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DIARY FOR APRIL.

18. Sun.....*Palm Sunday.*
23. Fri......*Good Friday.* Holiday H. C. J. St. George's Day. Shakespeare born 1564, died 1616.
25. Sun.....*Easter Sunday.* Bank of England incorporated 1694.
26. Mon....*Easter Monday.* Ho'iday H. C. J.
27. Tues...Primary examination of students and articled clerks.
29. Thur...Graduates seeking admission to Law Society to present papers.

TORONTO, APRIL 15, 1886.

THE election of Benchers has resulted in the return of the same men as before, with the exception that Mr. Lash takes Mr. Crickmore's place. The expectations of many amongst the country Bar of seeing a larger representation of those who would endeavour to bring the rights of their brethren in the matter of conveyancing more prominently forward have been disappointed. They were too late in moving in the matter.

CODIFICATION.

THE question of Codification is again discussed in the last number of the *American Law Review.* A well known writer, after referring to the importance, but vastness of the work, thinks that unless the work is done in divisions or branches of the law, it will probably never be done at all. He instances, as the sort of work to be done, the Act passed in England in 1882, to "Codify the law relating to bills of exchange, cheques and promissory notes." He thus concludes a very able paper :—

"Nor must we form unreasonable expectations of the benefits to be derived from codification, no matter how well it may be performed. It is not possible, and, therefore, not desirable, to attempt to make any enactment so comprehensive as to embrace all cases or combinations of fact which will arise, nor is it possible to make statutes so clear and precise as to avoid the necessity of judicial interpretation and construction. Besides, the habits, modes of thought, practice, and traditions of a people, or of a great profession like that of the law, are deeply rooted and incapable of legislative extirpation, if it were attempted. Within proper limits the doctrine of Judicial Precedent is reasonable and highly convenient, if not necessary. Its influence has probably pervaded every system of jurisprudence, even where it has been expressly attempted to exclude it. Justinian enacted that cases actually tried by the Emperor should be law, not only for the cases decided, but for all similar ones. The French code prohibits judicial legislation, and under it judicial decisions do not constitute an authoritative rule for other judges in the sense of our doctrine of Judicial Precedent. And the same thing is true, at least, theoretically, of the contemporary Continental codes. The Prussian and Austrian Codes went so far at first as to forbid a judge from referring to the opinion of a law writer or to previous judicial judgments, and the Prussian code expressly directed him to base his decisions upon the statutes and the general principles of the *Landrecht.* But this was afterwards modified in both countries, so that at this time, the decisions of the Supreme Court are regularly published, and we can not doubt that they exercise a weighty influence upon inferior judges, whether they are absolutely binding upon them as precedents or not.

"The sound conclusion would seem to be that 'the law itself should be reduced, so far as possible, to the form of a statute': not with the expectation that the work of judicial interpretation will be no longer necessary, but with a view to reduce the necessity of judicial legislation and of judicial interpretation to the narrowest possible limits, and to remove as far as may be the existing uncertainty in the law.

"The argument, on the merits, can be summed up, codified, if you please, in a sentence. What is well settled, *can* be expressed, and what is doubtful, *ought* to be made certain, by legislative enactment."

GLANVILLE.

THERE are few students of the English law who are not familiar with the name of Glanville, and yet to most modern lawyers Glanville is little more than a name, as we fear very few nowadays deem it worth their while to devote any time to the perusal of the pages of this ancient legal sage. To those who regard the study of the law from a purely utilitarian point of view, it doubtless seems a useless task to study a treatise written some seven hundred years ago; but to the more philosophically disposed student it must always be a matter of interest to trace the various steps by which the vast body of modern English law has from age to age been developed, and among such, at least, Glanville, even in the present day, may count on some few readers.

In the days of Glanville it was thought to be in no way inconsistent with the pursuit of the law, to follow also the profession of arms. That was a warlike and somewhat turbulent age, when the law even sanctioned in civil disputes the trial by duel, and it is therefore not surprising to find that Glanville appears first to have gained distinction as a soldier, when, as sheriff of Yorkshire, he levied the *posse comitatus* to repulse the Scottish King, William the Lion, who had made an incursion into the country. After a rapid march, Glanville attacked and defeated the Scottish king's forces and made him a prisoner.

When the news arrived in London of the capture of the King of Scotland, Henry II. was in bed smarting from the effects of the whipping he had received from the monks of Canterbury on his recent penance at the shrine of St. Thomas à Becket, and he was more inclined to attribute the defeat of the Scottish King to the interposition of that saint, than to the ability and courage of his valiant sheriff. From this event, however, Glanville appears rapidly to have gained the favour of his sovereign, and he was shortly after promoted to the office of Chief Justiciar, which he held until Henry's death. He afterwards, in the ensuing reign, became a crusader, and perished gallantly fighting in the Holy Land "the enemies of the Cross of Christ."

Concerning the exact date of his celebrated treatise on the laws and customs of England, authorities are in conflict. It is, however, plausibly conjectured from the fact that in two of the precedents which he gives he uses the date, "33 Henry II."; that the treatise was probably written in that year, or in one or other of the remaining three years of that king's reign, which would make its date about 1186 or 1187, just about seven hundred years ago.

Dipping into this, the first systematic book of English law now extant, we get a curious insight into the state of the law in that remote period. We have first a detailed account of the proceedings in a lawsuit to recover land. Even in those days "the law's delay" was not a thing unknown, for we learn that after a defendant had been summoned, he had the privilege of excusing his attendance by "casting essoins"; in other words, presenting excuses such as that he was sick, or beyond the seas, or fighting in the Holy Land; in the latter case he was entitled to a year and a day's delay. These essoins or excuses were required to be proved by oath; but those who were deputed to prove them might themselves also "cast essoins," and it would seem, on the whole, to have been a pretty difficult job to get a reluctant defendant before the Court. The Court in those days had, moreover, a way of dealing out justice which would astonish modern suitors. For instance, if on the day appointed neither the plaintiff nor defendant appeared, the judge might, at

his pleasure, punish both parties, the one for his contempt of Court, and the other for his false claim.

Having got the parties before the Court, the next step was for the demandant to prefer his claim, which was done in a formal manner, very much in the fashion of an old common law declaration. The demand having been made, it was then open to the defendant to deny it if he could, and if he did, he might then either have the question tried by duel or by a proceeding called the grand assize.

In the former case he appointed a champion, if he did not choose to fight himself, and the plaintiff did the like; but before the battle was finally waged further essoins might be cast. Ultimately the parties and their champions appeared in Court and, armed with batons, they proceeded to belabour each other until the stars appeared. If the defendant could hold his ground till then he was successful, and the cause was decided in his favour. If, on the other hand, he or his champion was beaten, he not only had to put up with a battered body but also with the loss of his cause. Lord Coke says that death seldom ensued from such encounters; but it appears from Glanville that the duel was sometimes attended with fatal results; for speaking of the superior m[illegible]s of the grand assize over trial by battle, he mentions that by the former not only "the severe punishment of an unexpected and premature death is evaded, or at least, the opprobrium of a lasting infamy of that dreadful and ignominious word which so disgracefully resounds from the mouth of the conquered champion."

In the event of defeat the conquered party had to acknowledge his fault or pronounce the word "cravent," which is the disgraceful word to which Glanville refers in the passage above cited; otherwise his left foot was disarmed and uncovered as a sign of cowardice; the defeated party, moreover, was fined sixty shillings. There was one merit about this mode of trial, and that was, that it was complete and final, and no appeal could be had from the judgment which followed.

