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DIARY FOR DECEMBER.

1. Tues .....County Court Sittings (York) begin.
3. Thur.....Divisional Court Sitt., Chan. Div. H.C.J., begin.
4. Fri.....Armour, J., Q.B., sworn in, 1877.
5. Sat .....Michaelmas Sitt. Com. Law Div. H.C.J., end.
6. *Sun.....2nd Sunday in Advent.*
8. Tues ....Gen. Sess. and Co. Court Sitt. (ex. York) begin.
11. Fri .....Blake, V.C., sworn in, 1872.
13. *Sun.....3rd Sunday in Advent.*
14. Mon.....Christmas vac. in Sup. Ct. and Exchequer Ct. begin.
15. Tues....Morrison, J., Court of Appeal, 1877.

TORONTO, DECEMBER 1, 1885.

WE call attention to the letters of a correspondent on the subject of "Ultra Vires" in connection with judicial appointments and *quasi*-judicial appointments in the Provinces since Confederation, in which several points of interest are discussed. The first letter will be found *ante*, p. 340, and the second in this issue, *post*, p. 421.

THE LAW OF DOWER.

"THE avowed object of the Legislature in passing an Act, as made known to the public by the discussion that takes place upon the Bill in its passage through the Legislative Assembly, and the intention of the Legislature in passing the same Act, as extracted by the judicial process, are often widely different." Thus said Mr. Justice Armour in *Clarke* v. *Creighton*, 45 Q. B. 518, and the truth of the remark must be admitted by all.

Many confirmations of its correctness might no doubt be cited, but as "the latest case" is always the one that lawyers are most concerned about, we prefer to confine our attention to *Smart* v. *Sorenson*, 9 O. R. 640, and of which a note appears *ante*, p. 320.

In that case Mr. Justice Ferguson had to consider the effect of the statute 42 Vict. c. 22 (O.), by which it was supposed an important alteration had been made in the law of dower. Previous to the passage of that Act, the law undoubtedly was that a woman joining in a mortgage of the legal estate and barring her dower therein, rendered her concurrence in any subsequent mortgage or conveyance of the equity of redemption by her husband unnecessary; and that, so long as the mortgage remained undischarged, he alone had complete dominion over the equity of redemption; and that it was only in such equity of redemption as he might die seized of that the wife could claim dower. This was felt to be an injustice to the wife, because the husband might procure his wife's release of dower to a mortgage of a small amount upon an estate worth thousands of dollars; and having done so, he thereby became enabled immediately to dispose of the whole estate so as to cut out her dower entirely. It was argued that the wife's bar of dower in a mortgage should only be a bar for the purpose of the particular mortgage in which it was contained, and so far as it might be necessary to effectuate that, and should not be for any other purpose an unlimited bar of dower.

Two things had to be considered; first, the rights of the wife as against the mortgagee in whose mortgage she had joined; and, secondly, the rights of the wife as against her husband and those subsequently claiming under him. As regards the first, it was felt the rights of the mortgagee should not be disturbed or encroached upon; but, as regards the second, it was thought desirable to interpose some

protection in favour of the wife, so that in future, her consenting to a mortgage of the legal estate, should not have the effect of depriving her of all control over the equity of redemption.

We confess to being no great advocates for the continuance of the law of dower in any shape; at the same time, if it is the will of the Legislature to continue it, the propriety of the proposed alteration in the law was we think manifest. The amendment, we believe, was suggested by the late Chief Justice of Ontario, than whom, one would have thought, no more precise or accurate lawyer could be named to supervise the draft of the Act to give effect to his suggestion, and we have reason to believe that the draft of the Act was in fact submitted to him and received his approval, as carrying out his intention.

The only section which it is necessary to consider here is the first, which reads as follows:—"No bar of dower contained in any mortgage, or other instrument intended to have the effect of a mortgage or other security upon real estate, shall operate to bar such dower to any greater extent than shall be necessary to give full effect to the rights of the mortgagee or grantee under such instrument." At first sight, certainly, these words appear to effect an important change in the law of dower. Whereas, formerly a bar of dower in the legal estate had an unlimited effect, and enabled the husband alone to dispose of his wife's dower in the equity of redemption, the Act says that henceforth a bar of dower in a mortgage is only to be operative to the extent that may be necessary to give full effect to the mortgage. If, for realizing the security, it is necessary that the bar should be absolute, then it is absolute. If, on the other hand, it is not necessary for that purpose that it should be absolute, then it is not absolute but only partial.

