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DIARY FOR AUGUST.

1. Mon .....Slavery abolished in British West India Islands, 1838.
6. Sat.....Thomas Scott, 4th C.J. of Q.B., 1860.
7. Sun.....*9th Sunday after Trinity.*
11. Thur.....Battle of Lake Champlain, 1814.
14. Sun. .....*10th Sunday after Trinity.*
16. Tues .....Primary Examination of students and articled clerks, university graduates and matriculants seeking admission to Law Society to present papers.
20. Sat.....Last day for filing papers with secretary Law Society, before call or admission.
21. Sun.....*11th Sunday after Trinity.*
22. Mon.....Ontario Judicature Act came into force, 1881.
23. Tues .....First Intermediate Examination.
24. Wed .....Last day of setting down for Div. Ct. Chan. Div.
25. Thur.....Second Intermediate Examination.
28. Sun.....*12th Sunday after Trinity.*
30. Tues .....Solicitors' examination.
31. Wed .....Barristers' examination.

TORONTO, AUGUST 1, 1887.

CANADIANS are not the only people who are suffering from a surfeit of laws. Our contemporary, the Chicago *Legal News*, says that the Illinois Legislature has during its session of 1887 made more changes in the laws than any Legislature for fifteen years, and that it will take the Courts of Illinois twenty years to settle the law so as to place it in as good a condition as it was in January last.

THE sudden death of Mr. F. A. Lewin, at the early age of forty-five, has removed from the field of legal literature the latest editor of Lewin on Trusts It appears that Mr. Lewin suddenly dropped dead while taking part in a jubilee celebration in a field near Kensington Palace. His death was due to heart disease consequent on over-exertion and excitement.

RUMOUR has, as usual, been busy with the names of possible successors to the late Sir Matthew Cameron, and of other judges whose resignation is shortly expected to take place; and, as usual, the vaticinations are based largely upon the assumption that the appointment will be made according to the dictates of political expediency. It is to be regretted that there is too much foundation for the belief that judgeships are looked upon by the authorities at Ottawa as fitting rewards for mere political services, and that the interests of the public are but a secondary consideration.

Were the public interests the first consideration, we think it clear that they demand that the Bench of this Province should be reinforced by at least two first-class equity lawyers. At present the only equity lawers on the Bench are the Chancellor and his colleague, Mr. Justice Proudfoot. Mr. Justice Ferguson, though he has of late years, by force of circumstances, been compelled to study the principles of equity, was prior to his appointment to the Bench a common law practitioner. Mr. Justice Robertson's practice at the Bar was also almost exclusively confined to the common law. In neither of the other Divisions, nor in the Court of Appeal, is there a single judge who can be reasonably considered an equity lawyer; and yet purely equity cases are frequently tried by these judges who have to acquire their knowledge of the subject for the occasion. Considering the supremacy which the Judicature Act has given to equity principles, it is of great importance that in each Division of the Court there should now be at least one of the judges thoroughly versed in the principles of equity jurisprudence. Yet ever since the Judicature Act was passed, not a single equity lawyer has been appointed to the Bench. This may possibly be due to the

fact that most of the prominent equity lawyers are connected with the Liberal party politically, and this may, no doubt, have caused their claims to promotion to the Bench to be ignored. There is also the difficulty resulting from inadequate salaries, which no doubt deters leaders of the Bar from accepting judicial office. Neither of these obstacles to a proper selection are, however, insuperable.

SELECTIONS.

INSURANCE FOR WIDOW AND CHILDREN UNDER THE MARRIED WOMEN'S PROPERTY ACT, 1870.

A recent case before Mr. Justice North (*Re Seyton; Seyton* v. *Satterthwaite*, 56 L. T. Rep. N.S. 479; 34 Ch. Div. 511) has removed the doubts which have long hung over sec. 10 of the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93).* By that section "a policy of insurance effected by any married man on his own life, and expressed upon the face of it to be for the benefit of his wife, or of his wife and children, or any of them, shall enure and be deemed a trust for the benefit of his wife for her separate use, and of his children, or any of them, according to the interest so expressed, and shall not, so long as any object of the trust remains, be subject to the control of the husband, or of his creditors, or form part of his estat.. . . . If it shall be proved that the policy was effected and premiums paid by the husband with intent to defraud his creditors, they shall be entitled to receive out of the sum secured an amount equal to the premiums so paid." The first time that questions were raised on the meaning of this clause was in *Re Mellor's Policy Trusts* (6 Chy. Div. 127; 7 Chy. Div. 200). There the policy contained a recital that the assured had proposed to effect an insurance with the company upon his own life for the benefit of any wife, and also of any children or child who might survive him, and by the policy the capital stock and funds of the company were charged with and made liable to pay to such person as should be competent, or entitled, to give a good receipt and discharge for the same under the Act, within three calendar months after proof satisfactory to the directors of the company should have been given of the death of the assured, for the benefit of his wife and children or child, the full sum of £400, together with all other moneys payable thereunder, and all benefit thereof. The interests to be taken by the widow and children of the assured were not further or otherwise expressed upon the face of the policy. The assured left a widow and two daughters, and by his will he gave all his property to his widow absolutely, and appointed her one of the executors, and she proved the will alone. The widow and children then petitioned the court for a declaration of their rights and interests in the policy moneys, and asked for a distribution either as upon an intestacy, or else to the widow for life, with remainder to the children, according to the usual trusts of a settlement. Vice-Chancellor Malins refused the former alternative, because the words of the Act are that it is to be deemed a trust for the widow for her separate use. The money was therefore, he decided, to be held by the trustee, when appointed, upon trust for the widow for life, with remainder to her children, according to the usual trusts of a settlement, and with an ultimate remainder, if either daughter attained twenty-one or married, for the widow absolutely. Shortly afterwards an application was made in the same case that, as the husband had died intestate, and the income of the money to be received under the policy would be inadequate for the maintenance of the widow and children, the fund might be applied according to the provisions of the Statute of Distributions. The Vice-Chancellor held that he could interpret the provision in the 10th section as meaning that the fund "was to be held for the separate use of the widow as against a husband so long as the woman was married, and that it did not mean that a woman formerly married, but whose husband was dead, could

* See R. S. O. c. 120, s. 16.

not take a part of the capital with the sanction of the court. As the applicant was a widow, and proved to be in poor circumstances, he should hold that the money might be distributed as in the case of an intestacy."

For six years the question slumbered. But in 1883 it came again to the fore, in *Re Adam's Policy Trusts* (48 L. T. Rep. N. S. 727; 23 Chy. Div. 525). There the husband effected a policy for the benefit of his wife and the children of their marriage. He died intestate and insolvent, his wife and one child of the marriage having predeceased him. There was no intention of taking out administration to the husband's estate. The seven surviving children, three of whom were infants, petitioned the court for the appointment of a trustee of the moneys payable under the policy, for a declaration of the rights and interests of the petitioners in the moneys, and for an order upon the trustee to hold the moneys when received in trust for the children equally. Mr. Justice Chitty took a view of the Act which has not been adopted in the latest case. It appeared to him that the effect of the policy and of the Act taken together was to constitute a declaration of an executed trust, and that all the court has to do is to express its views of the construction of the two instruments taken together. Now there were only two possible constructions. One was, that the wife took for life, with remainder to the children; and the other was, that the wife and children took as joint tenants. The judge expressed his opinion that, upon a fair construction of the policy, the wife took a life interest, and this for two reasons: First, the Act says that the policy expressed upon the face of it to be for the benefit of the man's wife, or of his wife and children, shall be deemed "a trust for the benefit of his wife for her separate use and of his children, or any of them, according to the interest so expressed." If the wife took as a joint tenant, the words of the Act, so far as they give her an interest "for her separate use," would have no meaning at all. Assuming a joint tenancy, the wife has a right of severance immediately upon the fund falling in, or before the money is received, and the money is usually payable by the insurance office six months after the death of the assured; but it could scarcely be said that the Legislature contemplated the re-marriage of the wife within that period of six months, and that therefore the words "separate use" are intended to apply to so short a period. Secondly, in the 11th section of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75) the words "separate use" are omitted, because by sec. 1 (3) the presumption in future as to all married women is that their property is held for their separate use. For these two reasons the order in *Re Adam's Policy Trusts* was prefaced with an expression of opinion that the representatives of the wife and deceased child were not necessary parties to the petition, and that the surviving children took jointly. Mr. Justice Chitty characterized the first decision in *Re Mellor's Policy Trusts* (*ubi sup.*) as inexplicable, and confessed that he was unable to discover on what ground the Vice-Chancellor proceeded when the case came before him the second time, and he held that the fund ought to be distributed as in the case of an intestacy. The Vice-Chancellor was, he said, much too good a lawyer to hold that a fund held on trust for a wife and children should go as on an intestacy; and the only ground for his reference to the Statute of Distributions seemed to have been that the widow was in poor circumstances.