Should, however, the defendant prefer it, he might have the controversy decided by the grand assize. This proceeding, Glanville declares, "is a certain royal benefit bestowed upon the people, and emanating from the clemency of the Prince with the advice of his nobles"; and it certainly had the advantage of saving suitors and their friends the inconveniences resulting from cracked heads. Moreover, under it so many "essoins" were not allowed, as in the case of trial by battle, and it was altogether a more civilized method of procedure.

This mode of proceeding more nearly coincided with our present mode of trial, but there were some very important differences. After the parties were at issue, a writ was issued to four knights requiring them to elect twelve other knights of the neighbourhood, who were to return on their oaths which of the parties had the better right to the land in question. To the election of these twelve knights either party might take exception on the same ground that witnesses were rejected in the Court Christian. The election being completed, the twelve knights were summoned to Court, and on the day fixed they attended, and if none of them knew the truth of the matter, recourse was then had to others, until twelve could be found prepared to swear that one or the other of the parties was entitled. And if some were in favour of the plaintiff, and some of the defendant, then others were required to be added until twelve at least were found to agree in favour of one side. It will thus be seen that the ancient juror was really a witness, and the sum of the matter appears to be, that a plaintiff, before he could succeed upon a grand assize,

must have at least twelve witnesses prepared to testify in favour of his claim.

Jurors in those days were under a very strong obligation to speak the truth, for if it were proved that they had perjured themselves they were liable to forfeit all their chattels to the king, and to be imprisoned for a year.

It would sometimes happen, no doubt, that cases would arise where twelve men could not be found to support a claim, no matter how well founded, and in such a case we gather from Glanville that no redress could be had by grand assize, and the only alternative would appear to have been a recourse to the duel.

Before passing on from the consideration of the proceedings in real actions, we may notice one feature which bears a strong resemblance to the third party procedure recently introduced by the Judicature Act.

In Glanville's time, when a man sold land to another he was required to warrant his title, and in the event of the title of the purchaser being called in question in any suit, the latter might cite his warrantor to appear. Upon the appearance of the latter, he might enter into the warranty of the subject of dispute, or decline it. If he adopted the former course, he then became a principal party to the cause, which was thenceforward carried on in his name. If he declined to enter into the warranty, then proceedings were carried on between him and the person citing him, to determine whether he was bound to warrant or not; and if he were found to be liable to warrant, then, in the event of the tenant losing his land, the warrantor was bound to make him a competent equivalent. The tenant was not bound to cite his warrantor, but if he undertook the defence of the action himself and lost, he could not afterwards recover against his warrantor.

In Glanville, too, we may learn something of the laws affecting that class of the community called villeins, whose status appears to have been little, if anything, better than that of the Russian serfs before their emancipation.

The law of dower, we find, has experienced some changes since Glanville wrote. In his time it commonly meant that property which any free man gave to his bride at the church door. If he named the dower it was confined to that named, provided it were not more than one-third of his freehold land; he might give less, but he could not give more. If he did not name it, then the third part of all the husband's freehold land of which he was seized was understood to be the wife's dower. A man might also endow his wife after marriage with land subsequently acquired, provided the endowment did not exceed the third of all his freehold land; but when the dower was expressly named at the church door, the wife was not entitled as of right to dower in after-acquired lands. Dower in those days, however, was, during the husband's life, in his absolute disposition, and he might sell it, even without his wife's concurrence. Practically, therefore, the right of dower in no way hindered the free disposition of the land by the husband, and this is a point to which modern legislation appears to be again tending.

In Glanville's time we learn that the law of descent was by no means uniform. In some cases the eldest son, and in some the youngest son, was the heir, in others all the sons equally were entitled to the inheritance. The eldest son's title as heir seems to have been confined principally to land held by military tenure, but when the land was held in free and common socage (which is the tenure by which all lands in this Province are now held), the inheritance was equally divisible among all the sons, provided such socage land had been anciently divisible. The eldest

son, however, in such cases was entitled to the capital messuage, making compensation to the others therefor. The rule in favour of an equal division between all the sons seems rapidly to have been supplanted in favour of the right of the eldest son, so that by the time of King John even socage lands (except in Kent) were held to be descendible to the eldest son only, unless the contrary were proved. There was also a difference as to when the heir of a knight and a soc man became of age; the former not being of full age until he had completed his twenty-first year, while the latter was esteemed of full age when he had completed his fifteenth year.

Another curious feature of the law in Glanville's time was the penalty attached to the offence of usury. Usury, it appears, was committed whenever a person entrusted to another any such thing as consists in number, or weight, or measure, and received back more than he lent. So also, it was considered to be a species of usury if a man received lands in pledge for a sum of money, and entered into the enjoyment thereof upon an agreement that the rents were not to be applied in reduction of the debt. This was not prohibited by the law, yet if any one died having such a pledge, his nroperty was disposed of as the effects of an usurer. Now the punishment of usurers was rather curious, for it was not the custom to proceed against any one for this offence in his lifetime. So long as he lived apparently he had a *locus penitentiæ*, but upon it being proved on the oaths of twelve lawful men of the neighbourhood that he had died in the offence, all the chattels of the deceased usurer were seized to the King's use, and his heir for the same reason was deprived of his inheritance, which thereupon reverted to the lord.

Glanville not only discourses on civil proceedings, but he also devotes the concluding book of his treatise to a discussion of the criminal law. For the offence of mayhem, which signified the breaking of a bone, or injuring the head either by wounding or abrasion, the accused was obliged to purge himself by the ordeal, *i.e.*, by the hot iron if a free man, and by water if he were a rustic. The trial by ordeal was a very ancient mode of trial, and seems to have been in existence in England so early as the reign of Ina; and we may conclude these somewhat discursive remarks by stating briefly how the trial by ordeal was conducted according to the laws of Ina. The trial took place in a temple or church. A piece of iron weighing not more than three pounds was placed upon a fire, the fire being watched by two men, who placed themselves on either side of the iron, and who were to determine upon the degree of heat it ought to possess. As soon as they were agreed, two other men were introduced who placed themselves at either extremity of the iron. All these witnesses passed the night fasting.

At daybreak the priest who presided, after sprinkling them with holy water and making them drink, presented them with the gospels to kiss, and then crossed them. The service of the mass was then begun, and from that moment the fire was no more increased, but the iron was left on the embers until the last collect. That finished, the iron was raised, and prayers were addressed to the Deity to manifest the truth. Thereupon the accused took the iron in his hand and carried it the distance of nine feet; his hand was then bound up and the bandage sealed, and after three days it was examined to ascertain whether or not it was *impure*; it being accounted impure, and therefore the accused to be guilty, if it should turn out to have suppurated; if, on the other hand, the sore was found to be healthy, the accused was adjudged to be innocent.

The ordeal by water consisted in the

accused plunging his arm up to the wrist for inferior crimes, and up to the elbow for crimes of deeper dye, in a vessel filled with boiling water. The other proceedings were similar to those in an ordeal by fire.

And now we may take leave of Glanville, trusting we have not wearied our readers with this little excursion into his domains.

RECENT ENGLISH DECISIONS.

We continue the cases in the Chancery Division.

SOLICITOR AND CLIENT—LIEN.