We are certainly disposed to agree with the late Chief Justice in thinking that the Act does in effect work the change in the law which he contemplated; but, then, such is the infirmity of human language and its inadequacy to express to all minds the same ideas, that we find to others the self-same words have a very different import. In *Smart* v. *Sorenson* Mr. Justice Ferguson in effect holds, as we understand his judgment, that the Act has made no alteration whatever in the wife's interest in the equity of redemption; and that now, as formerly, whenever the wife bars her dower in the legal estate, her husband may in his lifetime dispose of the equity of redemption so as to deprive her of her dower therein.

The dower of a woman in a legal and equitable estate stood on quite a different footing—while the former rested on the common law, the latter was purely the creation of a statute. While the one could not be defeated by the conveyance of the husband alone, the other could. Perhaps this distinction has not been kept sufficiently in view by the draftsman who framed the Act in question. At the same time, there is certainly room for argument that the limitation which the Act undoubtedly does create in the effect of a bar of dower contained in a mortgage, is to a certain extent, if not altogether, defeated by the construction which Mr. Justice Ferguson has placed upon it.

The learned judge seems to have thought that the wife had no interest in the equity of redemption, upon the ground that her husband could assign it without her assent. We submit that the second section of the Act gives her an interest in the equity, even though it should be ultimately decided that her husband by an assignment can deprive her of this interest without her consent.

The language of this section is: "In the event of a sale of the land comprised in any such mortgage or other instrument, under any power of sale contained therein,

or under any legal process, the wife of the mortgagor or grantor [*i.e.*, the grantor in an instrument intended to operate as a mortgage],'' who shall have so barred her dower in such lands, shall be entitled to dower in any surplus of the purchase money arising from such sale which may remain after satisfaction of the claim of the mortgagee or grantee to the same extent as she would have been entitled to dower in the land from which such surplus purchase money shall be derived, had the same not been sold. Certainly a creditor of the husband could not claim this surplus money without satisfying the wife's claim, and if not, it is difficult to see on what principle such a creditor can sell the equity of redemption, and take the proceeds freed from her claim.

We are not, however, prepared to assent to this view that a husband can, since the Act, by an assignment of an equity of redemption, cut out his wife's interest. It is a canon of construction that effect should, if possible, be given to every section of a statute. It appears to us the decision cited reads the statute as if the first section were omitted. Unless this section prevents a husband disposing of an equity of redemption to the prejudice of his wife, what effect has it? With the above decision, and that of Galt, J., in *Calvert* v. *Black*, 8 P. R. 255, against us, we feel bound to say that it is not improbable that our view is incorrect, but the question is so important that we feel it our duty to call attention to it, as practitioners acting upon these decisions may find that the construction which appears to us to be that which is in accordance with the intention of the legislature will ultimately prevail.

RECENT ENGLISH DECISIONS.

The *Law Reports* for November comprise 15 Q. B. D. pp. 441-560, and 30 Chy. D. pp. 1-191.

GIFT OF CHATTELS—PARENT AND CHILD.

Taking up the cases in the Queen's Bench Division, the first that calls for notice is that of *In re Ridgway*, 15 Q. B. D. 447, which, although a bankruptcy case, is one involving a principle which is of general interest. The bankrupt had, in 1866, shortly after the birth of his son Thomas, purchased a pipe of wine, which he had bottled and laid down in his cellar, and from that time it remained intact, with the exception that a bottle was occasionally used in the family to test its condition. The wine was always known in the family as "Tom's wine." In 1885 the bankruptcy occurred, and the wine was still in the bankrupt's cellar, but was claimed by the son as against the trustee. Denman, J., held that there had been no perfect gift of the wine to the son, and that it remained the bankrupt's property and passed to his trustee. He considered that the bankrupt had formed the intention of giving it to his son at some future time without fixing in his own mind when that time would arrive, and had determined in the meantime to retain control over it, and the power of dealing with it as circumstances might require.

