. The testator died in 1866 and his widow in 1870.

Held (GALT, C.J., C.P., dissenting), affirming the judgment of ROBERTSON, J., 16 O.R., 341, that the Act abolishing primogeniture did not apply (1) because the will was made before it was passed or took effect, and (2) because the land had been lawfully devised by the person who died seized, and therefore that the eldest son of the deceased nephew, as his common-law heir, was entitled to the remainder in fee expectant upon the death of the widow.

Tylee v. *Deal*, 19 Gr., 601, approved.

Upon the death of the testator's widow the three surviving children of the deceased nephew (one daughter had died a short time before intestate and unmarried) entered into possession and enjoyment of the land in question under the belief that they were tenants in common of one undivided moiety thereof, the surviving nephew being entitled to the other undivided moiety. From time to time leases and sales of portions of the land were made, in which all parties joined, the instruments containing recitals as to the assumed tenancy in common, and the rents and proceeds of sales being divided among them in the proportion of one-half to the surviving nephew, and one-sixth to each of the others. In 1885 a partition deed was executed of the unsold portion. In 1886 the eldest son for the first time had brought to his attention the question of his title under the will, and this action was soon afterwards brought by him, asking that the title might be declared, the partition deed set aside, and the rents and proceeds of sales, received by the brother and sister, repaid to him.

Held, affirming the judgment of ROBERTSON, J., 16 O R., 341, that as all parties had acted under a mistake as to, and in ignorance of, the true legal construction of the will, the plaintiff was not barred by laches or acquiesence as far as the land unsold was concerned, but that there could be no recovery back of the moneys actually received by the brother and sister.

Cooper v. *Phibbs*, L.R. 2, H.L. 170; *Earl Beauchamp* v. *Winn*, L.R. 6, H.L. 234; and *Rogers* v. *Ingham*, 3 Chy.D., 351, considered and followed.

Held, further, in this also affirming the judgment of ROBERTSON, J., 16 O.R., 341, that as there was no consideration therefor, and no compromise or settlement of any disputed question, the partition deed and other dealings could not be supported as in the nature of family arrangements.

Held, also (GALT, C.J., C.P., dissenting), reversing the judgment of ROBERTSON, J., 16 O.R., 341, that the eldest son having always received a share of the rents and profits of the undivided moiety was in law always in possession of the whole of that moiety, and therefore that no title had been acquired against him by the brother and sister under the Statute of Limitations.

Robinson, Q.C., and *H. Cassels*, for the appellant.

Irving, Q.C., *McCarthy*, Q.C., *Moss*, Q.C., *G. M. Evans*, and *W. Barwick*, for the several respondents.

HIGH COURT OF JUSTICE.

Queen's Bench Division.

Full Court.] [June 27.

REGINA *v.* MENARY.

Justices of the Peace—Summary conviction—Liquor License Act, R.S.O., c. 194—Offence against s. 49—Arrest in lieu of summons—Remand by one justice only—Powers of justices under s. 70—Distress warrant—Imprisonment upon non-payment of fine and costs—Admission of no distress—Costs of conveying to jail—Power to amend conviction—Evidence—Saving clause, s. 105.

The defendant was convicted before two justices of the peace for selling liquor without a license, contrary to s. 49 of the Liquor License Act, R.S.O., c. 194. A conviction was drawn up and filed with the clerk of the peace in which it was adjudged that the defendant should pay a fine and costs, and if they were

not paid forthwith, then, inasmuch as it had been made to appear on the admission of the defendant that he had no goods whereon to levy the sums imposed by distress, that he should be imprisoned for three months unless these sums and the costs and charges of conveying him to gaol should be sooner paid. An amended conviction was afterwards drawn up and filed, from which the parts relating to distress and the costs of conveying to gaol were omitted. A warrant of commitment directed the gaoler to receive the defendant and imprison him for three months, unless the said several sums and the costs of conveying him to gaol should be sooner paid.

Upon a motion to quash the convictions and warrant,

Held, that the mode adopted for bringing the defendant before the justices was not a ground for quashing the conviction; and *semble*, also, that it was not improper to arrest him instead of merely summoning him.

Held, also, that the fact that the defendant was remanded by only one justice could not affect the conviction.