In re Galland, 31 Chy. D. 296, is another decision of the Court of Appeal. The application was made by a client against a solicitor for the delivery and taxation of his bill of costs, and also for the delivery up of papers in his custody belonging to the client. The solicitor had been discharged by the client, and insisted on his right to retain the papers in his hands until his lien should be satisfied. But Chitty, J., ordered that the papers should be delivered up on the client paying into Court the amount claimed by the solicitor to be due for costs, together with a sum to meet the costs of taxation. He moreover held that the solicitor's lien is confined to what is due to him in that character, and does not extend to general debts. The parties having agreed that the solicitor should be entitled on delivery up of the papers to receive out of Court a part of the money directed to be paid in, without awaiting the result of the taxation, it became unnecessary for the Court of Appeal to pronounce on that part of the case. They, however, unanimously upheld the ruling of Chitty, J., as to the extent of a solicitor's lien.

POWER OF APPOINTMENT—RESIDUARY GIFT.

The point involved *In re Hunt*, 31 Chy. D. 308, was a simple one. A testatrix, having a power of appointment over a fund in favour of a class, by her will purported to appoint to the class (which included F. and B.), and also another person not a member of the class in equal shares; and by a residuary clause she gave all the residue of her estate over which she had any disposing power to F. and B. The appointment being bad as to the share appointed to the person not an object of the power, the question was whether F. and B. were entitled to this share under the residuary gift; and Bacon, V.C., held that they were, and that the share in question did not go as upon default of appointment.

REDEMPTION—ACTION BY PUISNE INCUMBRANCER—FORM OF JUDGMENT.

In *Hallett* v. *Furze*, 31 Chy. D. 312, a question arose as to the proper form of a judgment for redemption where the action is brought by a second mortgagee against the first mortgagee and the mortgagor. The point being whether, on failure of the plaintiff to redeem, the action should be dismissed with costs as to both defendants, or only as against the mortgagee. Kay, J., decided the proper practice is to dismiss the action as to both defendants with costs.

6 ANNE, C. 18—PRODUCTION OF CESTUI QUE VIE.

In re Stevens, 31 Chy. D. 320, was an application under the statute 6 Anne, c. 18, to compel a person having an interest in land, determinable upon the life of another person, to produce such person. It appeared that one Stevens, who was tenant for life of the property in question, previous to going to sea in 1864, had put his wife in possession of the rents of the property, telling her that she should receive the rents as long as he lived; he had not been heard of since 1866, and an order having been made at the instance of the tenant in remainder requiring the wife to produce her husband, or in default declaring that he ought to be deemed to be dead, the registrar objected to draw up the order on the ground that the wife was not tenant *pur autre vie*, but merely agent of the tenant for life; but Chitty, J., though thinking the registrar had rightly raised the objection, nevertheless came to the conclusion that the case was within the statute, inasmuch as the husband intended the wife to have an interest in the property and was not a mere agent; but he directed a clause to be added to the order, reserving to any party interested liberty to apply to discharge the order.

SURVIVING PARTNER—MORTGAGE OF ASSETS FOR PAST DEBT.

The question before North, J., *In re Clough, Bradford Commercial Banking Co.* v. *Cure*, 31 Chy. D. 324, was the simple one, whether a surviving partner has power to mortgage the assets of the partnership to secure a debt of the firm. The learned judge held that he has. He says, at p. 327:—

It is clear that the surviving partner could have paid off, out of the assets of the firm, any existing debt, and therefore he could equally well satisfy any creditor by giving security upon a part of the assets.

PROMOTER OF COMPANY—AGENT—SECRET COMMISSION.

Lydney and Wigpool Iron Co. v. *Bird*, 31 Chy. D. 328, was an action in which the principle established in the celebrated case of *Emma Silver Mining Co.* v. *Grant*, 11 Chy. D. 118, was sought to be invoked. The defendants were employed by the vendors to form and launch a company to purchase some mines belonging to the vendors; and it was agreed between them that the defendants should receive a commission of £10,800 out of the purchase money of £100,000. The defendants undertook all the business connected with the issuing of the prospectus and bringing out of the company. They subscribed the articles of association, and guaranteed the subscription of the shares offered to the public. The company was formed, and the commission paid by the vendors to the defendants; but the payment of the commission was not made known to the company. On its being discovered, the company brought the present action to compel the defendants to refund it. But on the evidence Pearson, J., held that the defendants could not be deemed to be promoters, but that they were merely agents for the vendors, and that the purchase money had not been increased for the purpose of providing for the payment of the commission, and therefore that the defendants were not liable. In the agreement for sale of the mines, entered into by the vendors with a trustee for the intended company, a stipulation was inserted that the company should employ the defendants to onduct the sales of the company's ores at a commission; which arrangement was to continue until good cause should be shown to the contrary, and this agreement was adopted by the company on its formation. But it was held that the interest which this arrangement gave the defendants was not sufficient to constitute them promoters, and the action was therefore dismissed.

VENDOR AND PURCHASER—FAILURE OF VENDOR TO SHOW TITLE.

In re Yielding and Westbrook, 31 Chy. D. 344, was an application under the Vendor and Purchaser's Act, R. S. O. c. 109, s. 3. The vendor had failed to prove title, and the application was made to compel him to refund the deposit with interest, and to pay the costs of investigating, the title, and of the application. Pearson, J., made the order asked, and made the costs a charge on the vendor's interest in the property.

SOLICITOR—NEGLIGENCE—SUMMARY JURISDICTION.

The only remaining case in the Chancery Division is *Batten* v. *Wedgwood Coal Co.*, 31 Chy. D. 346, in which it was held by Pearson, J., that a plaintiff's solicitor, who had obtained an order directing certain purchase money to be paid into Court and invested in consols, was guilty of negligence in omitting to take the necessary steps to have the investment made as provided by the order, and was liable to make good to the person entitled to the money the loss occasioned by his omission to get it invested, and that this liability might be enforced by summons in the action

EVIDENCE—LEGITIMACY.

Turning now to the Appeal Cases for March, the first calling for attention is *The Aylesford Peerage*, 11 App. Cas. 1, in which the only point of interest decided by the Lords is that although a mother cannot be heard as a witness to bastardise her own offspring born in wedlock, yet statements made by her *ante litem motam* as to its paternity are admissible, not as proof of its illegitimacy but as evidence of conduct.

COMPANY—TRANSFER OF SHARES—PRIORITY.

The Societe Generale v. *Walker*, 11 App. Cas. 61, is a decision of the House of Lords on a question of some importance. M., the owner of shares in a company, deposited with S. certificates of the shares and a blank transfer as security for a debt. Afterwards he fraudulently exe-

cuted a blank transfer of the same shares, and deposited it with the appellants as security for a debt; he excused the non-production of the certificate by pretending it was lost. The appellants applied to the company to register their transfer, and offered to indemnify the company against the loss of the certificate—the production of which was required as a condition of registration. The company refused the indemnity and declined to register the appellants as transferees, and subsequently the company received notice of the claim of S. The appellants then brought the action to obtain a declaration that they were entitled to the shares as against S. But the Lords (affirming the Court of Appeal) held that S. was entitled to priority, and that the appellants' first giving notice to the company of their transfer gave them no priority over S. whose claim was prior in point of time.

RAILWAY COMPANY—NUISANCE.

In *The London, Brighton and South Coast Ry.* v. *Truman*, 11 App. Cas. 45, the House of Lords reversed the decision of the Court of Appeal (29 Chy. D. 89), which we noted *ante*, vol. 21, p. 266. It may be remembered that the appellants, in pursuance of their Act, had purchased property for a cattle yard, and that the action was brought by adjoining proprietors who were annoyed by the bellowing of cattle, and the noise of the drovers, to restrain the defendants from continuing the nuisance. The Courts below held the plaintiffs entitled to the relief, but the Lords were of opinion that as the purpose for which the land was acquired was expressly authorized by the Act, and being incidental and necessary to the authorized use of the railway for the cattle traffic, the company were justified in doing as they had done, and were not bound to choose a site more convenient to other persons, and therefore dismissed the action.