PRISONER—HABEAS CORPUS.

The next case we think worthy of notice here is that of *Weldon* v. *Neal*, 15 Q. B. D. 471, in which the plaintiff who has recently been conspicuous as a litigant in the English Courts applied for a *habeas corpus* to the keeper of a gaol in which she was a prisoner under sentence of six months' imprisonment for a libel, in order to enable her to appear in Court to argue in person a rule for a new trial. The Court (Grove and Manisty, JJ.), following *Benns* v. *Mosley*, 2 C. B. N. S. 116, refused the application.

PRODUCTION OF DOCUMENTS.

In *The London and Yorkshire Bank* v. *Cooper*, 15 Q. B. D. 473, the Court of Appeal affirmed the decision of the Divisional Court, 15 Q. B. D. 7; noted *ante*, p. 318.

Recent English Decisions.

Interlocutory injunction—Conspiracy to effect an unlawful object.

The case of *The Mogul Steamship Co.* v. *McGregor*, 15 Q. B. D. 476, is in reality an equity case, notwithstanding it appears in the Queen's Bench Division. The decision is upon an application for an interlocutory injunction to restrain the defendants from conspiring together, and with other persons unknown, by undue means, to prevent the plaintiffs obtaining cargoes for their steamers from certain ports in China to England. The motion was heard before Coleridge, C.J., and Fry, L.J. It appeared that the defendants had formed a combination or "ring," and had issued circulars which had the effect of injuring the plaintiffs' custom; but the Court, being of opinion that no irreparable damage was shown, and furthermore, that the injury complained of had been going on for six years past, held that an interlocutory injunction should not be granted. The case, however, is remarkable for the expression of opinion it contains on the subject of the law relating to conspiracies. At page 483 Lord Coleridge, who delivered the judgment of the Court, says:

"It is certainly conceivable that such a conspiracy—because conspiracy undoubtedly it is—as this might be proved in point of fact; and I do not entertain any doubt, nor does my learned brother, that if such a conspiracy were proved in point of fact, and the *intuitus* of the conspirators were made out to be, not the mere honest support and maintenance of the defendants' trade, but the destruction of the plaintiffs' trade, and their consequent ruin as merchants, it would be an offence for which an indictment for conspiracy, and, if an indictment, then an action for conspiracy, would lie. It seems to both of us to be within the principle of an old case decided by Lord Mansfield, *The King* v. *Eccles*, 1 Lea. C.C. 274-276. . . . So far as I know the case itself, for the principle of law which it defines, is as good law now as when Lord Mansfield enunciated it, and would be upheld at the present day."

Buying pretenced title to land—32 Henry viii., c. 9 s. 2—(R. S. O. c. 98 s. 5).

Readers of the Reports for the last few years must have frequently come across the case of *Lyell* v. *Kennedy*, an action for the recovery of land, which has given rise to numerous interlocutory applications on the subject of discovery. We now come to the same litigants, but in this case their position is reversed, and it is *Kennedy* v. *Lyell*, 15 Q. B. D. 491. The subject-matter of dispute, however, is practically the same. It appears from the report that Kennedy acted as the agent of one Ann Duncan in collecting the rents of a valuable estate in Manchester. Ann Duncan died in 1867 intestate as to this property, and, as was supposed, without heirs. Kennedy continued after her death to receive the rents, which he paid into a bank to the account of "the executors of A. Duncan." In March, 1880, Lyell, claiming to be the heir of Ann Duncan, commenced an action against Kennedy to recover the property in question. In July, 1880, Lyell discontinued this action, and subsequently obtained a conveyance from three ladies who were believed to be the true heirs-at-law of Ann Duncan, and it was in respect of this transaction that the present action was brought as being the buying of "a pretenced title" within the 32 Henry VIII., c. 9 s. 2. On the 4th January, 1881, the defendant, Lyell, brought a second action to recover the land, relying on the title acquired under the deed in question, and this action is still pending. Denman, J., before whom the case was argued, held that the purchase of the title of the heirs by Lyell was not within the Act, and he dismissed the action. He held that it was necessary, not only for a plaintiff to show that the title purchased by the defendant was fictitious, or bad, but that the defendant when he purchased it knew it to be so. That since the 8 & 9 Vict. c. 106 (R. S. O. c. 98 s. 5), the sale of a right of entry was valid, notwithstanding the 32 Hen. VIII., c. 9, and that the mere fact that a person other than the vendor had been in possession for a period sufficient to bar the right of the vendor under the Statute of Limitations did not render the sale obnoxious. He says on this point:

"I have come to the conclusion that the mere fact—even if it be the fact—that the right of the coparceners was statute-barred at the time of the purchase does not necessarily render it a 'pretenced,' or fictitious title within the statute of Hen. VIII., so as to make the buyer liable to an action for penalties. He only knows that the time has elapsed which will enable the party in possession to set up the statute. I apprehend that the party in possession might always refrain from setting up the statute; and it cannot be said therefore

that the title is not one that may, since 8 & 9 Vict. c. 106, be honestly bought in the hope that no such defence will be raised by the person in possession." The case is also interesting for the remarks of Denman, J., upon the effect of the receipt of rents and profits for the statutory period by a person who has held himself out as not being in possession for himself, but for the heirs of a deceased person, whoever they may be. On this point, speaking of the plaintiff's possession, he says, at p. 500:

"Until a period long within twelve years of the deed of December, 1880, he regularly paid the rents into an account, not his own, and took receipts for outgoings, not in his own name, and disclaimed altogether any intention of dealing with the property as his own. I think, therefore, there was nothing to prevent the possession of the tenants from enuring to the benefit of the heirs-at-law, or to make the taking of the rents and profits (professedly not for his own benefit but for theirs) a possession in the plaintiff, for the purposes of the Statute of Limitations."

HALF-YEAR'S NOTICE AND SIX MONTHS' NOTICE.

In *Barlow* v. *Teal*, 15 Q. B. D. 501, the Court of Appeal affirmed the decision of the Divisional Court, noted *ante*, p. 372.

ESTOPPEL—RES JUDICATA—PRAYER FOR FURTHER AND OTHER RELIEF.

The only other case in the Queen's Bench Division which seems necessary to be noticed is that of *Serrao* v. *Noel*, 15 Q. B. D. 549, which is a decision of the Court of Appeal, reversing the judgment of Grove, J. The facts of the case were as follow: In March, 1881, the plaintiff handed to one Bird, a broker, shares in a mining company, with a transfer signed (a blank being left for the name of the transferee) for the purpose of sale. Bird died, and it was then discovered that he had, without the knowledge or authority of the plaintiff, lodged the shares with the defendant's firm as security for an advance. The plaintiff, having received notice from the company of their being about to register the shares in the name of the defendant, commenced an action in the Chancery Division to restrain the company and the defendant's firm from parting with the shares, and from registering the defendant as transferee, concluding with the usual prayer for "such further or other relief as the nature of the case might require." On the 23rd February, 1882, the defendants in that action consented to an order for the delivering up of the shares to the plaintiff forthwith. The order directed that "upon delivery of the deed or form of transfer and the securities representing the same, and upon payment of costs to the plaintiff and the mining company, all proceedings in the said Chancery action should be stayed." The shares were not delivered up until the 28th April, 1882, and were then sold at a considerable loss. The plaintiff then commenced the present action to recover damages for their detention. The jury found that the plaintiff did not authorize Bird to pledge the shares for his own debt, or lend them to him for that purpose, and Grove, J., gave judgment in favour of the plaintiff, but the Court of Appeal held that the plaintiff was estopped by the consent order made in the Chancery action on the 23rd February, 1882, from recovering in this action damages for the detention, and that the defendant was not responsible for the detention of the shares by the company after the date of the consent order. Brett, M.R., says:

"Grove, J., seems to have supposed inadvertently that the Court of Chancery still exists, being represented by the Chancery Division. It is true that there are two divisions—the Queen's Bench Division and the Chancery Division—but they are divisions of one Court, and that Court administers one law. The former action was brought in the Chancery Division of the High Court, and the present claim might have been maintained in that action. The plaintiff might have been entitled to several remedies; but they could have been all combined and made available in one action."