Now, however, the decision of Vice-Chancellor Malins has been explained. In *Re Seyton; Seyton* v. *Satterthwaite* (*ubi sup.*) the policy contained a recital that the husband was desirous of assuring his life under the provisions of the Married Women's Property Act, 1870, for the benefit of his wife and of the children of their marriage. And it certified that under the provisions of the Act his wife and the children of their marriage, whom failing, the heirs, executors or administrators of the husband, should be entitled to receive out of the funds of the institution at the end of six months after the decease, the sum of £4,000. There were issue of the marriage seven children; one died before the policy was effected, another died an infant in the lifetime of the assured, a third died shortly after his death under age. The other four were all infants, and defendants to a summons taken out by the widow, as sole executrix of her husband, devisee, and legatee of all his estate, and

testamentary guardian of the children, to determine the right of herself and her children in the policy moneys. On this Mr. Justice North decided that the widow and children took as joint tenants. The court has often taken hold of slight circumstances, in the case of a gift to a wife and children, as sufficient to indicate that the wife is to take for life with remainder to the children; but there was no such indication in the policy in question. The Act refers, as might be expected, to the policy itself for the expression of what the benefit intended is. In the policy there was not the smallest indication to justify the court in deciding that the widow was to take for life with remainder to the children. And there has never been a case in which the mere direction in a gift to a mother and children that the interest of the mother should be for her separate use has been held sufficient in itself, without more, to warrant the construction that the mother takes for life with remainder to her children. This being so, Mr. Justice North came to the conclusion that, whether the policy was considered alone or jointly with the Act, it amounted to a settlement on the wife and children by creating vested interests as joint tenants in such of them as were living at their father's death. As regards the decision in *Re Mellor's Policy Trusts*, it was pointed out that Vice-Chancellor Malins held, that the reference in sec. 10 of the Act to the wife's interest being for her separate use did not prevent her taking a share of the capital. "The learned counsel," said Mr. Justice North, "seems to have relied again on the Statute of Distributions, and to have confused the mind of the reporter thereby; but the Vice-Chancellor said nothing about the statute. He modified his order that there must be a settlement on the wife for life, with remainder to the two children, and held that they could all share in the capital. They must therefore all have taken like third shares; which are the exact proportions they would have taken in any fund as to which there had been an intestacy. I have no doubt that some remarks by the Vice-Chancellor to that effect, referring to the argument urged before him, are summarised by the reporter in the final words, 'that the money might be distributed as in the case of an intestacy.' The report, however, is not a satisfactory one." The case is not reported in the *Law Times*. With these conflicting decisions on the section, it seems very desirable that the opinion of Mr. Justice North should be indorsed by the Court of Appeal.

It remains to observe in this connection that a petition, presented since the coming into operation of the Married Women's Property Act, 1882, for the appointment of trustees of the proceeds of a life policy effected by a husband, under the provisions of the Married Women's Property Act, 1870, for the benefit of his wife and children, ought to be entitled in the matter of the Act of 1882, and also of the Trustee Acts. In *Re Soutar's Policy Trust* (26 Chy. Div. 236) the lamented Mr. Justice Pearson doubted whether section 10 of the Act of 1870 remains in force for any purpose, because sec. 11 of the Act of 1882 says that if at the time of the death of the assured there shall be no trustee, a trustee or trustees "may be appointed by any court having jurisdiction under the provisions of the Trustee Act, 1850, or the Acts amending and extending the same." And in another case under the Act of 1870 (*Re Howson's Policy Trusts*, Weekly Notes, 1885, p. 213) the petition of the widow and infant children asked for the appointment of a single trustee for the purpose of receiving the policy money from the insurance company, relying on the fact that sec. 10 speaks of the appointment of "a trustee." But Mr. Justice Pearson said that it would be contrary to the practice of the court to appoint a single trustee when a fund was to be retained on behalf of infants.

The sec. 11 (in the Act of 1882) is an amplification of sec. 10 of the Act of 1870, and differs from it in four respects. First, as has already been observed, it omits the words "for her separate use," as being superfluous. Secondly, it makes similar provision for a policy effected by a woman for the benefit of her husband and children as for one effected by a man for the benefit of his wife and children, and the subsequent provisions of the section apply equally to both. Thirdly, the more modern section enables the assured, by the policy or any memorandum under his or her hand, to appoint trustees, and to make provision for the appointment of new trustees, and for the investment of the moneys.

Lastly, the new Act adds the provision that, in default of the appointment of trustees, or in default of notice to the insurance office, the receipt of the legal personal representative of the assured shall be a discharge to the office for the sum secured by the policy or for the value thereof, in whole or in part.—*Law Times.*

THE DUTIES OF RETURNING OFFICERS.

The decision of the Court of Appeal in the case of *Regina* v. *The Mayor of Bangor*, 56 L. J. Rep. Q. B. 326, is an important contribution to Parliamentary law, showing a tendency on the part of the judges somewhat to minimize the office of returning officer in the direction of making his duties ministerial. It also decides as part of the positive law of municipal elections that an alderman is eligible as a candidate for common councillor during the time when he is alderman, and blots out of the books a case of *Regina* v. *Coaks*, 23 Law J. Rep. Q. B. 133, having the authority of no less distinguished judges than Lord Campbell and Mr. Justice Crompton, but decided after several cases which the Court of Appeal consider inconsistent with it, and which certainly were not cited to the Queen's Bench of that day. In regard to the duties of the returning officer between the nomination and the return exclusively of both, the Court of Appeal interpret the rules of the Ballot Act, which apply to Parliamentary and municipal elections, in the sense that he is a mere counter of papers, a view which cannot but be considered novel and somewhat subversive of preconceived notions. In regard to municipal elections the effect of this ruling is that so soon as a candidate's name has passed the ordeal of nomination, he must be declared elected if he obtain a sufficient number of votes. Whether the mayor at a municipal election or the returning officer at a Parliamentary election can object to the eligibility of a candidate at the nomination, and whether the returning officer at a Parliamentary election can on his return reject a candidate who has obtained sufficient votes as ineligible, and return an opponent, are points left open, but undoubtedly the tendency of the decision is to reduce the character of the duties of these occasions from *quasi* judicial to ministerial. As there is no return at a municipal election the only point at which an objection to eligibility can be made is at the nomination, if even then.

The difficulty arose at the municipal elections for Bangor last November. For the election of councillor on November 1, Mr. Roberts, an alderman, whose term of office would not expire until November 9, and Mr. Pritchard, who was eligible, were nominated for one of the wards. Objection was taken to the nomination of Roberts before the mayor, but his nomination was received. When the returning officer for the ward counted the votes at the poll he found that Roberts had a majority, but he did not declare him elected, although the mayor took upon himself to announce the numbers. Two days afterwards the returning officer issued a notice that Roberts was disqualified, and that Pritchard was elected, and the rivals both took their seats. We believe that the result of this rivalry was that rival mayors were elected, one at one end of the Guildhall and the other at the other, and the Queen's Bench was called upon to relieve the deadlock. This they did by declaring in favour of Pritchard, issuing a peremptory *mandamus*, which, now that there is an appeal to the House of Lords in respect of it, will probably supersede the old practice of issuing in important or doubtful cases a writ of *mandamus* requiring a return. An appeal was immediately carried to the Court of Appeal, and the matter argued, adjudged and reported with a fulness worthy of the occasion. All the judges, except Lord Justice Lindley, admitted that the two offices were incompatible, but Lord Justice Lindley appeared to have been misled as to the dates, for he says, "As Roberts went out of office as alderman on November 9, and as his new office as councillor did not begin till November 9 there was no co-existence of the two offices." This, however, is a mistake. By section 52 of the Municipal Corporation Act, 1882, the day of election of councillors is November 1, and by sec. 60 the day for aldermen is November 9, and by sec. 13 (2) and 14 (6) these days respectively are the days of vacating the offices. Roberts's term of six years as alderman expired on November 9, and he