PAYMENT OF MONEY BY MISTAKE—LIABILITY TO REFUND.

The Colonial Bank v. *Exchange Bank*, 11 App. Cas. 84, was an appeal from the Supreme Court of Nova Scotia, in which the right to recover money paid in mistake was in question. The plaintiffs having instructions to remit R.'s moneys to a bank in Halifax, through mistake of their agents paid them to a New York bank for transmission to the defendants, who, on being advised thereof, debited the New York bank and credited R. in account with the amount thereof; and on being afterwards advised of the mistake claimed the right to retain the moneys and apply them in reduction of R.'s account with them.

The Supreme Court was of opinion that the plaintiffs, under the circumstances, had no *locus standi* to bring the action, but the Lords of the Privy Council were unanimously of opinion that the plaintiffs had a sufficient interest in the moneys to entitle them to recover them as moneys received to their use.

REPORTS.

ONTARIO.

(Reported for the CANADA LAW JOURNAL.)

MASTER'S OFFICE.

MERCHANTS' BANK v. MONTEITH.

Evidence of accomplices—Conflict of evidence—Executor bound by testator's fraud.

There is no presumption of law against the evidence of an accomplice; but it is the general practice of judges to caution juries not to respect the unsupported testimony of accomplices.

This practice applies in civil cases, to the evidence of a *particeps fraudis*, as much as in criminal cases to the evidence of *particeps criminis*; and to all cases where witnesses are allowed *suam allegare turpitudinem*.

There is a difference between evidence corroborative of a fact, and evidence of the probability of a transaction; and the latter is not corroborative evidence.

In a case of doubt, arising on the conflict of testimony, the decision should be in favour of written documents; of fair dealing instead of forfeiture; and of the lawful, instead of the unlawful, act.

A fraudulent instrument is void against creditors; but not against the party to it or his executors. An executor cannot avoid a fraudulent instrument, but only when he is a principal creditor.

[Mr. Hodgins, Q.C.

This was a proceeding on a reference back after an appeal from the Master's report. The particu-

lars of the case are referred to in 21 CANADA LAW JOURNAL, 71, and 10 Ont. Pr. R. 467.

W. N. Miller, and *Rae*, for plaintiffs.

J. Macgregor, for administrator.

J. A. Paterson, for creditors.

THE MASTER IN ORDINARY.—Under the former reference I had held—not without authority—that the salutary rule of judicial experience, which distrusts the admissions of an accomplice in a criminal act unless corroborated, was applicable to the evidence on the issues of fact in this case.

There is no presumption of law against the evidence of an accomplice. It is not a rule of law, but only a general and prudential practice of judges which, as Lord Abinger said, "deserves all the reverence of law," that juries are cautioned not to respect the unsupported testimony of an accomplice: *Reg* v. *Farler*, 8 C. & P. 106. The judicial caution only affects the credibility of the accomplice; but if the jury is satisfied of his truthfulness, they may disregard the caution of the judge and give their verdict in accordance with his evidence, and it will not be disturbed: *Reg* v. *Stubbs*, 1 Jur. N. S. 1,115. Nor is the caution limited to criminal cases. It is equally applicable to cases of fraud. The rule of the civil law, *Nemo allegans turpitudinem suam est audiendus*, though formerly applied to witnesses, is now only applicable to the case of a party seeking relief. A witness, if an accomplice in a fraud, may be sworn in a civil suit; but a jury would be advised to view his evidence with the same scrupulous jealousy they would that of a *particeps criminis*.

"In cases pregnant with fraud, resting on the attesting witnesses alone, these witnesses must be beyond suspicion; and if at all shaken in credit, no part of their evidence can be relied on: " *Bridges* v. *King*, 1 Hag. Ec. Cas. 288.

A witness, if *particeps fraudis*, is not legally infamous, and may be sworn in a civil action, as well as a *particeps criminis* in a criminal action; although it would be difficult for a jury to give much credit to him if his participation in the fraud should turn out to be true: *Bean* v. *Bean*, 12 Mass. 20. The testimony of a witness, who is a participant in a fraud, ought to be strongly corroborated: *Kittering* v. *Parker*, 8 Ind. 44.

An American text-writer on evidence in civil cases says: "In cases where the statements of a witness are those of a *particeps criminis*, slight credit will be given:" "where the witness is *particeps criminis*, his testimony with corroboration is entitled to little weight:" *Wharton's Evid. Civ. Cas.* s. 414

Equally clear are the opinions of English judges. In *Cotton* v. *Luttrell*, 1 Atk. 451, the evidence of a witness was objected to because there was clear evidence of her participation in the fraud and malpractices charged, but Lord Hardwicke held that the objection only went to her credit, not to her competency.

Lord Eldon, in *Howard* v. *Braithwaite*, 1 V. & B. 302, thus referred to the practice of judges in discrediting witnesses, whose evidence invalidated instruments they had signed: "Lord Mansfield often said he would hear those witnesses, but would give no credit to them. Lord Kenyon followed him in that. I have differed from both these great judges to this extent: that if the witnesses are to be heard, their credit is to be duly examined, but their testimony is to be received with all the jealousy necessarily—for the safety of mankind—attaching to a man who, upon his oath, asserts that be false which he has by his solemn act attested to be true. Every circumstance, therefore, is to be regarded with a strong inclination to believe that which he did was right, and that he swears under a mistake."

And he added if the question was to be tried at law, "I have not doubt a judge would tell a jury, they must look at his evidence with the most anxious jealousy—that the safety of mankind requires it."

In *Bootle* v. *Blundell*, 19 Ves. 494, the same learned judge again quoted Lord Mansfield as saying that "a witness impeaching his own act, instead of credit, deserved the pillory;" and he then added "Admitting, however, that such evidence is to be received with most scruplous jealousy, I should not, upon the evidence of those two witnesses, have directed the jury to find any other verdict" than the one which disregarded the evidence of the witnesses referred to.

These references seem to warrant the conclusion that the salutary and prudential practice of jndicial cautions to juries to regard with distrust the testimony of a witness, who is an accomplice in a crime, though not a rule of law, applies equally to the testimony of a witness, who is an accomplice in a fraud; in fact, to all civil and criminal cases where witnesses are allowed *suam allegare turpitudinem*.

If during Monteith's lifetime, civil and criminal actions had been instituted respecting these warehouse receipts, Herson would be a competent witness against him. But can it be contended that a judge trying each action would caution a jury as to his evidence in the criminal, and not in the civil action?

Further evidence has been given on this reference, presumably as a corroboration of Herson's testimony. But I do not find that it comes within the definition of corroborative evidence. It can, I

think, only be read as showing a probability of Herson's evidence being correct, rather than as corroborative of the facts stated by him. One witness, Chapman, proves that Herson was at the warehouse "around there every day," and that he and Monteith "had business together," which would be consistent with the fact of Herson having some right of possession to the warehouse when the goods were stored from Monteith. There is, however, a great difference between evidence of the probability, and evidence corroborative of, a fact. Evidence proving the probability of a transaction, but not going into the transaction or act itself, is not corroborative evidence: *Simonds* v. *Simonds*, 11 Jur. 830: *Reg.* v. *Birkett*, 8 C. & P. 732: *Whittaker* v. *Whittaker*, 21 Chy. Div. 657.

The parol evidence given by Herson on the former reference impeached his truthfulness: upon his oath he asserted that to be false which he had, in the written documents signed by him, attested to be true.