Speaking as to the question of damages for detention after the making of the consent order he says:

"After the making of that order the mining company was no longer the agent of the defendant; the order was made against the company; the shares were kept back by the company on its own account, and not by the defendant; the remedy is against the company, for there has been no disobedience by the defendant."

COSTS—AGENCY CHARGES—CHARGES FOR COUNSEL FEES NOT YET PAID.

The first case in the Chancery Division is *In re Nelson*, 30 Chy. D. 1, a decision of the Court of Appeal affirming Pearson, J. An application was made by a country solicitor to

tax the bills of his London agents extending over a period of seven years. During the agency the agents had delivered generally once a year to the principal detailed bills of their charges, and also a cash account for each year, in which all payments made by the principal were credited, and also all moneys received by the agents on his account, and he was therein debited with all payments made by the agents on his account, and also with the gross amount of the agency bills. The balances were carried forward in each successive account. Some of the actions in respect of which the agency charges were incurred continued during several years, and one of them (*Rhodes* v. *Jenkins*) continued during the whole period of the agency. Pearson, J., held that only the bills delivered within twelve months could be taxed, and that the earlier bills must be treated as having been settled in account, and thus paid. The principal appealed in respect of the bills relating to the case of *Rhodes* v. *Jenkins;* but the Court of Appeal held that, notwithstanding the fact that all the costs in that case had not yet been taxed, the bills from time to time rendered were in fact separate bills, and could not be treated as one continuous bill at the option of the country solicitor. The agents had charged the principal with fees to counsel which had not yet been paid, the country solicitor not having supplied them with sufficient funds to pay the fees; but it was held by Pearson, J., that this charge was not a circumstance sufficient to justify a taxation after twelve months.

WILL—CONSTRUCTION—WILLS ACT, 1837, SEC. 24 (R. S. O. c. 106 s. 26.)

The case of *In re Portal & Lamb*, 30 Chy. D. 50, is an important decision of the Court of Appeal as to the construction of a will having regard to the provision of the Wills Act (R. S. O. c. 106 s. 26), which provides that a will shall speak as to the real and personal estate comprised in it from the day of the testator's death. The testator, at the time he made his will, was the owner of a cottage let at about £5 a year, with 22 acres of rough land held therewith. His will contained a specific devise of "my cottage and all my land at Stour Wood"; the will also contained a residuary devise of "all other my freehold manor, messuages, lands, and real estate whatsoever and wheresoever." The testator subsequently contracted to purchase a mansion and 10 acres of land adjoining the 22 acres also at Stour Wood, and the question was whether this house and land passed under the specific, or the residuary, devise. Kay, J., held (see 27 Chy. D. 600) that the mansion and the 10 acres passed under the specific devise; but the Court of Appeal reversed the decision, holding that it passed under the residuary devise. This case seems to have a very strong bearing upon a very similar question now awaiting the decision of our Chancery Divisional Court in the case of *Morrison* v. *Morrison*. Cotton, L.J., says:

"The words 'and all my land at Stour Wood' are no doubt sufficient by themselves to carry the after-acquired land and the house on it; but that is not all. We have 'my cottage' preceding these words, and when we find that at his death he had the small cottage and also this larger house in which he was then residing, and which was a gentleman's residence with gardens and pleasure-grounds, all which would pass under the description of a house, I cannot but think that what passed by the devise was that which was aptly described, the small cottage which he had held and the land he had held with it, and that only; and for this reason 'my cottage' does not aptly describe the subsequently purchased house, and when we come to the words 'and all my lands at Stour Wood,' although such a devise by itself would carry with it any house standing on that land, yet when these words are added to the previous description of 'my cottage,' in my opinion, it shows that 'all my land' in this particular case was not intended to include this residence with the garden and grounds held with it."

SEPARATION DEED—MAINTENANCE OF CHILDREN—RIGHT OF CHILD TO SUE.