would, therefore, for eight days fill in fact both offices at the same time. Whether he filled both in law is a point fully argued by the Master of the Rolls, depending on the consideration whether the acceptance of the office of councillor was a vacation *ipso facto* of the office of alderman. A long string of authorities, beginning with 1765 and going down to 1841, were in favour of the view that the acceptance of the new office vacated the old. Against this view was the decision in *Regina* v. *Coaks*, and the fact that the Acts of 1835 and 1882 had since those cases considerably altered the precedure at municipal elections. The Master of the Rolls and Lord Justice Lopes disposed of the case of Coaks by saying that the question of the eligibility of the alderman in that case was concluded by the terms of the special case. The words of the special case were: "All the citizens who delivered their voting papers for Blake had notice that he was not eligible as councillor by reason of his then being an alderman of the city and not having resigned such office as alderman." It is difficult to see how a special case stated in terms like these by Chief Justice Jervis at Nisi Prius "stated the case out of court," as the Master of the Rolls says. It stated the fact of his being an alderman, and not whether he legally was an alderman. A better ground for discounting the case is to be found in the fact that the learned judges do not in their judgments deal with the point of eligibility, but rather with the point whether the votes were thrown away; and of the seven earlier cases cited in the Court of Appeal having the contrary effect not one was cited to them. It was impossible that the case of Coaks could stand against this weight of authority, unless the then recent statute made a change in the law. It was contended for Pritchard that the result of this view of the Act would bring about that the alderman would be subject to a fine for resigning his office. On this point the Master of the Rolls says: "I do not now decide, but I assume for the purposes of this case that he is liable, and that by accepting the office of councillor, and thereby resigning the office of alderman, he elects to pay the fine." Lord Justice Lopes says: "I very much doubt whether he would be liable to a fine." On turning to sec. 36, the fine imposed does not seem to be of a very penal nature. It provides that "a person elected to a corporate office may at any time by writing signed by him and delivered to the town clerk resign the office on payment of the fine for non-acceptance thereof." In the case of an alderman the fine is £25. Before the Act of 1835 a resignation was an indictable offence, so that the milder view taken by the Act would strengthen the position taken up by the Court of Appeal if this section applied to a resignation brought about by accepting another office. Moreover, the fine appears to be rather a composition than a penalty. A resignation by operation of law is not a resignation by writing under the section, and it thus appears that the Act does not contemplate resignations by operations of law, such as existed before the Act of 1835. There is, however, a formidable argument against the view of the Court of Appeal, in the confusion it may introduce by allowing a candidate to be nominated who is only contingently qualified. No doubt, as the contingency is his being elected, no great harm is done, but the rule is contrary to that in force at Parliamentary elections, at which a candidate must be qualified at the time of nomination. It seems also strange that the Act should, by section 14, sub-section 4, have expressly provided for the vacation of the seat on a councillor becoming an alderman, but is silent in regard to the converse process.

Little need be said of the interpretation put on the Ballot Act. It is read literally. By section 2 the returning officer shall open the ballot boxes and ascertain the result of the poll by counting the votes given to each candidate, and shall forthwith declare to be elected the candidate or candidates to whom the majority of votes have been given. The word "candidate" is read not as eligible candidate, but as a candidate whose name appears on the nomination paper. Again, Rule 45 of the Ballot Act, which requires that the returning officer shall "give public notice of the names of the candidates elected," is interpreted to mean the names of the persons nominated who have the most votes, whether eligible or not. Whether after this decision there is any shred left of the judicial duties of the returning officer in regard to the eligibility of can-

didates is a matter of doubt. The Master of the Rolls reserves the question whether the mayor at the nomination may reject a candidate as ineligible, and whether the returning officer at a Parliamentary election may reject as ineligible the candidate with most votes. These, however, are crucial points in the action of the respective officers, and it were better first to decide their duties in regard to them, and afterwards to decide their duties on minor occasions. It can hardly have been intended that the duties of a returning officer should be at one point to declare a candidate elected, and at another point to return some one else. So far as municipal elections are concerned, the duties of the mayor at a nomination appear, by Rule 9 of Part 2 of Schedule 3, to be confined to objections to nomination papers. How far this strict interpretation of the Ballot Act will affect Parliamentary elections remains to be decided. At present all that is definitely laid down is that the returning officer of a ward at a municipal election is a ministerial officer, but indirectly the decision appears to go far towards making the duties of all returning officers purely ministerial.—*Law Journal.*

EMPLOYERS' LIABILITY FOR DEFECTIVE PLANT.

In *Thomas* v. *Quartermaine*, 56 Law J. Rep. Q. B. 340, reported in the June number of the *Law Journal Reports*, the Court of Appeal differed in opinion as to the meaning to be put on the obscure expression of the Legislature at the end of section 1 of the Employers' Liability Act, 1880,* as applied to the first of the subjects on which the law of master and servant is altered. "Where," says the section, "personal injury is caused to a workman by reason (among other things) of any defect in the condition of the ways, works, machinery, or plant connected with, or used in the business of, the employer, the workman shall have the same right of compensation and remedies against the employer, as if the workman had not been a workman of, nor in the service of, the employer." The enacting part of this provision, so far as regards the other three cases mentioned in the section, all of which involve the old doctrine of common employment, can have an intelligible meaning given to it. The words "as if the workman had not been a workman," however inept, may be read to destroy the doctrine of common employment. What is their meaning when applied to the case of defective machinery? Lord Esher differs on this point from Lord Justice Bowen and Lord Justice Fry. Lord Esher's view is that the words "as if he were not a workman" mean in this application that "the employer shall pay." The workman has only to establish a defect in the plant of his employer, and damage arising out of that defect to himself, and he can call on his employer to compensate him. On the other hand, Lord Justice Bowen and Lord Justice Fry consider the effect of the words to be, to convert the workman's relation into the same relation to the employer as if he were a stranger invited on to the premises by the employer. There are grave difficulties in the way of both those views. If Lord Esher be right, why did not the statute impose the liability for defective plant directly on the employer instead of using words which evidently refer to the responsibility of the master only in regard to the acts of fellow-servants? On the other hand, the interpretation of Lords Justices Bowen and Fry seems inconsistent with itself, especially as put by Lord Justice Bowen—that is, on the doctrine, that the workman incurred the risk with his eyes open. The learned judges assume that the workman is a stranger, but they impute to him the knowledge he possesses as a workman. There is a third construction of the section which makes the whole tolerably intelligible. It is this, that the "defect" referred to, which is to throw the liability on the employer as if the workman were not his workman, means a defect brought about by the negligence of a fellow-workman. The only difficulty in the way of this interpretation, apparent on the statute itself, is that section 2, subsection 1, provides that "the defect under sub-section 1 of the previous section shall arise from, or not be discovered or remedied owing to, the negligence of the employer" or his superintendent; but the object of this clause seems rather meant to include within the jurisdiction of the

* See 49 Vict. c. 28, s. 3 (O.).

County Court the old common law form of action in which the employer was made liable for his own personal positive negligence, than to give any wider meaning to section 1, sub-section 1, than was necessary to rescind the rule as to fellow-servants, so far as the plant was concerned. A further difficulty, however, was in the way of the Court of Appeal in the shape of the decision in the case of *Cripps* v. *Judge*, 53 L. J. Rep. Q. B. 517, a case disposed of in a few brief sentences, following *Heske* v. *Samuelson*, 53 Law J. Rep. Q. B. 45. In *Cripps* v. *Judge* the Court of Appeal, composed of the same judges as sat in *Thomas* v. *Quartermaine*, held that sub-section 1 of section 1 of the Employers' Liability Act of 1880 imposed a liability on the employer for damages caused by reason of defects in his plant in point of its original design and construction. Both *Heske* v. *Samuelson* and *Cripps* v. *Judge*, were respectfully criticised at the time of their decision in these columns; and it was submitted that the only defects included were defects arising in the course of use. The complication which they add to the present question considerably increases the doubts expressed of those decisions.