The further evidence on this reference weakens his credibility; while it establishes that Monteith was in every way reliable and trustworthy. It also places beyond question, that Monteith on every occasion represented to the banks that Herson had leased the cellar of his warehouse, which representations the warehouse receipts signed by Herson himself confirmed; and which fact was so found by Rose, J., in *Monteith* v. *Merchants' Bank* (10 Pr. R. 469).

While there are these strong reasons for not giving Herson's evidence the credit contended for it, there are others illustrated in the cases next referred to, which must also influence the disposal of this case. In *Re Browne*, 2 Gr. 590, it was held, that in cases where parol evidence is admissable to control the legal operation of a written document, no effect should be given to such evidence if its accuracy was involved in doubt. Blake, C. said: "It must be admitted, that, in determining the intention of these parties, their solemn deed upon the subject would be very cogent evidence, under any circumstance. To assume those parties to have had an intention different from that expressed in the deed, upon the parol evidence laid before us, would be, in my opinion, quite unwarrantable."

So in *Cameron* v. *Barnhart*, 14 Gr. 661, where the evidence was contradictory, it was held that the presumption in a case of doubt must be in favour of fair dealing, and not of forfeiture.

And where the conflict of evidence related to a deposit of title deeds with a bank as security for advances; as alleged by the plaintiffs it would be lawful, but as alleged by the defendant it would be unlawful. The Court in view of these contingencies decreed in favour of the lawful act, and rejected the evidence of the defendant: *Royal Canadian Bank* v. *Cummer*, 15 Gr. 627.

Apply these to this case: The parol evidence of Herson throws doubt upon the validity of the written documents signed by him; upon the truthfulness of the representations made by Monteith in his lifetime, and of the written and parol declarations of Herson, immediately prior to, or at the time of, Monteith's death. The decision in such a case of doubt should be in favour of the written documents; of fair dealing instead of forfeiture; and of the lawful, rather than the unlawful act.

Any one of the grounds commented upon would justify my not giving effect to Herson's evidence. Indeed after the parties had heard my former judgment, counsel for the unsecured creditors asked me to find as to Herson's credibility, and I then stated in effect, that if I had so to find, I would have great difficulty in crediting his evidence. Further consideration rather confirms this difficulty; and, therefore, for the reasons stated, I must disregard Herson's evidence, as utterly unsafe to warrant a finding against the validity of these warehouse receipts: *Cotter* v. *Cotter*, 21 Gr. 159, *Grant* v. *Brown* 13 Gr. 256.

I had ruled on the former reference, that if those warehouse receipts were fraudulent or void, the defendant Pritchard, as administrator of Monteith, could not impeach their validity on that ground. The cases there cited, and the following, support that view.

A fraudulent instrument is only void against creditors, but not against the party himself, or his executors or administrators; for against them it remains valid: *Hawes* v. *Leader*, Cro. Jac. 270. An executor or administrator shall not avoid a fradulent bill of sale as such executor or administrator, but only when he is a principal creditor: *per* Holt C. J., 13 Vin. Abr. 516.

"The fradulent alienation," says May, "is good against the rightful executor or administrator, for he is not a creditor, nor does he represent creditors; and, therefore, it is no devastavit for him to deliver the goods to a fradulent grantee, who can be sued for them by creditors, but not by any other person"; May on Fraud. Conv., 60.

An action arising out of the fraud of a testator lies against, and is transmitted to, his executors, they being liable to make good the damage sustained by the misconduct of those whom they represent so far as they have assets: *Per* Lord Brougham, in *Davidson* v. *Tulloch*, 6 Jur. N. S. 543.

I dispose only of the question referred to in the Chancellor's judgment, and re-affirm my former findings. I give no costs. If the cases above re-

ferred to had been cited on the appeal I think there would have been no reference back.

On appeal, the Master's ruling was affirmed by Ferguson, J., and on re-hearing was varied in part.—See 10 Ont. R. 529.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

SUPREME COURT OF CANADA.

Quebec.]

LORD V. DAVIDSON

Charter party—Deficient cargo—Dead freight—Demurrage.

By charter party the appellants agreed to load the respondent's ship at Montreal with a cargo of wheat, maize, peas or rye, "as fast as can be received in fine weather," and ten days' demurrage were agreed on over and above lying days at forty pounds per day. Penalty for non-performance of the agreement was estimated amount of freight. Should ice set in during loading, so as to endanger the ship, master to be at liberty to sail with part cargo, and to have leave to fill up at any open port on the way homeward for ship's benefit.

The ship was ready to receive cargo on the 15th November, 1880, at eleven a.m., and the appellants began loading at two p.m. on the 16th November. After loading a certain quantity of rye in the forward hold, as it would not be safe to load the ship down by the head any further, the captain refused to take any more in the forward hold. No other cargo was ready, as the respondents would not put the rye anywhere except in the forward hold, and they stopped loading. At eight a.m. on the 19th, the loading recommenced, and continued night and day until six a.m. Sunday, the 21st, at which time the vessel sailed in consequence of ice beginning to set in. When she sailed she was 214½ tons short of a full cargo. The respondent sued appellants because ship had not received full cargo, and claimed 2½ days 15th, 16th and 17th of November, and freight on 214½ tons of cargo not shipped. The appellants contended delay was not due to them, but to ship in not supplying baggers and sewers to bag the grain.

That the time lost on the first week was made up by night work, and that mere delay in loading could not sustain claim for dead freight.

The Superior Court gave judgment for the respondent for the dead freight, but refused to allow demurrage. This judgment was affirmed by the Court of Queen's Bench (appeal side). On appeal

Held (affirming the judgment of the Court below), that as there was evidence that the vessel could have been loaded with a full and complete cargo without night work before she left, had the freighters supplied the cargo as agreed by the charter party, the appellants were liable for damages.

That the demurrage mentioned in the charter referred to, and are over and above the lying days, and have no reference to the loading of the ship.

Appeal dismissed with costs.

Kerr, Q.C., for appellants.

Abbott, Q.C., for respondent.

Quebec.]

COLLETTE V. LASNIER.

Patents—Validity of prior patent—Infringement—Damages—What proper measure.

In 1877 L., a candle manufacturer, obtained a patent for new and useful improvements in candle making apparatus. In 1879 C., who was also engaged in the same trade obtained a patent for a machine to make candles. L. claimed that C.'s patent was a fraudulent imitation of his patent, and prayed that C. be condemned to pay him $13,200, as being the amount of profits alleged to have been made realised by C. in making and selling candles with his patented machine, and also $10,000 damages.

C. contended his patent was valid as a combination patent of old elements, and also that L.'s patent was not a new invention. The Superior Court on the evidence found that C.'s patent was a fraudulent imitation of L.'s patent, and granted an injunction, and condemned C. to pay L. $600 damages for the profits he had made on selling candles made by the patented machine. This judgment was affirmed by the Court of Queen's Bench (appeal side). At the trial there was evidence that there were other machines known and in use for making candles, and there was no evidence as to the cost of making candles with such machines, or what would have been a fair royalty to pay L. for the use of his patent, and that L.'s trade had been increasing. On appeal it was

Held (affirming the judgment of the Court below), HENRY, J. dissenting, that L.'s patent had been infringed.

Also (reversing the judgment of the Court below), that the profits were not a proper measure of damages in this case, and that on the evidence only $100 should be awarded for the infringement.

Appeal dismissed with costs, the judgment of the Court below modified.

Lacoste, Q.C., for appellant.

Bobidoux, and *Geoffrion*, Q.C., for respondent.

Quebec.]

TREMBLAY V. SCHOOL COMMISSIONERS OF ST. VALENTIN.