Semble, that the justices had no power under R.S.O., c. 194, s. 70, to issue a distress warrant or to make the imprisonment imposed dependent upon the payment of the fine and costs; but as this objection was not taken by the defendant, no effect was given to it.

Held, also, that the justices had the right to draw up and return an amended conviction in a proper case.

Held, also, that if the justices were bound to issue a distress warrant, the insertion of the words relating to the admission of the defendant that he had no goods, was proper; and if they had no power to issue a distress warrant, these words were mere surplusage, and did not vitiate the conviction.

Held, also, that if the justices had no power to require the costs of conveying him to gaol to be paid by the defendant, the conviction was amendable, as and when it was amended; for the amendment was not of the adjudication of punishment.

Held, lastly, that having regard to s. 105 of R.S.O., c. 194, and to the evidence before the justices, the convictions and warrant should not be quashed.

Alan Cassels for the defendant.

Langton for the complainant.

Div'l Court.] [June 27.

EDMONDS *v.* HAMILTON PROVIDENT AND LOAN SOCIETY.

Mortgagor and mortgagee—Application of insurance moneys—Acceleration clause in mortgage—Election not to claim whole principal, R.S.O., c. 102, s. 4, s-s. 2—Interest, time of commencement—Mortgage account—Rectification of mortgage—Laches—Agreement—Local agent and appraiser, powers of—Wrongful sale under power in mortgage—Illegal distress—Measure of damages.

Upon a motion for an interim injunction the defendants filed an affidavit and statement showing that they had applied insurance moneys received by them, in respect of loss by fire of buildings upon land mortgaged to them by the plaintiffs, upon overdue instalments of principal, and an insurance premium paid by them; and in their statement of defence they also stated their position in a way inconsistent with that which they afterwards took, viz., that the insurance money was applicable upon the whole principal, which, by virtue of an acceleration clause in the mortgage had become due.

Held, that the defendants had made their election, so far as the effect of the default and the application of the insurance money was concerned, not to claim the whole principal as having become due by reason of the default; and that being so, that they must apply the insurance money, as required by R.S.O., c. 102, s. 4, s-s. 2, upon arrears of principal and interest.

Corham v. *Kingston*, 17 O.R. 432, approved and followed.

Interest can be claimed by mortgagees only from the time the money is actually paid out by them.

Method of taking a mortgage account shown.

Rectification of the mortgage deed as to the time of the first payment of principal was refused where it was sought by the mortgagors at a time when the payment in any event was long past due, and the mortgagees, without fraud, had acted upon the mortgage as executed, and without notice of the intention of the mortgagors to have the payment fixed for a later period; and where also there was really no agreement upon which to found the rectification, the defendants' local appraiser and agent to receive applications having no express or implied authority to make such agreements.

For wrongful proceedings under power of sale in a mortgage, illegal distress upon chattels, and consequent wrongs,

Held, that the plaintiffs were entitled to recover more than their mere money loss.

P. C. Macnee for the plaintiffs.

Crerar, Q.C., for the defendants.

BOYD, C.] [Oct. 11.

TREMEEAR *v.* LAWRENCE.

Solicitor's lien—Costs of actions to restrain sale of estate—Lien upon estate in hands of assignee—Absence of fund upon which lien could attach—Costs.

Two actions were brought by a trader to restrain proceedings under a chattel mortgage against the trader's stock of goods, and interlocutory injunctions were granted, but the actions were not carried further. The chattel mortgagee brought an action to recover the mortgage money and to restrain the mortgagor from selling the goods, whereupon the latter made an assignment for creditors, and, by arrangement in that action, the goods were sold by the assignee, and payment was made in full to the mortgagee for debt, interest, and costs of that action, after notice and without objection on the part of any of the creditors or of the solicitor who conducted the actions brought by the trader.

The solicitor claimed that by his exertions in these actions he had saved the goods from being sacrificed by summary sale, and brought this action to have it declared that he was entitled to a preferential lien upon the estate in the hands of the assignee for costs.

Held, that even if it were shewn that stopping the sale under the mortgage were a benefit to the estate, there was no jurisdiction without the direction of a statute to charge the property recovered or preserved, and without a money fund there was no subject for a lien.