The views of the Master of the Rolls of the effect of sub-section 2 of section 1, read with section 2, sub-section 1, is that it clears out of the way of the workman the two doctrines that he could not recover for the negligence of his fellow-servant, and that he undertook the risk of the service. The action, then, in his opinion, resolved itself into the ordinary action of negligence, which he proceeds to treat according to his well-known views on the subject, as expressed in *Heaven* v. *Pender*. This doctrine he expresses on this occasion in the words that "the duty in these cases is that you shall do nothing to injure a man who is near you, and of whose proximity you are aware." He applies this doctrine to the Employers' Liability Act by saying that "the Act recognizes, if it does not impose, the duty upon the master to use reasonable care, and not to have the ways, works, machinery, or plant in a defective condition." The answer to this view seems to be found in the words of Lord Justice Bowen when he says "that an Act which distinctly provides that the workman is to have the same right as if he were not a workman, cannot, except by violent distension of its terms, be strained into an enactment that the workman is to have the same rights as if he were not a workman and other rights in addition." In other words, although the workman ceases to be a workman, so far as his legal disabilities are concerned, he does not cease to be a man, and therefore the master is not responsible to him unless as between man and man, he would have been responsible to a stranger. The difficulty is where to draw the line which the statute has not drawn for us. It is impossible to read the statute literally, because that renders it nugatory. If the workman is only to have the same rights as if he were not a workman, nor in the service of the employer, he would literally have no rights at all, because his identity would be destroyed, and he would be as if he had not been on his master's premises at all or only there as a trespasser. The statute must, therefore, be construed so as to give the workman a status not so low as a trespasser, but better than a workman. This status is that of a visitor, or of a person lawfully on the premises of another by his invitation. So far the reasoning of the Lords Justices will be concurred in, but we think it unfortunate that they should have resorted to the very vague and unsatisfactory maxim, "*Volenti non fit injuria*," in order to show what the duty of Quartermaine was to Thomas in this case. The maxim, no doubt, has sometimes been loosely applied, but it properly means simply that an injury is no injury to the person who consents to it. In explaining that a trespass is excused by a license the maxim is appropriate, but in this case the man was very far from *volens*. The very last thing he wished to happen to him was a fall into the vat. Moreover, so soon as we begin to look at the intention of the parties as defining the duty of one to the other, we enter upon the region of contract, which region in regard to this subject of master and servant the statute intends to close to us. There was no necessity to resort to the maxim at all, because it is settled law that the duty of a proprietor to a visitor is to guarantee him against traps, and not to guarantee that every object he may meet during his stay is in the highest possible

condition of perfection. The phrase, *volenti non fit injuria*, is not used in *Indermaur* v. *Dames*, 35 Law J. Rep. C. P. 184, which is the leading case on the question of the duty of the proprietor to a visitor.

The decision of the Court of Appeal, it is to be observed, was delivered on the assumption that there was evidence of negligence on the part of the employer, not such evidence as would have satisfied the old common law rule imposing liability on the employer, but such as would satisfy the requirements of section 2, sub-section 1. The County Court judge so found, and there appears to have been no motion made to alter his findings on this head on the ground that there was no evidence in law to support it. At the same time it is difficult to see what evidence of negligence there was. The County Court judge appears to have been of opinion that the vats ought to have been fenced, in order that a man engaged in such an operation as that in which Thomas was engaged—namely, removing a lid from underneath an adjoining boiler—might not fall into the vat through the lid being jammed, and the man too eagerly pulling at it. The combination of circumstances seems to have been such that no employer, however prudent, was likely to expect it, or could be blamed for not anticipating it. The case, therefore, must not be used as a precedent on this point, but it stands good for the position that a workman in regard to his employer's plant is in the same position as a visitor to his premises. Lord Justice Fry draws an elaborate distinction between willingness to assume danger, which he says affects the duty of the defendant, and contributory negligence, which affects the right of the plaintiff to recover. Whether the distinction is sound, except when the negligence in the one instance is matter of contract, we are not prepared to say; but in order to understand the Lord Justice's statement, a correction must be made in the text of his judgment. He says: "There are two matters which are liable to be confused and yet are inseparable in reason," when he meant, no doubt, to say "separable." —*Law Journal.*

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

QUEEN'S BENCH DIVISION.

McGREGOR v. DEFOE.

Illegal distress for rent—Over-holding tenant—Removal of goods.

Plaintiff remaining in possession and paying rent after expiry of term, defendant distrained on his goods on the premises six miles from Toronto for two months' arrears of rent, removing goods to Toronto to impound and sell.

Held, that the relationship of landlord and tenant existed at time of distress; and that the removal in question of the goods, unless unnecessary and unreasonable, or malicious, was not a good ground of action.

G. T. Blackstock, for motion.

J. E. Robertson, contra.

Div. Court.]

McGREGOR v. BISHOP.

Promissory note—Partial failure of consideration—Parol agreement to reduce full value of note by $500—Indorsement after maturity.

Defendants bought stock of C. for $5,500, covenanting to pay same, the deed also providing part of amount was to be secured by four promissory notes of $1,100 each. After maturity of last note C. indorsed it *sans recourse* to plaintiff. To action on note, defendants pleaded that C. misrepresented value of goods, and agreed before maturity of note to allow reduction of $500 from its face value, and that plaintiff took note after maturity. Defendants paid $626.50 into court, the balance due on note, with interest. At the trial plaintiff admitted he claimed to occupy no different position from C. Defendants' evidence showed a verbal agreement to make the reduction of $500, but there was nothing in writing. C swore he never made the agreement. The judge found C. had, and that plaintiff stood in

same position as C., dismissing action with costs.

Held, right, and that plaintiff was bound by the verbal agreement.

A. C. Galt, for motion.

W. Nesbitt, contra.

Div. Court.]

REGINA v. DUNNING.

Weights and Measures Act—Crime—Evidence of defendant—Imprisonment—Jurisdiction—Certiorari Conviction bad in part.

Defendant was convicted by two justices under Weights and Measures Act (42 Vict. ch. 16, s. 41, ss. 2 [D.]), as amended by 47 Vict. ch. 36, s. 7 (D.), of obstructing an inspector in discharge of duty, and fined $100 and costs, to be levied by distress, imprisonment for three months being awarded in default of distress. At the hearing defendant tendered his own evidence, which was rejected, when he appealed to the General Sessions, again tendering himself as a witness, but with same result, and the conviction was affirmed. On motion for certiorari,

Held, that conviction being affirmed on appeal, certiorari was taken away, except for want or excess of jurisdiction, neither of which existed, as the justices and General Sessions had jurisdiction to determine whether defendant's evidence was admissible or not, and their judgment, even if wrong, could not be reviewed by certiorari.

Per ARMOUR, J.—That even if they could be reviewed, the justices were right, as the offence charged was a crime.

Held, also, ARMOUR, J., dissenting, that imprisonment was justified in default of distress, by 32 & 33 Vict. ch. 31, s. 62 (D.), incorporated in Weights and Measures Act, by s. 53 thereof; but that if imprisonment were not so justified the whole conviction would be bad, there being no power to amend by striking out the award of imprisonment.

Per ARMOUR, J.—That 32 & 33 Vict. ch. 31, s. 62 (D.) should only be construed as fixing the duration of the term of imprisonment where the special Act provides specifically for some imprisonment without fixing its duration; and that as no imprisonment is expressly imposed by the Weights and Measures Act for the offence charged here, so much of conviction as awarded imprisonment was *ultra vires*, and therefore bad; but that it was separable from the residue of the conviction, and should be quashed, the residue standing.

Shepley (*McDougall* with him), for motion.

Clement, contra.

Div. Court.]

SHAW v. ONTARIO COTTON MILLS CO.

Master and servant—Negligence—Injury to workman—47 Vict. c. 39, s. 15, ss. 1 (O.)—49 Vict. 28, s. 3, ss. 1 (O.)