Con. Stats. (L. C.) ch. 15—40 *Vict. ch.* 22, *sec* 11, *P. Q.—Construction of*—33 *Vict. ch.* 25, *sec.* 7—*(P. Q.)—Erection of a schoolhouse—Decision of Superintendent—Final—Mandamus.*

Under 40 Vict. ch. 22, sec. 11, the Superintendent of Education for the Province of Quebec, on an appeal to him from the decision of the School Commissioners of St. Valentin, ordered the school district of the Municipality of St. Valentin should be divided into two districts with a schoolhouse in each.

The School Commissioners by resolution subsequently decreed the division, and a few days later on a petition, presented by ratepayers protesting against the division, they passed another resolution refusing to entertain the petition. Later on, without having taken any steps to put into execution the decision of the Superintendent, they passed a resolution declaring that the district should not be divided as ordered by the Superintendent, but should be reunited into one.

In answer to a peremptory writ of mandamus, granted by the Superior Court, ordering the School Commissioners to put into execution the decision of the Superintendent of Education, the School Commissioners (respondents) contended that they had acted on the decision by approving of it, and, that as the law stood, they had power and authority to reunite the two districts on the petition of a majority of the ratepayers, and that their last resolution was valid until set aside by an appeal to the Superintendent.

Held (reversing the judgment of the Court of Queen's Bench, appeal side), that the commissioners having acted under the authority conferred upon them by Con. Stats. L. C. ch. 15 secs. 31 and 33, and an appeal having been made to the Superintendent of Education, his decision in the matter is final, 40 Vict. ch. 22, sec. 11, P. Q., and can only be modified by the Superintendent himself, on an application made to him under 33 Vict. ch. 25, sec. 7; and therefore, that the peremptory mandamus ordering the respondents to execute the Superintendent's decision should issue.

Appeal allowed with costs.

Prudel, Q.C., *Geoffrion*, Q.C., for appellants.

Beaudin, for respondents.

VOGEL ET AL. V. GRAND TRUNK RAILWAY COMPANY.

Railway Company—Carriage by railway—Special contract—Negligence—Liability for—Power of company to protect itself from—Live stock at owner's risk—Railway Act, 1868, *sec.* 20, *sub-sec.* 4—36 *Vict. ch.* 43, *s* 5—*Railway Act*, 1879.

A dealer in horses hired a car from the Grand Trunk Railway Company, and signed a shipping note by which he agreed to be bound by the following among other conditions:—

1. The owner of animals undertakes all risks of loss, injury, damage and other contingencies, in loading, etc.

3. When free passes are given to persons in charge of animals, it is only on the express condition that the railway company are not responsible for any negligence, default, or misconduct of any kind on the part of the company or their servants, or of any other person or persons whomsoever, causing or tending to cause the death, injury or detention of any person or persons travelling upon any such free passes. . . . The person using any such pass takes all risks of every kind no matter how caused.

The horses were carried over the Grand Trunk Railway in charge of a person employed by the owner, such person having a free pass for the trip; through the negligence of the company's servants a collision occurred by which the said horses were injured.

Held, (*per* RITCHIE, C.J., FOURNIER and HENRY, JJ.), that under the General Railway Act, 1868, sec. 20, sub-sec. 4, as amended by 34 Vict. cap. 43, sec. 5, which prohibits railway companies from protecting themselves against liability for negligence by notice, condition or declaration, and which applies to the Grand Trunk Railway Company, the company could not avail themselves of the above stipulation that they should not be responsible for the negligence of themselves or their servants.

Per STRONG and TASCHEREAU, JJ.—That the words "notice, condition or declaration," in the said statute contemplate a public or general notice, and do not prevent a company from entering into a special contract to protect itself from liability.

Appeal dismissed with costs.

McCarthy, Q.C., and *Osler*, Q.C., for appellants.

Ermatinger, and *Dickson*, Q.C., for respondents.

Quebec.]

WYLIE v. THE CITY OF MONTREAL.

Con. Stat. L. C. ch. 15 and 41 Vict. ch. 6, sec. 26 (P.Q.)—Art 712—Mun. Code P.Q.—Construction of.

Held (GWYNNE, J., dissenting), that property situated in the city of Montreal, and occupied by its owner exclusively as a boarding and day school for young ladies, and receiving no grant from the municipal corporation is an "educational establishment" within the meaning of 41 Vict. ch. 6. sec. 26 (P.Q.), and exempt from municipal taxes.

Appeal allowed with costs.

Kerr, Q.C., for appellant.

R. Roy, Q.C., for respondents.

Quebec.]

COUNTY OF OTTAWA v. MONTREAL, OTTAWA & WESTERN RY. CO.

The corporation of the county of Ottawa, under the authority of a by-law, undertook to deliver to the Montreal, Ottawa and Western Railway Company for stock subscribed by them 2,000 debentures of the corporation of $100 each, payable twenty-five years from date, and bearing six per cent. interest, and subsequently, without any valid cause or reason, refused and neglected to issue said debentures. In an action for damages brought by the railway company against the corporation for breach of this covenant

Held (affirming the judgment of the Court below), that the corporation was liable. Arts. 1,065, 1,070, 1,073, 1,840 and 1,841 C.C. reviewed.

Appeal dismissed with costs.

Laflamme, Q.C., for appellants.

De Bellefeuille, for respondents.

New Brunswick.]

SOVEREIGN FIRE INSURANCE COMPANY v. PETERS.

Insurance against loss by fire—Condition in policy, not to assign without written consent of company—Breach of condition—Chattel mortgage.

Where a policy of insurance against loss or damage by fire contained the following provision:

"If the property insured is assigned without the written consent of the company at the head office endorsed hereon, signed by the secretary or assistant secretary of the company, this policy shall thereby become void, and all liability of the company shall thenceforth cease."

Held (affirming the judgment of the Court below), that a chattel mortgage of the pro-

perty insured was not an assignment within the meaning of such condition.

Appeal dismissed with costs.

Lash, Q.C., for appellants.

Hannington, for respondents.

QUEEN'S BENCH.

Wilson, C.J.]

REGINA V. CHAYTER.

Held, electroplated ware not jewellery within 48 Vict. ch. 40, s. 1, and a conviction for selling same unlicensed was therefore quashed, though the fine had been paid.

Foster, Q.C., for motion.

COMMON PLEAS DIVISION.

WILSON V. LOUCKS.

Pleading—Statement of claim—Sufficiency—Municipal Act—Closing up road.

A statement of claim set out that the plaintiff was the owner of certain land being part of an original road allowance granted and conveyed to him by the corporation, a township; that previous to the execution of the deed by the said corporation by a by-law which had been duly passed by the said council, in accordance with and under the authority of the Consolidated Municipal Act, 1883, the said municipal council had authorized the said corporation to sell the said parcel of land, and to convey the same to the purchaser thereof; that the said by-law was afterwards confirmed by a by-law duly passed by the municipal council, in accordance with the provisions of the said Act.

Held, on demurrer, good; that it being alleged that the by-law authorizing the sale was duly passed in accordance with the Act, it must be assumed that all the requirements of the Act have been complied with, and it is not necessary to pick them out and allege performance of each in detail.

Watson, for the plaintiff.

Maclennan, Q.C., for the defendant.

CHANCERY DIVISION.

Divisional Court.] [March 6.

RATTE V. BOOTH.

Riparian proprietor—Reservation in patent of rights of navigation—Ownership of land covered with water—Navigable waters—Nuisance—Damages—Injunction—48 *Vict. c.* 24 (*O.*).