Costs as of a successful demurrer only were allowed to the defendant.

Colin McDougall, Q.C., for the plaintiff.

Shepley, Q.C., for the defendant.

Chancery Division.

Full Court.] [Sept. 4.

MCCLURE *v.* BLACK.

Patent to land—Locatee receipt—Fraudulent locatee—Statute of Limitations—R.S.O., 1887, c. 24, s. 16.

The plaintiff, in 1855, obtained from the Commissioner of Crown Lands a receipt on sale of a certain lot of land. In 1868, one Beaton, in whose possession this receipt was, handed it back to the Crown Lands Office, and by means of fraud procured his own name to be substituted as purchaser in the books of the Department; and he and those claiming under him, including the defendant, had remained in possession of the lot ever since. In 1872, the plaintiff, having learned of the imposition, applied to the Department for redress. This application was pending and undisposed of by the Commissioner of Crown Lands till March 14th, 1889, when it was ordered that the patent should issue to the defendant; but three months were allowed to the plaintiff to take proceedings in Court to establish his title.

Held, that the plaintiff's right of action was not barred by any Statute of Limitations.

Per BOYD, C. The case might be likened to a matter litigated in the proper forum wherein no decision is given till after the lapse of years; in which case, pending judgment, the Statute of Limitations cannot operate to vest or divest rights, but must be deemed suspended.

W. Cassels, Q.C., for the defendant.

O'Connor, Q.C., for the plaintiff.

Full Court.] [Sept. 4.

SAWYER ET AL *v.* PRINGLE.

Vendor and purchaser—Property not passing till full payment—Resuming possession—Action for balance of purchase money after resale.

Sawyer & Co. sold to the defendant a traction engine and separator under a written agreement whereby it was provided that the defendant should give three promissory notes for the price; and that in default of payment of any of the notes the whole price should become payable; and that no property should pass to the defendant on the machine until the whole price was paid; and the vendors might resume possession on default, or for other good cause.

Default occurring, the vendors resumed possession, and resold the machine; and after crediting on the notes what the machine brought on the resale they now sued the defendant for the balance of the notes.

Held, per BOYD, C., that they had a right so to do; for the agreement gave a right of action

for the full price upon default in payment, and a concurrent right to resume possession of the machine. The mere fact of selling the machine had not any other effect than to fix the value of the machine as deteriorated by the defendant's use of it.

Held, per ROBERTSON, J., that the plaintiffs had no right to recover. By resuming possession they to all intents put an end to the contract. They were not necessarily bound to assume that position; they could have sued on the promissory notes, and left the possession in the defendant; but having elected to resume possession they had no cause of action for whatever may be due on the purchase money.

Hoyles, Q.C., and *Chisholm* for the plaintiffs.

J. M. Clark for the defendants.

Full Court.] [Sept. 6.

ATTORNEY-GENERAL DOMINION *v.* ATTORNEY-GENERAL ONTARIO.

Constitutional Law—Validity of 51 Vict., c. 5—Lieutenant-Governor—Pardoning power.

Held, that the Act of the Ontario Legislature, 51 Vict., c. 5, being an Act respecting the executive administration of the laws of this Province, is *intra vires*.

Per BOYD, C. No change is aimed at by the Act in the office of Lieutenant-Governor as such; but rather important and congruous functions are sought to be added thereto, to be administered by that chief public officer by whom, through the Dominion, the Province is connected with the Queen. As to section 2, relating to the pardoning power, the power to pass laws implies necessarily the power to execute or to suspend the execution of these laws, else the concession of self-government in domestic affairs is a delusion. Sovereign power is a unity, and though distributed in different channels and under different names it must be politically and organically identical throughout the empire. The local legislature which creates the offence has power to suspend the sentence, to commute or remit the punishment. The royal prerogative in its large sense as exercisable in reference to crime, this Statute does not purport to interfere with. It may be classified as one made in relation to the imposition of punishment; or from another point of view as one for the administration of justice in the Province.

C. Robinson, Q.C., and *Lefroy*, for the Attorney-General of the Dominion.

E. Blake, Q.C., and *E. Irving*, Q.C., for the Attorney-General of Ontario.

Div'l Ct.] [Oct. 18.

CENTRAL BANK OF CANADA *v.* GARLAND.