In *Gandy* v. *Gandy*, 30 Chy. D. 57, the Court of Appeal decided that when in a separation deed between husband and wife, the husband covenanted with the trustees to support the children, on refusal of the trustees to sue, the children could not themselves maintain an action to enforce the covenant; but an action having been brought in the name of one of the children alone against the husband, the trustees being joined as defendants, the Court ordered it to stand over, with liberty to add parties; and on this the wife was added as a

co-plaintiff—the trustees still refusing to be joined as plaintiffs—and on the action, so constituted, coming on again the Court held that the plaintiffs were entitled to succeed. This case is also useful as showing that a party cannot in a court of law "blow both hot and cold." The defendant had defeated an application for increased alimony made to the Divorce Court on the ground that he was still liable on the covenants contained in the separation deed; but in the present action he sought to escape liability on the deed on the ground that his liability under it had determined by reason of the custody of one of the children having been given to his wife. But the Court of Appeal held that he was not at liberty to retain the benefit of the decision given on the footing that his liability under the deed continued, and at the same time insist that his liability under it had determined, and the appeal was ordered to stand over to enable the wife to apply again to the Divorce Court for increased alimony.

WILL—GIFT OF "FURNITURE, GOODS AND CHATTELS"—EJUSDEM GENERIS.

In *Manton* v. *Tabois*, 30 Chy. D. 92, two points arose. The first was as to the effect of a bequest in the following words, "I desire that the furniture, goods and chattels be not sold during my wife's lifetime, but at her decease be divided among the executors." Applying the rule of *ejusdem generis*, Bacon, V.C., held that it passed only such furniture, etc., as on the house being let furnished, would go with the occupation of the house, and not such articles as jewellery, fire-arms, tricycles and scientific instruments. The second question was as to whether or not a gift of all the testator's interest in the C. estate had been adeemed. It appeared that the C. estate belonged to the testator's wife, and that she had made a will appointing it absolutely in the testator's favour. At the date of the testator's will, however, his wife was living, and the property had been expropriated by a public body and the purchase money therefor had been paid into Court, the wife not being of sound mind. On her death, the testator administered the estate, conveyed the C. estate to the expropriators, and received the purchase money out of Court and paid it into his bankers, part of it as a special deposit, and the rest to his general account. At his death part of the purchase money remained at his credit as a special deposit, and part to the credit of his general account at his bankers. Under these circumstances, Bacon, V.-C., held that there had been an ademption, and that no part of the money passed under the will as the testator's "interest in the C. estate."

WILL—ILLEGITIMATE CHILD—CLASS OF CHILDREN.

In *Re Byron, Drummond* v. *Leigh*, 30 Chy. D. 110, the testator bequeathed to M. B. B., "daughter of my nephew," J. B., £200, and to J. B., "son of the said J. B.," £100; and he directed his trustees to stand possessed of the residue of his estate upon trust, for "all and every the children and child" of R. C. and J. B. respectively. By a codicil the testator revoked the bequest of £200 "to my great niece," M. B. B., and the bequest of £100 "to my great nephew," J. B,; and instead thereof he bequeathed to M. B. B. £100, to J. B. £100, and to A. B., "another daughter of my nephew J. B.," £100. M. B. B. was illegitimate. J. B. and A. B. were legitimate, and the question was whether M. B. B. was entitled to share in the residue, and Bacon V.C., before whom the case was argued, held that she was. He says:—

"I have not the slightest doubt that in the gift of residue to (amongst others) 'all and every the children and child of' his nephew, he meant to include this person, whom he had described as the daughter of his nephew, and that which he meant it is my duty to carry into execution."

SETTLEMENT OF REAL ESTATE—FORFEITURE ON BANKRUPTCY.

The short point in *In re Levy's Trusts*, 30 Chy. D. 119, was whether an estate which was settled subject to a clause of forfeiture in the event of the tenant for life becoming bankrupt was forfeited by the tenant for life being adjudged insolvent, in New South Wales. Kay J., held that it was.

HUSBAND AND WIFE—SEPARATION AGREEMENT—RECONCILIATION.