The judgment of PROUDFOOT, J., reported *ante*, p. 23, reversed.

Per BOYD, C.—The effect of the patent is to convey the dry land and the land covered by water two chains out, subject to the rights of the public in the Ottawa as a navigable river. As to the land bordering on the water the plaintiff is a riparian proprietor, and has the right to have the water in front of him open for all navigable purposes, and to enjoy it free from extraordinary impurities. Even if the land under the water is vested in the plaintiff's grantor he could not derogate from his grant to the water's edge by polluting, filling up, or otherwise cutting off his grantee from the beneficial enjoyment of the river, still less can the defendants be protected in their wrong doing. The grant to the patentee of the river bed two chains out carries as parcel of it the water thereon, so that we have to this extent the bed, the bank and the water, vested as private property in the patentee, subject to the servitude of a common public right of way for the purposes of navigation.

The term "navigable waters" in the patent is to be construed as referring to water of such a depth and situation as is, according to the reasonable course of navigation, in the particular locality practically navigable. The patentee may rightfully use and occupy the land covered by water, but only so much as will not interfere with the public easement; but every encroachment on the water will be at his peril if it is proved that he is guilty of a public nuisance. There is no evidence to show that the plaintiff's structure (boathouse) is a nuisance, and whatever may be the nature of the plaintiff's title or occupancy of the water, it is enough that his possession and business are as against the public legitimate in order to entitle him to recover as against a wrongdoer. Even if the plaintiff's place of business

was proved to be a nuisance because it invaded the navigable waters of the river, it does not follow that that disposes of the plaintiff's claim for an injunction and damages, as he might well invoke the maxim *Injuria non excusat injuriam.*

Per FERGUSON, J.—There is nothing either on the face of the conveyance to the plaintiff or in the surrounding circumstances at the time of its execution to indicate that the grantor intended, if intention could now be of any consequence, to reserve to himself the part of the lot under the water or any right or title to it; the contrary would rather appear from his being in possession at the time and having a boathouse situate as the present one is.

By the conveyance to the plaintiff he obtained title to the lands in the stream embraced in the two chains from the bank, but subject to the right of navigation expressed in the patent. What the plaintiff has done is no nuisance, nor is it shown that he has caused any injury to navigation, and he is entitled to redress for the grievances of which he complains. Even if the plaintiff is not the owner of the land under the water he is entitled to redress for the injuries he has sustained as a riparian proprietor merely.

Maclennan, Q.C., for the plaintiff.

McCarthy, Q.C., and *Gormully*, contra.

Proudfoot, J.] [February 26.

RE BRITON MEDICAL AND GENERAL LIFE ASSOCIATION.

Dominion Winding-up Acts—Insufficient evidence of insolvency—45 Vict. c. 23 (D.).

Held, that the evidence of insolvency was not sufficient to satisfy the requirements of the Dominion Winding Acts, and therefore order to wind up the company refused.

Moss, Q.C., and *Osler*, Q.C., for the petitioner.

J. Maclennan, Q.C., and *Francis*, for the company.

Boyd, C.] [March 31.

RE GILCHRIST AND ISLAND CONTRACT.

Short form mortgage—Inadmissable alteration—Personal power—Assignment of mortgage—Power of sale.

Where, in a mortgage purporting to be made under the Short Form of Mortgage Act, the power of sale was in the following words:—"The said mortgagee on default of payment for two months may, without giving any notice, enter on and lease or sell the said lands."

Held (1) that this was a power personal to the original mortgagee, and could be exercised only by him and not by an assignee of the mortgage.

(2) That inasmuch as this form of words did not correspond to the form of words in column 1, No. 14 of R. S. O. ch. 109, and was not either literally or in substance the statutory abbreviated form of words nor a mere extension from or qualification of the form of the statute, but an abolition of one of its most important terms, the benefit of the extended form of words in column 2 of the statute could not be claimed.

PRACTICE.

Boyd, C.] [January 12.

MACPHERSON V. TISDALE.

Attaching debts—Unascertained costs—Set-off—Payment into Court.

By the judgment in this action the defendant was found to owe the plaintiff $115, and he was ordered to pay the plaintiff's costs of action, less some interlocutory costs awarded to the defendant. Subsequent to judgment, certain creditors of the plaintiff issued garnishment process from a Division Court, attaching all debts due from defendant to plaintiff. After the taxation of the plaintiff's costs, but before the taxation of the defendant's interlocutory costs, the defendant paid $115 into the Division Court, having previously paid another sum of $115 to the sheriff to procure his release from arrest under a *capias* after judgment in this action.

Held, that the costs coming to the plaintiff constituted an attachable debt before taxation, which was bound by the service of the garnishment process and properly payable into the Division Court after it was ascertained by taxation; and the defendant could not object that his set-off was not ascertained at the time of payment into Court as it was by his own default; and therefore the money paid into Court pursuant to the attachment process was to be taken to be part of the money due to the plaintiff for costs, and not as representing the same debt as the money paid to the sheriff.

W. H. P. Clement, for the plaintiff.

A. H. Marsh, for the defendants.

Mr. Dalton, Q.C.] [March 23.

THE QUEEN *ex rel.* FELITZ v. HOWLAND.

Municipal election—Quo warranto—Master in Chambers, jurisdiction of—Time—Qualification—Married woman—Municipal Act, 1883.

The jurisdiction of the Master to grant a fiat for a summons in the nature of a writ of *quo warranto*, to contest the validity of a municipal election, *held* to be established by the 13th sec. of the A. J. Act, 1885.

A summons issued within a month of the formal acceptance of office by the statutory declaration of qualification of office was *held* to be in time, notwithstanding that it was issued more than six weeks after the election, and more than a month after a speech accepting office made by the respondent to a meeting of electors and certain other acts of a similar character, less formal than the statutory declaration.

The respondent was rated on the assessment roll, in respect of a leasehold property, sufficient in value to qualify him for office, but the property was that of his wife, to whom he was married in 1872, and who acquired the property in 1884.

Held, that the respondent had no estate in the property in respect of which he was rated, and, therefore, did not possess the qualification required by sec. 73 of the Municipal Act of 1883, (O.)

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

Robinson, Q.C., *Lash*, Q.C., and *Henry O'Brien*, for the respondent.

Mr. Dalton, Q.C.] [March 24.

JENNINGS v. GRAND TRUNK R. W. CO.

Pleading not guilty by statute—Particulars.

Particulars were ordered of any defence intended by a plea of not guilty by statute, other than a denial of the facts stated or implied in the statement of claim, and a denial of the legal liability of the defendants to the plaintiff.

Shepley, for the plaintiff.

Aylesworth, for the defendants.

Boyd, C.] [March 24.

CANADA PACIFIC RY. CO. v. CONMEE ET AL.

Fraud—Production of documents—Privilege—Particulars—Facts.

In an action to recover payments made by the plaintiffs to the defendants, who were contractors for the building of the plaintiffs' line of railway, on the ground that the progress certificates upon which the payments were made were false and fraudulent, the defendants asked for (1) production of documents shewing the results of measurements and surveys made by the plaintiffs for the purpose of litigation; and (2) particulars of the matters alleged to be wrong in each certificate complained of.

Held, that the documents in question were privileged, even if they were procured, not for this action, but for another action between the same parties; but

Held, that the plaintiffs should give particulars of the errors in the certificates on which they relied, and although this might involve the disclosing of matters of fact derived from privileged communications, yet it was no breach of the rule which protects documents so privileged.

Information obtained by means of the measurements and examination of the company's surveyors was not *per se* privileged; the results are matters of fact involving less or more of earth and rock, excavation and filling.