In defendants' dyehouse were a number of vats for boiling cotton. While employed in defendants' factory plaintiff had to stand on top of one of the vats, the covering of which was some boards. Plaintiff, about 3rd Dec., 1886, complained to the foreman of the insufficient number of boards for the purpose, but without effect, and on 6th of same month a board on which he was standing slipped, and he was thrown into the boiling liquid. Then defendants remedied the defect. A similar accident had occurred two years before.

Held, setting aside a nonsuit at the trial, that there was evidence enough of negligence on defendants' part in not guarding the vat, under 47 Vict. ch. 39, s. 15, ss. 1, the Ontario Factory Act, to have justified the jury in finding for plaintiff, and that apart from the Factory Act plaintiff could have sued under 49 Vict. ch. 28, s. 3, ss. 1, the Workmen's Compensation for Injuries Act; and that the maxim *Volenti non fit injuria* did not apply to this case.

Staunton, for motion.

Mackelcan, Q.C., contra.

Div. Court.]

STANDARD BANK v. DUNHAM.

Promissory note—Partnership—Liability of retiring partner for note signed in firm name after dissolution.

D. carried on business at M. from Feb., 1886, to 1st September, 1886, under style of D. & Co. He also did so at T. with P. from

1st May, 1886, to 1st August, 1886, under same name. It was agreed between D. & P. that D. should not sign firm's name to bills or notes. Their dissolution was not advertised till 20th August, 1886. D., for his own purposes, and without knowledge of P., on 11th August, 1886, signed notes for $21,000 with firm's name and gave them to I. The note in question in this action was one of these, but dated 30th July previously. Plaintiffs, in ignorance of P. being a member of the firm, took the note, without notice of any infirmity, in security for a pre-existing overdue debt. The judge at the trial told jury plaintiffs could resort to either for payment.

Held, misdirection, and that there was no such right of election; that creditor must prove who his debtor was, and defendants need not prove they were not the debtors.

Held, also, if note given before 1st August, judge should have asked jury which firm D. intended to bind; but as note not given during the partnership, and plaintiffs were ignorant of firm, or that P. was a member, the question was not material.

Held, also, that plaintiffs being ignorant of firm of D. & Co., or its members, and having had no dealings with it, P. was not liable on the note signed after 1st August, when the dissolution took place, though before 20th August when publication of same was made. The facts being all before them, the court, instead of ordering new trial, gave judgment for P., with costs.

J. K. Kerr, Q.C., and *John A. Paterson*, for motion.

Lash, Q.C., and *Holmes*, contra.

Div. Court.]

BALLARD v. STOVER.

Will—Devise—Trust—Trustee—Beneficial interest—Intestacy—Construction—"Share and share alike"—"Survivors and survivor."

A testator devised as follows:

"I will devise and bequeath unto William Stover, Ephraim Stover, Adam J. Stover, William Francis Jacob and Jacob Stover . . . their heirs, executors, administrators and assigns for ever, all my real and personal property, share and share alike . . . upon trust that they, or the survivors, or survivor of them shall, out of the said real and personal estate, suitable and well, support Mary Stover, my present wife, in as comfortable a position as she now has with me, for and during her natural life.

"I hereby nominate, constitute and appoint the aforesaid W. S., E. S., A. J. S., and W. F. J., executors of this my last will and testament."

The plaintiff and the defendants, the above named executors and the other defendants, were all nieces and nephews of the testator, and would have been entitled to share in the testator's estate in the case of his dying intestate.

Held (ARMOUR, J., dissenting), that the trustees took the beneficial interest in the estate, subject to the maintenance of the testator's wife.

Per ARMOUR, J.—The trustees took no beneficial interest in the estate, and after the death of the testator's wife, the purposes of the will were satisfied, and the estate passed to the plaintiffs and those entitled as in the case of intestacy.

Div. Court.]

WINFIELD v. FOWLIE.

Interpleader—Practice—Evidence of intention to extend operative force of a deed—R. S. O. caps. 102 and 104—Short Forms Acts—Onus probandi in interpleader issues—Mill and machinery, realty or personalty—Dominant and servient tenements—Partnership rights under fi. fa. against one partner—Analogy between operative words in wills and deeds.

In December, 1874, Hugh Kean purchased machinery in question for $1,529. In March, 1875, Hugh K. placed this machinery in the mill in question, which cost $600, and was erected by Alexander K., with Hugh K.'s money, in the water opposite lot 15, con. 7, township of Tay, county of Simcoe, over two hundred feet from low water line, and outside the limits of lot 15, even had the lot been all dry land.

The mill was built on a framework of logs sunk to the bottom of the bay and kept there by stones, the foundation of the mill being bolted to the upper logs, and the machinery

in question being, till its removal by defendant, securely fastened to the mill.

On 18th March, 1875, Hugh K. and Alexander K. entered into partnership, articles of which appeared in evidence, whereby it was agreed *inter alia* that they should purchase a parcel of land in the said township and erect thereon a shingle factory; and furnish funds equally, and divide all profits and share all losses; each partner to have power to purchase land for said business, the partnership to continue twenty years unless dissolved by mutual consent. Hugh K. never got anything out of said business; this partnership was never dissolved, but Hugh K. abandoned all interest in it in 1877, though retaining his legal claim, while Alex. K. from its erection had sole charge and control of the business. In September, 1876, Alex. K. purchased from one W. D. Ardagh for $400 the said lot 15, and received a Short Form Deed under R. S. O. cap. 102, wherein the land was described by exact metes and bounds, the water limit being described as "following the course of the water's-edge." All subsequent documents of title refer to this description, and none contain any reference to a mill or machinery.

The mill was connected to the land by a foot-bridge. The land was used as a convenient piling-ground. The mill was placed in deep water to facilitate floating logs to it.

There was no evidence of the intention of Ardagh in giving this deed to Alex. K. On 1st June, 1877, Alex. K. borrowed from John K. $1,000 for nine months for purpose of the business, giving a mortgage under R. S. O. cap. 104, on this lot, believing the mill to be covered by the mortgage. On same date Hugh gave a collateral mortgage on same land because required by John K., who knew of the partnership, and that Hugh K. had paid for the mill and machinery. This mortgage debt was never paid. In June, 1883, the plaintiff recovered a judgment against Alex. K. On 4th July, 1883, John K. gave Alex. K. the usual notice of sale, and from that date considered the property his own.

In Sept., 1885, John K. gave one Frank K. a power of attorney to sell the said lot 15, intending to authorize him to sell the mill and machinery also. In Sept., 1886, Frank K. sold the land, mill, and machinery to defendant. On 25th February, 1886, John K. gave defendant a deed of the lot under the power of sale in his mortgage, intending to convey to him also the mill and machinery. On 8th March, 1886, defendant paid the consideration, and received a receipt in full for the property, mill and machinery, and authorizing defendant to "remove the mill and machinery at once." This was the only document in which the words "mill," or "machinery," etc., appear.

By 6 a.m. on 11th March, 1886, defendant had the mill and machinery removed and loaded on G. T. Ry. cars for shipment; at 10 a.m. an alias fi. fa. against goods of Alex. K. was issued by plaintiff, and the mill and machinery was seized in possession of defendant, and this issue was directed in the usual course.

It clearly appeared that all parties considered the mill and machinery as part of the adjoining lot.

At the trial the learned judge *held*, 1st. No evidence of intention could be received to extend the operative force of the documents of title; 2nd. The claimant (the defendant) must succeed by the strength of his own title and not by weakness of plaintiff's; 3rd. The mill did not pass under the documents, and plaintiff must succeed.

On rehearing before Divisional Court,

Held (O'CONNOR, J., dissenting), evidence of intention is admissible to show what the parties to a conveyance mortgage, etc., intended to pass thereunder.

Held (O'CONNOR, J., dissenting), this mill and machinery having been "used, occupied and enjoyed," with the land in question, would pass with a statutory deed or mortgage of the land, the short form having the same force as the long form set out in detail in R. S. O. caps. 102 and 104.

Held (*per* WILSON, C.J.), evidence of intention being admissible, the title of Alex. K. would pass to John K. under the statutory mortgage pursuant to the full language of No. 13, Column 2, R. S. O. cap. 104, which includes all the right and title of the mortgagor in the "premises hereby conveyed or mentioned or intended so to be."

Held (*per* WILSON, C.J.), the plaintiff must establish his title to the property in question in interpleader issues.