Banks and banking—Discount of promissory notes—Right of bank to recover accessory securities.

A tradesman sold goods to customers, taking promissory notes for the price and also hire receipts by which the property remained in him till full payment was made. The notes were discounted through the medium of a third person by the plaintiffs, who were made aware when the line of discount was opened of the course of dealing and of the securities held. They were not, however, put in actual possession of the securities; and there was no express contract in regard to them. In an action to recover the securities or their proceeds from the assignee for creditors of the tradesman,

Held, that the securities were accessory to the debt; that in equity the transfer of the notes was a transfer of the securities; that the defendant was in no higher position than his assignor, and could not resist the claim to have the receipts accompany the notes; and that it was not material that the relation of assignor and assignee did not immediately exist between the tradesman and the plaintiffs.

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

Watson, Q.C., and *Masten*, for defendants.

FALCONBRIDGE, J.] [Aug. 19.

BAIN *v.* ÆTNA LIFE INSURANCE CO.

Insurance — Life — Endowment participating plan—Right of insured to profits—Divisible surplus—Discretion of actuary and directors —Statements of company in letters and pamphlets.

The plaintiff insured with the defendants upon their endowment participating plan, and by the contract of insurance the defendants agreed to pay him at the end of a specified period, if he survived, a certain sum, together with his share of the profits made in that branch of the business during the period.

The plaintiff, being dissatisfied with the share allotted to him, claimed an account and payment of his share of all the profits. The defendants claimed the right to hold a portion of their apparent surplus to ensure the future stability of the company.

Held, that the plaintiff was bound to acquiesce in the discretion of the actuary and directors of the company, *bona fide* exercised, and to take his share of what was apportioned as divisible surplus; and that being so that his case was not advanced by statements made by officers of the company in letters or pamphlets as to the course pursued by them in dividing the surplus.

Laidlaw, Q.C., for plaintiff.

S. H. Blake, Q.C., and *J. J. Maclaren*, Q.C., for defendants.

MACMAHON, J.] [July 15.

GORDON *v.* PROCTOR.

Estoppel—Fraudulent preference — Mortgagee attacking title of mortgagor.

Held, that an assignee of a mortgage is not estopped as such from attacking the conveyance to the mortgagor as fraudulent and void while, nevertheless, maintaining his mortgage as a valid encumbrance.

Clute for the plaintiff.

Osler, Q.C., and *J. W. Kerr* for the defendants Proctor and Hagerman.

Watson for the defendants W. and J. Leary.

Riddell for the defendants Christopher Leary and Edmison.

BOYD, C.] [Sept. 27.

HALL *v.* HOGG.

Mechanics' lien—Material men—Time for registering claim—R.S.O., c. 126, s. 21.

Merchants supplied materials to the contractor for certain buildings and claimed a lien under the Mechanics' Lien Act in respect thereof. There was no contract for the placing of these materials upon the property; the last of them were bought by the contractor from the merchants on the 22nd November, and were by him placed in the building on the 23rd November.

Held, that the time for registering the claim of lien, under s. 21 of the Act, R.S.O., c. 126, began to run from the 22nd November.

J. A. Macdonald for plaintiffs.

Bain, Q.C., for defendant, Howland.

Practice.

FERGUSON, J.] [Oct. 9.

HEASLIP *v.* HEASLIP.

Costs—Taxation—Appeal to Master under Rule 854—Order upon appeal—Further appeal from order to Judge—Appeal from certificate of taxing officer—Costs between solicitor and client.

An appeal by the defendant in an action of alimony from the certificate of a taxing officer, upon taxation of the plaintiff's costs of the action and reference between solicitor and client, as directed by the judgment.

Pending the taxation there was an appeal by the plaintiff to the Master in Chambers under Rule 854, upon which the Master made an order allowing the appeal. The taxing officer in his certificate simply followed the order of the Master, and the present appeal was in respect only of the items in question before the Master. The order of the Master was not appealed from and the time for appealing from it had elapsed.

Held, that the appeal under Rule 854 should be looked upon as an intermediate thing and advisory in character, and that the defendant was not precluded from appealing from the certificate of the taxing officer because he did not appeal from the order of the Master.