R. M. Wells, for the plaintiffs.

Wallace Nesbitt, for the defendants.

Wilson, C.J.] [March 30.

ARMSTRONG V. DARLING.

Arbitrator—Compensation—Day's sitting—R. S. O. ch. 64.

The day's sitting upon arbitrations mentioned in schedule B to R. S. O. ch. 64, which is to consist of not less than six hours, is to be computed by the number of these sittings of at least six hours' duration, whether they are held upon the same natural day or upon different days, and the compensation to the arbitrators is to be reckoned on that footing.

W. H. P. Clement, for plaintiff.

Delamere, Black, Reesor and English, for defendants.

Boyd, C.] [April 3.

RE PARR.

Infants—Bequest—Foreign guardian.

An application for an order sanctioning the payment of a bequest in favour of certain infants to their father, who with the infants resided in a foreign state, and had there been appointed guardian by a Surrogate Court, was refused, and the executors were ordered to pay the amount of the bequest into Court.

Re Andrews, 21 C. L. J. 428, distinguished.

Hoyles, for the application.

Proudfoot, J.] [April 7.

HUTTEL V. WANZER.

Indemnity—Costs—Solicitor and client—Party and party.

W. sold land to H., and covenanted to indemnify him against a mortgage thereon.

Held, that H. was not entitled to solicitor and client, but only to party and party costs against W. of an action on the covenant, although he was entitled in the action to recover his solicitor and client costs of defending an action brought by the mortgagee.

Hoyles, for plaintiff.

W. H. P. Clement, for defendant.

CORRESPONDENCE.

THE CONVEYANCERS' SCANDAL.

To the Editor of the LAW JOURNAL:

SIR,—Permit an outsider to add a few lines to the correspondence in your journal respecting the manner in which the business of the country solicitors is cut up by the host of so-called "conveyancers." In towns and cities in the West the professional charge for ordinary deeds or mortgages is $4; now, to my knowledge, the fees charged by the country conveyancers, storekeepers, saddlers, insurance agents, and the like, range from $1 to $1.50 for the same class of instruments! The damage to the legal profession is not merely the large number of instruments which are prepared by these unauthorized amateur conveyancers, but also in the reduction of the fees payable for such work. The country solicitor has to reduce his charges to the low level of his opponents' in order to get business; hence, he suffers in two ways, first, by the loss of the volume of business filched away; and, secondly, by the reduction of the value of the work he does obtain to less than one half of the proper charge. Another evil I would point out is that these non-professional conveyancers poison the minds of the people against the profession; they do not scruple to say, in effect: "If you go to a lawyer you will be fleeced; better let *me* do the writings." I need hardly dwell upon the grossly inaccurate manner in which the work is performed by these gentry, and which gives great trouble and anxiety to the registrar.

The Ontario Government should pass an Act making it a misdemeanour for any one not holding a "conveyancer's certificate" of fitness to accept any fee or other reward for drawing any instrument affecting lands. The Law Society might provide for the examination of and granting to such persons who can pass a license to practise as conveyancers merely, on a yearly fee of, say, $10. This would leave the door open for a few thoroughly competent men to continue their business, while it would cut off nine-tenths of the ignorant, unlicensed, unscrupulous persons who are rendering the practice of the law in country places a perfect by-word.

Yours, etc.,

A COUNTY REGISTRAR.

MAGISTERIAL POACHERS.

To the Editor of the LAW JOURNAL:

SIR,—What is the use of spending time and money in becoming a solicitor or a member of the Bar, when it is far more profitable, at least in this country, to be a justice of the peace?

A justice is a power in the land, he exercises great authority in his district, and must be treated with the utmost deference by every legal practitioners, or his client will be considerably harassed, and, to crown all, he receives every consideration and protection from the Superior Courts.

This prominence brings grist to his mill; parties consult him on law matters, he can fine and imprison, draw deeds and wills, take affidavits in proof of execution, obtain probates, attend Division Courts, and, in short, do all a country practitioner's work, without license, without payment of fees, and without any responsibility.

Our Benchers are supposed to look after our interests, but as they have neglected them so long, and there is no prospect of any protection, I intend to leave the profession as soon as I can manage to be appointed a J. P., or can own one.

In some country offices a J. P. is kept as a clerk, and this double-barrelled gun brings down more clients than fall to the lot of a more conscientious practitioner.

Yours, etc.,

CONSIDRIUS.

Collingwood, April 9th, 1886.

LITTELL'S LIVING AGE.—The numbers of the *Living Age* for the weeks ending 27th March and April 3rd contain Grattan, and the Irish Parliament, *Westminster*; The Economic Value of Ireland to Great Britain, *Nineteenth Century*; A Diary at Valladolid in the Time of Cervantes, *Blackwood*; Sebastian van Storck, *Macmillan*; Reminiscences of my Later Life, by Mary Howitt, *Good Words*; A Pilgrimage to Sinai, *Leisure Hour*; A Country Village in the Beginning of the Eighteenth Century, *Longman's*; The Story of the One Pioneer of Tierra del Fuega, *Cornhill*; American Manners, *All the Year Round*; with instalments of "This Man's Wife," and "Caroline," and poetry.

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

WANTED.

LAW STUDENT, IN GOOD TORONTO Office. No salary. Apply by letter to care of Publishers of CANADA LAW JOURNAL, 5 Jordan Street, Toronto.

Law Society of Upper Canada.

SUBJECTS FOR EXAMINATIONS.

Articled Clerks.

1884 and 1885.
- 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.

In 1884 and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil, at their option, which are appointed for Students-at-Law in the same years.

Students-at-Law.

1884.
- Cicero, Cato Major.
- Virgil, Æneid, B. V., vv. 1-361.
- Ovid, Fasti, B. I., vv. 1-300.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. IV.

1885.
- Xenophon, Anabasis, B. V.
- Homer, Iliad, B. IV.
- Cicero, Cato Major.
- Virgil, Æneid, B. I., vv. 1-304.
- Ovid, Fasti, B. I., vv. 1-300.

Paper on Latin Grammar, on which special stress will be laid.
Translation from English into Latin Prose.

MATHEMATICS.

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

ENGLISH.

A Paper on English Grammar.
Composition.
Critical Analysis of a Selected Poem:—
1884—Elegy in a Country Churchyard. The Traveller.
1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

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 rom English into French prose.
1884—Souvestre, Un Philosophe sous le toits.
1885—Emile de Bonnechose, Lazare Hoche.

or NATURAL PHILOSOPHY.

Books—Arnott's elements of Physics, and Somerville's Physical Geography.

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.

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.

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 Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

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 Socity 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, six 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 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 year, 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.

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 for Diplomas	2 00
Fee for Certificate of Admission	1 00
Fee for other Certificates	1 00

PRIMARY EXAMINATION CURRICULUM

FOR 1886, 1887, 1888, 1889 AND 1890.

Students-at-law.

CLASSICS.

1886.
- Cicero, Cato Major.
- Virgil, Æneid, B. I., vv. 1-304.
- Cæsar, Bellum Britannicum.
- Xenophon, Anabasis, B. V.
- Homer, Iliad, B. VI.

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. (vv. 133.)
- 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. . (vv. 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:—

1886—Coleridge, Ancient Mariner and Christabel.

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; *or* Peck's Ganot's Popular Physics, and Somerville's Physical Geography.

ARTICLED CLERKS.

Cicero, Cato Major; *or*, Virgil, Æneid, B. I., vv. 1-304, in the year 1886: and 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.

Copies of Rules can be obtained from Messrs. Rowsell & Hutcheson.