Held (*per* WILSON, C.J.), if the mill and machinery were personalty, it would in any event

be subject to the mortgage debt, and the partnership demands of one partner, as against execution creditors of the other partner.

Held (*per* ARMOUR, J.), the mill and machinery in question so placed became part of the realty.

Held (*per* O'CONNOR, J.), the purpose for, and manner in, which the property is used are to be considered in questions of title, hence the mill being the dominant tenement could not pass under a deed, etc., of the land which was the servient tenement, and R. S. O. caps. 102 and 104, must be strictly construed.

The practice of making execution creditors plaintiffs in interpleader issues commented upon by ARMOUR, J.

The analogy between decisions on R. S. O. caps. 102 and 104, and decisions on such words when used in wills, commented on by ARMOUR, J.

Lount, Q.C., for plaintiff.

Kean, for defendant.

CHANCERY DIVISION.

Ferguson, J.] [June 10.

McGEE v. KANE.

Trial after demurrer—Admissions in defence—Estoppel by conduct.

Where the plaintiff sued to recover land and it was objected at the trial that he had not properly proved his title, and it had appeared that he had proved all the material allegations in his statement of claim, and that the statement of claim had previously been held good on demurrer.

Held, that he was entitled to judgment, and that the rule that a party shall not succeed upon proving his pleadings, unless the judge is of the opinion that he should succeed, cannot be applied to a case where the pleading has been held good upon demurrer.

By way of a special separate defence in the action the defendant set up that one J. K., through whom the plaintiff proved title, was the patentee of the lands, and then went on to allege that he was thereby entitled to a fee simple therein as trustee for her.

Held, that this allegation that J. K. was patentee of the lands could not be made use of by the plaintiff to satisfy any defect in his evidence to prove the case, the burden of which rested upon him by reason of the pleadings of the defendants, which alleged possession in herself and her tenant as aforesaid.

The defendant also alleged that in certain proceedings theretofore had by the plaintiff for the purpose of selling the lands now claimed, under an execution obtained by the plaintiff against her, the plaintiff had asserted that the lands were hers, and that he was therefore now estopped from saying that they were not hers, but that all the time they had belonged to J. K., who had conveyed to him.

Held, that no such estoppel existed for fraud was necessary to the existence of estoppel by conduct, and the person to whom the alleged representation was made must have been ignorant of the truth of the matter, whereas the representation relied on here, assuming it to be made, was made by a person who was not ignorant of the truth of the matter, for the defendant must be taken to have known as well as the plaintiff could know, whether or not she was the owner of the land, or what, if any, interest she had in it.

In advertising certain property to be sold under writs of execution, the sheriff stated in the advertisement that he had seized and taken in execution the lands (describing them), and that these lands, or the right, title and interest of the defendant therein, would be offered for sale by him.

Held, that this form of advertisement was sufficient, and that it was not necessary for the advertisement to define more precisely the nature of the estate or interest to be sold.

Christie, Q.C., and *O'Gara*, Q.C., for the plaintiff.

McCarthy, Q.C., and *Mahon*, for the defendant.

Div. Court.] [June 18.

COX v. HAMILTON SEWER PIPE CO.

The Workmen's Compensation for Injuries Act, 1886—Negligence of superintendent—Notice of action—49 Vict. c. 28, secs. 3, 7, 10 (O.).

Solicitors for the plaintiff before action wrote as follows to the defendants:—

"We have been consulted by Mr. J. Cox

concerning injuries sustained by him while in your employ by which he lost his left hand. We have received instructions to commence an action against you for damages, unless the matter is satisfactorily settled without delay. If you intend contesting this suit, kindly let us have the address of your solicitors who will accept service of process on your behalf."

Held, reversing the decision of SIR M. CAMERON, C.J., that this was sufficient notice of action to satisfy the requirements of 49 Vict. c. 28, s. 7 and s. 10 (O.).

Held, also, that the evidence in this case *prima facie* brought it within s. 3, ss. 3, and the nonsuit must be set aside and a new trial had.

If, while in obedience to orders, injury arises through the negligence of the one giving the orders it is sufficient. No specific order at the time of the injury is requisite.

Lash, Q.C., for the plaintiff.

Osler, Q.C , for the defendants.

Chy. Div. Court.] [June 29.

PARKER v. MAXWELL.

Locatees—Timber license—Free grant—43 Vict. c. 4 (O.).

The meaning of the Act, 43 Vict. c. 4, relating to free grants, is that all standing pine belongs to the Crown; when cut during the process of actually clearing the land for cultivation, or in order to build and fence on the location, it belongs to the locatee: otherwise, when cut, it still continues the property of the Crown. The Statute, having regard to the usual course of operation by settlers, does not contemplate a locatee reserving trees and leaving them standing or uncut during the process of clearing. Where the clearance is all are to be removed, and as to all pine in the clearance so removed the Crown waives its rights in favour of the locatee. But it is not competent for the locatee to leave pine uncut upon his clearing with a view of having a timber reserve for future building or fencing purposes, so as thereby to oust the superior title of Her Majesty.

These principles were applied in the present case, in which the plaintiff sued the defendants who had converted to their own use certain pine trees upon the land which the plaintiff held as locatee, the defendants claiming to have a right to cut the same under a timber license from the Commissioner of Crown Lands.

Pepler, for the plaintiff.

Lount, Q.C., for the defendant.

Leave given to appeal.

Chy. Div. Court.] [June 29.

WARNOCK v. KLEPFER.

Insolvent—R. S. O. c. 118—48 Vict. c. 26, s. 2.

A man may be deemed insolvent in the sense of the Act, R. S. O. c. 118, as amended by 48 Vict. c. 26, s. 2, if he does not pay his way, and is unable to meet the current demands of creditors, and if he has not the means of paying them in full out of his assets realized upon a sale for cash or its equivalent.

Held, under the circumstances of this case, that a certain assignment of book debts made by J. M. to the defendant was made by him when in insolvent circumstances, and was void as against the plaintiff under the above Act.

McCarthy, Q.C., and *G. W. Field*, for the defendants, appellants.

Masson, Q.C., for the plaintiff.

Chy. Div. Court.] [June 29.

NISSOURI v. DORCHESTER.

Municipal corporations — Drainage works — 46 Vict. c. 18, ss. 570, 598.

The township of N., on the petition of seven out of ten property owners, passed a by-law under 46 Vict. c. 18, s. 570, for construction of a drain which was to extend through the adjoining township of D., forming one entire scheme of drainage through both townships. The property owners directly affected by the work were thirty-nine in D. and ten in N., and the rateable division of the costs of the work was $1,345 to be paid by N., and $5,725 by D.

This action was brought by N. to compel D. to pass a by-law under 46 Vict. c. 18, s. 581, to raise its proportion of the fund, which it refused to do.

Held, that the case was not one contemplated by s. 570 and following sections, but fell within s. 598, and that the county council was the proper authority to pass a by-law for

the construction of such a drain as that proposed; but apart from that, even under s. 570, in cases where the drainage work extends beyond the limits of one township, a petition by the majority in number of the persons to be benefited in any part of the townships would seem to be required, the parts of both townships being considered for the purpose of the Act as forming a quasi-municipality for the proper drainage of the particular locality, so that a majority of all that section formed by the combined parts of the two municipalities may ask for, and if the council of the originating township thinks proper, obtain the needful relief.

W. W. Fitzgerald, for the plaintiffs.

W. R. Meredith, Q.C., for the defendants.

Chy. Div. Ct.] [June 29.

MCPHAIL V. MCINTOSH.

Will—Construction—General intention in favour of a class—Particular intention in favour of individuals.

Judgment of Rose, J., noted *supra* p. 253, affirmed.

Moss, Q.C., for defendant, who appealed.

Cattanach, for plaintiff.

Chy. Div. Ct.] [June 29.

WELLS V. LINDOP.

Slander—Qualified privilege—Bad faith—Malice.

Action of slander. Motion after new trial of the case reported 13 O. R. 434, the defendant now in this action pleading privilege, and the motion being to set aside the verdict of $350 for the plaintiff, or for a new trial.

Held, that though the occasion on which the defamatory words were spoken was one of qualified privilege; yet inasmuch as it appeared that the defendant used the words in bad faith, not believing at the time the statements made by him to be true, the defendant's expressions were in excess of the requirements of the occasion and malicious, and he was not protected.