Re Nelson, 13 P.R. 30, followed.

Re Monteith, 11 P.R. 361, distinguished.

Held, also, that where costs have to be paid by the opposite party and not by the client, there is no difference between "costs as between solicitor and client," and "costs between solicitor and client"; both mean costs between party and party, to be taxed as between solicitor and client; and that the plaintiff was entitled to tax against the defendant under the words of the judgment only such costs as a solicitor can tax against a resisting client under the general retainer only to prosecute or defend the action; but that the taxation should be as liberal as possible, under the practice, in favor of the plaintiff.

Cousineau v. *City of London Fire Ins. Co.*, 12 P.R. 513, followed.

A. Hoskin, Q.C., for the defendants.

C. Millar for the plaintiff.

FERGUSON, J.] [Oct. 14.

SANVIDGE *v.* IRELAND.

Solicitor's lien—Settlement of action by parties without intervention of solicitors—Order for costs—Notice before money paid—Notice to solicitor instead of party personally.

Where a compromise of the action has been effected between the parties without the intervention of the solicitors, in order to entitle the plaintiff's solicitor to enforce his lien for costs upon the fruits of the litigation, by means of an order upon the defendant, collusion must be shewn, or the act complained of must have been done after notice from the solicitor complaining. And where parties made such a compromise, and the plaintiff's solicitor gave notice to the defendant's solicitor, after the agreement but before payment of the money agreed upon,

Held, that this was sufficient notice.

Tytler for the plaintiff's solicitor.

J. A. Macdonald for defendant.

BOYD, C.] [Oct. 16.

AYERST *v.* MCCLEAN.

Parties—Action of foreclosure—Mortgage made after 11th March, 1879—Wife of Mortgagor—Dower.

The wife of a mortgagor who has joined in a mortgage, made after 11th March, 1879, only for the purpose of barring her dower, is properly made a defendant to an action of foreclosure, in order that she may either redeem or protect her interest by asking for a sale; and being so made a defendant, and submitting to a foreclosure, no question could arise as to her dower being effectually extinguished. If the mortgage is before the Dower Act of 1879, the case is governed by the former law; therefore, the date of the mortgage is material, not that of the marriage.

Report of *Re Hewish*, 17 O.R., at p. 457, corrected.

T. R. Ferguson for the plaintiff.

Pepler, Q.C., for defendant Margaret McClean.

Law Students' Department.

EXAMINATION BEFORE TRINITY TERM: 1890.

CALL.

Harris—Broom—Blackstone.

Examiner: R. E. KINGSFORD.

1. If a passenger buys a ticket from the G. T. Railway from T. to B., via the N. Y. C. Railway, and is injured on the N.Y.C. Railway by the negligence of that company, against whom could he recover damages? Why?

2. If from the negligent manufacture of fireworks a bystander looking on at a pyrotechnic display is injured, could he recover against the manufacturer? Why?

3. In an action for malicious prosecution, what power has the jury in regard to inferring want of reasonable and probable cause from the fact of malice?

4. By what evidence of provocation may the charge of murder be reduced to manslaughter?

5. Of what crime would a man be guilty who should break into another's dwelling house at night for the purpose of getting some chattels belonging to himself?

6. When will coercion of the husband be a sufficient excuse for the wife on a criminal charge?

7. What is the main distinction in regard to the remedy in a case where a magistrate acts without jurisdiction, and a case where he acts erroneously within his jurisdiction?

8. What is the legal right of the owner of surface soil to the support of adjacent mineral soil owned by another party?

9. When can a party injured by the violation of a statutory duty, with or without a penalty attached for violation, recover damages therefor?

10. A statute is passed which without directly saying so, in effect repeals a prior statute. In the next session an amendment is made to the first statute as if it were still in existence. What is the effect?

Contracts—Evidence—Statutes.

Examiner: R. E. KINGSFORD.

1. A. is a creditor; B. principal debtor; C. the surety. A. gives time to B. C. knows that A. does so, but there is no reservation of the rights of A. against C. What is the effect as regards C.?

2. By an unlawful agreement money is to be paid over. Subsequently, by agreement, securities for the payment are taken in lieu of the money. How far are they valid?