Nicol v. *Nicol*, 30 Chy. D. 143, is a decision of North, J., which illustrates the effect of a separation agreement between husband and wife, followed by a subsequent reconciliation. An agreement was made between husband and wife that upon a judicial separation being

decreed the wife should be allowed to retain the furniture. A judicial separation was decreed, but the husband and wife afterwards resumed cohabitation. The present action was brought by the wife to recover the furniture; but North, J., held that the resumption of cohabitation put an end to the agreement. He says:

"I think it clearly established by numerous authorities (no case in any way conflicting with them) that when a separation arrangement is made, pure and simple, that arrangement is for the term of the separation, and for no longer. It comes to an end when the separation ends, not because the fact of reconciliation or re-cohabitation makes it void, but it dies a natural death. . . The parties may in terms say that the arrangement made is not to be operative during separation only; but shall continue during the lives of the parties, whether there is a reconciliation or not. Of course if they do that, the deed is not simply what is generally called a separation deed, but it is a re-settlement, or a settlement going further than a separation deed, pure and simple."

Injunction—Trade name—Telegraphic address.

In *Street* v. *Union Bank*, 30 Chy. D. 156, an application was made for an interim injunction to restrain the defendants from using the words "Street, London" as a cypher address for telegrams from abroad to themselves, on the ground that the same address had been used for many years in sending telegrams from abroad to the plaintiffs, who carried on business as advertising agents under the name of Street & Co., at 30 Cornhill, London. The consequence of the defendants using the same address was that telegrams intended for the plaintiffs were sometimes sent to the defendants and *vice versa*. But there was no attempt on the part of the defendants to interfere with plaintiffs' business. The injunction was refused. Pearson, J., said:

"All that the Court is asked to prevent is merely inconvenience. Has the Court any right or jurisdiction to interfere in a case of that kind? Is it not a case completely outside the jurisdiction, and a case which ought to be settled between the parties, and left to them to obviate the inconvenience which must arise to one or the other? . . . If Messrs. Street & Co. desire to have telegrams properly delivered, I think they ought to use their proper name and address. I think any one is entitled to adopt as a fancy address for the purpose of telegraphing that which is not any one else's proper name and address."

Married women—Restraint on anticipation—Costs.

In re Andrews, *Edwards* v. *Dewar*, 30 Chy. D. 159, was a case in which a married woman who was entitled under a will to the income of a trust fund for her separate use, with a restraint on anticipation, instituted a suit against the trustees (without a next friend), in the course of which she made an interlocutory application which failed. The question was whether the trustees were entitled to an order giving them liberty to retain their costs of the application out of the married woman's income, and Pearson, J., held that they were, notwithstanding the restraint on anticipation. He says:

"The restraint on anticipation is intended for the protection of a married woman outside the Court; it is not intended to enable her to do a wrong in the Court. It does not fetter the power of the Court in any case in which it thinks that she is not entitled to that protection. It does not prevent the Court from directing her income to be applied in payment of the cost of proceedings which she has improperly instituted. By making such an order the Court does not enable the married woman to anticipate her income, but deprives her of it till she has paid what the Court thinks she ought to pay."

Domicile—British subject in military service of Crown.

In re Macreight, *Paxton* v. *Macreight*, 30 Chy. D. 165, Pearson, J., determined that a British soldier in the service of his own sovereign retains the domicile which he had on entering the service, wherever he may be stationed, even though the domicile he had on entering the service was an acquired domicile and not his domicile of origin. The rule of law he laid down to be this:

"A British subject does not, by merely entering into the British army, abandon his domicile, and the remaining in the army is no evidence of an intention to abandon the domicile which he had at the time when he entered it, but as long as he remains in the army he retains that domicile which he had when he entered it."

Married woman—Separate Estate—Contingent interest.

We have already commented on the case of *In re Shakspear*, *Deakin* v. *Lakin*, 30 Chy. D. 169, when referring to the earlier report of the case in the *Law Times* (see *ante*, p. 365). It is only necessary here to say that the case is authority for saying that in no case can a

married woman make a valid contract in respect of a contingent reversionary interest which cannot come into possession until after the coverture has ended, and it would appear to be also authority for saying that neither can she make any such contract in respect of any other contingent reversionary interest to which she may be entitled.

MARRIED WOMAN—RESTRAINT ON ANTICIPATION.