Osler, Q.C., for plaintiff.

Aylesworth, for the defendant.

Ferguson, J.] [July 6.

DOWNEY V. DENNIS.

Trustees—Discretion—Power of sale—Reserve bid.

Motion for injunction restraining trustees under a will selling certain property without a reserve bid.

The will in question contained the following trust for sale: "And whereas trouble and discontent may arise among my family with regard to the property which I own in Toronto, on account of its being put out of the power of my trustees to sell and dispose of said property, I hereby order, direct and fully authorize at and after twenty years of my death my trustees, to whom I have hereinbefore devised my property in Toronto in trust, to absolutely sell and dispose of the said property in Toronto to the best advantage, the proceeds thereof to be equally divided between my heirs, share and share alike."

The twenty years having expired, the trustees had now advertised the property to be sold without reserve.

Held on motion for an injunction by one of the heirs, that the court had jurisdiction to enjoin the trustees from selling the property without proper care, and endangering the rights and interests of the plaintiffs in any way that is needless, and that the evidence in this case showed that to sell the property without reserve would be to do this, and therefore an injunction must go to restrain the proposed sale without reserve.

The Attorney-General of Ontario, for the plaintiffs.

Lash, Q.C., and *Roaf*, for the adult defendants.

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

Boyd, C.] [April 6.

THE CATHEDRAL OF THE HOLY TRINITY v. THE WEST ONTARIO PACIFIC RAILWAY COMPANY.

Expropriation by Railway Co. of part of block of land acquired for specific purposes—Liability to take whole block—Right to exercise option after taking possession—Damages—R.S.C. c. 109, sec. 100, cl. 2.

The plaintiffs were incorporated under 37 Vict. c. 91 (O.), for the purpose of building a cathedral, and were the owners of a block of land enclosed in one fence, and bounded on three sides by streets known as the Cathedral or Chapter House Block, upon which they had erected a chapter house as part of the cathedral, but for want of funds the other part of the cathedral was not proceeded with for some years.

The defendants, in constructing their railway, required part of the block for their line, which would cut off a part of the cathedral when erected, and took possession of it; but the plaintiffs, under the circumstances, declined to sell or convey or arbitrate as to the value of anything less than the whole block. In an action to compel the railway to take the whole, and desist from their proceedings as to part only, it was

Held, that the block of land was set apart for cathedral purposes, and had not by any default of the plaintiffs lost that distinctive ecclesiastical character, and an injunction was granted against the railway taking a part only, as in *Sparrow* v. *The Oxford, etc., R. W. Co.*, 2 D. M. & G. 94.

It was contended by the plaintiffs that the defendants having taken possession could not withdraw but must take the whole block.

Held, that the mere going into possession, although a high-handed act on the part of the defendants, did not necessarily commit them to the purchase of the whole; and that the defendants should have the option to take the whole, or withdraw and pay all damages and costs sustained by the plaintiffs.

Semble, In *Grimshawe* v. *The Grand Trunk Ry. Co.*, 15 U. C. R. 224, it was thought there was power to withdraw after possession taken, *a fortiori*, should that be permissible, when the possession was merely of a part, and having reference only to that part, and it was found that the proprietor objected to the company having that part unless on condition of taking the whole.

Hellmuth, for the plaintiffs.

Meredith, Q.C., and *Cronyn*, for the defendants.

REVIEWS.

COMMERCIAL UNION IN NORTH AMERICA.—We have received a pamphlet embodying a number of letters, papers and speeches on the subject of Commercial Union between the United States and Canada, collected and published by Mr. Erastus Wiman, of New York. Commercial Union between the United States and Canada is very like the union which takes place between the alligator and the fly. The alligator suns himself in the river with his mouth wide open, the flies rush in and settle on his tongue, his mouth suddenly closes with a snap and the union is complete. So it will be with Canadian flies if they are too much taken up with the charms of the tongue of the American alligator.

OSGOODE HALL LIBRARY.

The following is a list of books received at the library during the months of April, May and June, 1887:—

Addison on Torts. Sixth edition. London, 1887.
Arnold on Marine Insurance. Sixth edition. London, 1887.
Bates' Limited Partnerships. Boston, 1886.
Bennett on *Lis Pendens*. Chicago, 1887.
Bigelow's Supm'nt Overruled Cases. Boston, 1887.
Birdseye's Table N. Y. Statutes. New York, 1887.
Bishop on Contracts. Chicago, 1887.
Black's Constitutional Prohibitions. Boston, 1887.
Blackburn's Contract of Sales. Philadelphia, 1887.
Burrill on Assignments. Fifth edition. New York, 1887.
Bythewood's Conveyancing. Fourth edition. Vol. 4. London, 1887.
Chitty's Equity Index. Vols. 3 and 4. London, 1886.
Clifford's Private Bill Legislation. London, 1885-87.

Cook on Stock and Stockholders. New York, 1887.
Cox & Co.'s List of Persons Advertised. London, 1887.
Dale & Lehman's Digest Overruled Cases. London, 1887.
Ellis' Trustees Guide to Investments. London, 1887.
Freeman on Cotenancy and Partition. San Francisco, 1882.
Hammick's Law of Marriage. London, 1887.
Harris' "What is to be Done Before Trial." London, 1886.
Healey's Joint Stock Companies. Second edition. London, 1886.
Heard on Civil Precedents. Boston, 1886.
Hill's Repression of Crime. London, 1857.
Index to Local and Private Acts. Ottawa, 1887.
Jardine on the use of Torture in England. London, 1837.
Jones on Chattel Mortgages. Boston, 1883.
Lambard's Eirenarcha. London, 1614.
Law List (English). London, 1887
Lee s Bankruptcy. Third edition. London, 1887.
Maine's Ancient Law. Eleventh edition. London, 1887.
Malone's Criminal Briefs Baltimore, 1886.
May on Fraudulent Conveyances. Second edition. London, 1887.
Miller & Hodgins' Year Book, University of Toronto. 1887.
Murfree on Sheriffs. St. Louis, 1884.
Pike's History of Crime in England London, 1873.
Pollock on Torts London, 1887.
" Philadelphia, 1887.
Pomeroy's Equity Jurisprudence. San Francisco, 1881.
Potter on Road and Roadside. Boston, 1886.
Preble on Collisions in U. S. Waters. Boston, 1886.
Rogers' City Hall Recorder. Six vols. New York. 1816-21.
Roscoe's Law of Light Second edition. London, 1886.
Sichel's Practice Relating to Witnesses. London, 1887.
Smith's Common Law. Tenth edition. London, 1887.
Snell's Equity. Eighth edition. London, 1887.
Taylor's Landlord and Tenant. Eighth edition. Boston, 1887.
Tiedman's Limitations of Police Power. St. Louis, 1886.
United States, Revised Stat. of. Second edition. 1873-74. Washington, 1878.
United States Supplements. Washington, 1881.
Wharton's International Law Digest. Washington, 1886. D.

FLOTSAM AND JETSAM.

MUSICAL ANNOYANCES.—The large number of persons who, without being particularly sensitive or particularly nervous, suffer extreme annoyance from the popular performances of brass bands, barrel organs, steam trumpets, etc., will be much interested in a case which came recently before Mr. Justice Kekewich. The plaintiff was Mr. S. Winter, living at Brentwood, Essex, who claimed from the court an injunction to restrain the defendants from using a yard at the back of some model lodging houses for shows, which included steam circuses and organs, swings, rifle-shooting galleries, and all the noisy accompaniments of country fairs, prominent among which was a steam organ with twenty-seven trumpets. Evidence was given respecting the nuisance caused by the performances, and, without calling for a reply, Mr. Justice Kekewich delivered judgment in favour of the plaintiff, granting the injunction prayed for, and declaring the two defendants—Mr. Baker (the occupier of the yard), and Mr. Davies (the *entrepreneur* of the shows)—liable to pay the costs of the action. Setting aside the rifle-shooting, and the swings, as not necessarily nuisances if properly conducted, the learned judge said that the noise of the organ was rightly objected to, inasmuch as it was worked from six to ten every evening, except Saturday, when the time was still further extended. This loud and continuous playing necessarily interfered with the comfort of the neighbours, who were not over sensitive or fastidious, but wished merely to live like ordinary English people.