3. On a sale by sample of goods, what is the effect if the sample had a defect in manufacture not known to the parties?

4. A. means to sell goods to B. & Co. C. gets the goods from A. by falsely representing himself as a member of the firm, and authorized to act for them. How far will a sale or pledge by C. of the goods be valid as against A.?

5. Where a document is partly favorable to a party, and partly unfavorable, how far is the document admissible as evidence?

6. How far do interlineations or alterations vitiate a document as evidence.

7. In case of conflicting presumptions, which class prevail? Give instances.

8. What are the limits as to the right to compel a witness to answer degrading questions?

9. What are the advantages of direct over presumptive evidence, and of presumptive evidence over direct evidence?

10. A payment of part in discharge of the whole of a debt is made in a foreign country where acceptance of such payment has the effect of a release. What effect would such payment have in Ontario, where it is not valid?

Real Property and Wills.

Examiner: P. H. DRAYTON.

1. A., about to marry B., instructs his solictor to prepare a draft settlement of certain property on B. Before final approval, settlement was abandoned on A.'s verbal promise that he would forthwith execute a will, leaving the property to B., which accordingly was executed immediately after the marriage; it was subsequently revoked. State whether or not such would amount to part performance to take agreement out of the statute. Reasons.

2. What is the meaning of the words "die without issue" in wills before the Wills Act, and what its meaning now?

3. A. makes a deed of a lot and house in Toronto to B., who puts it in his vault, not registering it. Sometime after he registers it; in the meantime *fi. fa.* lands against lands of A. have been placed in the sheriff's hands. How is B.'s property affected?

4. A mortgagor dies after 1st July, 1886, intestate. How, if in any way, can the mortgagee realize on his mortgage, the same being in default where no letters of administration are taken out?

5. Is there any distinction between sales of real estate for taxes, and sales of real estate under sheriff's execution, with regard to dower?

6. What is the rule with regard to payment of interest on purchase money (1) in cases where there is express stipulation in agreement for payment of interest; (2) where it is silent on the same?

7. A. enters into a contract with B. to sell him a house in Belleville belonging to him. He writes B., "will sell you my house in Belleville for $5,000;" B. replies, "will agree to purchase at figure named." Give your opinion as to the liability in a suit of specific performance by either party in such a case, with reasons.

8. Why are wills required to be registered?

9. What provision, if any, is there under the Devolution of Estates Act as to the affidavits of value to be made by an administrator seeking for letters of administration?

10. State the law with regard to crops as between vendor and vendee when agreement is silent as to same.

Equity.

Examiner: P. H. DRAYTON.

1. A. and B. are partners in a mercantile business. Both partners have private property. Executions are placed in the sheriff's hands by both firm creditors and private creditors. The whole of the assets are insufficient to satisfy such executions. How will they rank upon the respective properties?

2. What relief will a Court of Equity grant in the (*a*) non-execution of a power; (*b*) the defective execution of a power; (*c*) the non-execution of a trust; (*d*) the defective execution of a trust?

3. What provision is there as to summary applications in cases of alleged fraudulent conveyances?

4. A., an express trustee, in breach of his trust conveys a portion of the trust estate to a purchaser for value without notice. Ten years elapse when he (A.) purchases the same, and claims to hold it as his own. His former *cestui que trust* brings an action for its recovery. A. defends the same, relying on the Statute of Limitations, and the fact of his having bought from a purchaser for value without notice. Who should succeed, and why?

5. Where there has been partial failure of the purposes for which conversion is directed, what distinction, if any, is there as to the application of the doctrine to cases where it is directed by by deed, and where it is directed by will?

6. State the general law in respect of copyrights in books, and in case of maps and charts. What would you consider as conclusive evidence that the one was a copy of the other in the absence of direct evidence?

7. A. is a patent medicine vendor; B. is an employee of his, and as such obtains the secret ingredients of a non-patented medicine; he leaves his master and proceeds to manufacture and sell the medicine. A. seeks to have him restrained by injunction. Can he succeed? Explain.

8. Explain the principle on which Courts of Equity proceed in decreeing specific performance.

9. State generally the effect of conditions annexed to gifts and legacies in restraint of marriage. Illustrate by examples.

10. What are the rules which have been adopted by the Court in respect of resulting trusts in gifts to charities?