The organ playing was a distinct nuisance, entitling the neighbours to complain. With regard to the noise of the assembled crowd who came to be amused with swings and roundabouts, it was almost inevitable that they would shout; there was, as laid down by the learned judge, nothing improper in their so doing, but it could not be permitted to interfere with other persons' comfort. The nuisance was proved, and the plaintiff was entitled to the injunction he asked for against the proprietor of the shows. Then came the question as to the liability of the proprietor of the yard in which the show was held. A man, said Mr. Jus-

tice Kekewich, was not generally liable for nuisance committed by his tenant; but Mr. Baker was a party to these nuisances, for he had let the yard knowing it was to be used for the shows, and after it had been let one week he let it a second time, being aware of the use that had been made of it on the first occasion.

The decision in this case is one which will be received with great satisfaction by all peace-loving people. It is only those whose residence has been within a quarter of a mile of a show of the same description as that so summarily put down by the injunction granted by Mr. Justice Kekewich, who can fully appreciate the effect of the maddening discord of a country show, with its roundabouts and organs worked by steam, and the shouts of those who are participating in the entertainment.

No right-minded persons would wish to interfere with the enjoyment of the people; but that that enjoyment should be purchased at the sacrifice of the comfort of others is not to be tolerated, and it is most satisfactory to know that outrages on the peace and quietude of a neighbourhood can be at once stopped by an injunction, and that the costs of the proceedings will fall on those who have for their own selfish ends disturbed the inhabitants of a district, and rendered the lives of the residents almost unendurable by their blatant discord.—*The Queen*, London, England.

SIR HENRY HAWKINS is getting a reputation for wit. Recently a prisoner pleaded guilty of larceny, and then withdrew the plea and declared himself innocent. The case was tried, and the jury acquitted him. Then said Sir Henry "Prisoner, a few minutes ago you said you were a thief, now the jury says you are a liar, consequently you are discharged."

Law Society of Upper Canada.

OSGOODE HALL.

CURRICULUM.

1. A graduate in the Faculty of Arts, in any university in Her Majesty's dominions empowered to grant such degrees, shall be entitled to admission on the books of the society as a Student-at-Law, upon conforming with clause four of this curriculum, and presenting (in person) to Convocation his diploma or proper certificate of his having received his degree, without further examination by the Society.

2. A student of any university in the Province of Ontario, who shall present (in person) a certificate of having passed, within four years of his application, an examination in the subjects prescribed in this curriculum for the Student-at-Law Examination, shall be entitled to admission on the books of the Society as a Student-at-Law, or passed as an Articled Clerk (as the case may be) on conforming with clause four of this curriculum, without any further examination by the Society.

3. Every other candidate for admission to the Society as a Student-at-Law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination and conform with clause four of this curriculum.

4. Every candidate for admission as a Student-at-Law, or Articled Clerk, shall file with the secretary, four weeks before the term in which he intends to come up, a notice (on prescribed form), signed by a Bencher, and pay $1 fee; and, on or before the day of presentation or examination, file with the secretary a petition and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The primary examinations for Students-at-Law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity and Michaelmas Terms.

7. Graduates and matriculants of universities will present their diplomas and certificates on the third Thursday before each term at 11 a.m.

8. The First Intermediate examination will begin on the second Tuesday before each term at 9 a.m. Oral on the Wednesday at 2 p.m.

9. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

10. The Solicitors' examination will begin on the Tuesday next before each term at 9 a.m. Oral on the Thursday at 2.30 p.m.

11. The Barristers' examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2.30 p.m.

12. Articles and assignments must not be sent to the Secretary of the Law Society, but must be filed with either the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

13. Full term of five years, or, in the case of graduates of three years, under articles must be served before certificates of fitness can be granted.

14. Service under articles is effectual only after the Primary examination has been passed.

15. A Student-at-Law is required to pass the First Intermediate examination in his third year, and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second vear and his Second in the first six months of his third year. One year must elapse between First and Second Intermediates. See further, R.S.O., ch. 140, sec. 6, sub-secs. 2 and 3.

16. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive certificates of fitness, examinations passed before or during Term shall be construed as passed at the actual date of the examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

17. Candidates for call to the Bar must give notice, signed by a Bencher, during the preceding Term.

18. Candidates for call or certificate of fitness are required to file with the secretary their papers and pay their fees on or before the third Saturday before Term. Any candidate failing to do so will be required to put in a special petition, and pay an additional fee of $2.

19. No information can be given as to marks obtained at examinations.

20. An Intermediate Certificate is not taken in lieu of Primary Examination.

FEES

Notice Fees	$1 00
Students' Admission Fee	50 00
Articled Clerk's Fees	40 00
Solicitor's Examination Fee	60 00
Barrister's " "	100 00
Intermediate Fee	1 00
Fee in special cases additional to the above.	200 00
Fee for Petitions	2 00
Fee ior Diplomas	2 00
Fee for Certificate of Admission	1 00
Fee for other Certificates	1 00

BOOKS AND SUBJECTS FOR EXAMINATIONS.

PRIMARY EXAMINATION CURRICULUM FOR 1887 1888, 1889 AND 1890.

Students-at-law.

CLASSICS.

1887.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. VI.
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. I.
- Cæsar, Bellum Britannicum.

1888.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. IV.
- Cæsar, B. G. I. (1-33.)
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. I.

1889.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. IV.
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. V.
- Cæsar, B. G. I. (1-33)

1890
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. VI.
- Cicero, In Catilinam, II.
- Virgil, Æneid, B. V.
- Cæsar, Bellum Britannicum.

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's Arnold's Composition, and re-translation of single passages.

Paper on Latin Grammar, on which special stress will be laid.

MATHEMATICS.

Arithmetic: Algebra, to the end of Quadratic Equations: Euclid, Bb. I., II., and III.

ENGLISH.

A Paper on English Grammar.
Composition.

Critical reading of a Selected Poem:—
1887—Thomson, The Seasons, Autumn and Winter.
1888—Cowper, the Task, Bb. III. and IV.
1889—Scott, Lay of the Last Minstrel.
1890—Byron, the Prisoner of Chillon; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy and Asia Minor. Modern Geography—North America and Europe.

Optional Subjects instead of Greek:—

FRENCH.

A paper on Grammar.
Translation from English into French Prose.
1886, 1888, 1890 } Souvestre, Un Philosophe sous le toits.
1887, 1889 } Lamartine, Christophe Colomb.

or, NATURAL PHILOSOPHY.

Books—Arnott's Elements of Physics and Somerville's Physical Geography; *or* Peck's Ganot's Popular Physics and Somerville's Physical Geography

ARTICLED CLERKS.

In the years 1887, 1888, 1889, 1890, the same portions of Cicero, *or* Virgil, at the option of the candidates, as noted above for Students-at-Law.
Arithmetic
Euclid, Bb. I., II., and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-Keeping.

RULE RE SERVICE OF ARTICLED CLERKS

From and after the 7th day of September, 1885, no person then or thereafter bound by articles of clerkship to any solicitor, shall, during the term of service mentioned in such articles, hold any office or engage in any employment whatsoever, other than the employment of clerk to such solicitor, and his partner or partners (if any) and his Toronto agent, with the consent of such solicitors in the business, practice, or employment of a solicitor.

First Intermediate.

Williams on Real Property, Leith's Edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and cap. 117, Revised Statutes of Ontario and amending Acts.

Three scholarships can be competed for in connection with this intermediate by candidates who obtain 75 per cent. of the maximum number of marks.

Second Intermediate.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada, the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three scholarships can be competed for in connection with this intermediate by candidates who obtain 75 per cent. of the maximum number of marks.

For Certificate of Fitness.

Taylor on Titles; Taylor's Equity Jurisprudence, Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales, Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

For Call.

Blackstone, vol. 1, containing the introduction and rights of Persons; Pollock on Contracts, Story's Equity Jurisprudence; Theobald on Wills, Harris' Principles of Criminal Law, Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence, Byles on Bills, the Statute Law and Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

Copies of Rules, price 25 cents, can be obtained from Messrs. Rowsell & Hutchison, King Street East, Toronto.