In re Spencer, Thomas v. *Spencer*, 30 Chy. D. 183, following *Re Bown*, 27 Chy. D. 411, Pearson, J., held that, where a testator directed surplus income of real or personal estate, after providing an annuity, to be accumulated during the life of his widow, and after her death he gave the capital to his children, and directed that the shares of his daughters should be for their separate use without power of anticipation or alienation during the mother's life; that the married daughters, during their mother's life, were not entitled to receive their share of the surplus income, but were only entitled to receive the income receivable from their shares of the accumulations when invested.

POWER OF APPOINTMENT—CONTINGENT EXERCISE OF.

In re Coulman, Munby v. *Ross*, 30 Chy. D. 186, is decision of Pearson, J., on the law of powers, in which he held that an appointment to an object of a power for life, with remainder to his next of kin, is valid in favour of the next of kin; provided that at the death of the tenant for life his next of kin are objects of the power. In other words, where the objects of the power are A. and his issue, a power exercised in favour of "A. and his next of kin" would be valid in favour of the next of kin, if they happened also to be the issue of A. This concludes our review of the cases in the November number of the *Law Reports*.

WE had intended to refer at some length to the Reil case, but in view of the elaborate discussion it has received in the lay press we spare our readers. We propose, however, if we can find room hereafter, to publish the memorandum of the Minister of Justice on the subject as a record of the proceedings. Of the legality and righteousness of the course taken by the Government there is no room for doubt.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

COURT OF APPEAL.

October 19.

FRADENBURGH v. HASKINS.

Insolvent debtor—Husband and wife—Preference—Fraudulent transfer of notes by husband to wife—R. S. O. ch. 118.

In an action impeaching the transfer of certain notes by an insolvent trader to his wife, the husband swore such transfer was made to secure her the payment of moneys loaned by her. Immediately after such transfer he absconded from the Province. At the trial the jury found, in answer to questions put by the presiding judge, (1) that the husband at the time he absconded was not solvent and able to pay his debts in full; (2) that he knew himself at the time to be on the eve of insolvency; (3) that the transfer of the notes to his wife was not voluntary; (4) that the scheme of such transfer originated with him and not with his wife. The jury, however, failed to find with what intent the transfer was made, and gave a verdict in favour of the defendant (the wife), which, on motion in term, the judge refused to disturb.

On appeal this Court, being of opinion that the answers given by the jury did not afford sufficient ground for a decision under ch. 118, R. S. O., ordered a new trial, but under the circumstances directed each party to bear their own costs, both of the appeal and of the new trial.

J. K. Kerr, Q.C., for appeal.

Coulter, contra.

[November 24.

MCKELLAR ET AL. v. MCGIBBON.

Bill of sale—Registration—Possession.

The defendants seized goods in the possession of McL. under an execution against him, and the plaintiffs claimed the goods under an unregistered bill of sale given by McL. merely as security for indebtedness and without change of possession.

Held, reversing the judgment of the County Court of Lambton, that an ineffectual attempt by the plaintiffs to obtain possession of the goods was not sufficient to satisfy the Bills of Sale Act, and that the defendant was therefore entitled to succeed.

Aylesworth, for the appellant.

Street, Q.C., for the respondent.

[November 24.

WALMSLEY v. GRIFFITH ET AL.

Appeal to Supreme Court—Time—Certificate—S. C. Act sec. 25.

Held, following the decision of the Supreme Court of Canada in *O'Sullivan* v. *Harty*, 22 C. L. J. 193, that the thirty days for appealing to the Supreme Court under sec. 25 of the S. C. Act will in all cases be computed from the date of issuing the certificate of the judgment of this Court.

Arnoldi and *J. A. Paterson*, for the defendants.

J. B. Clarke, for the plaintiff.

[November 24.

IN RE THE CORPORATION OF THE TOWN OF OAKVILLE AND CHISHOLM.

Prohibition to county judge—Amending registered plan—Status of applicant—Assign—R. S. O. ch. 111 sec. 84.

The judgment of PROUDFOOT, J., 9 O. R. 274, granting prohibition to the county judge of Halton to restrain him from adjudicating upon C.'s application under R. S. O. ch. 111 sec. 84 to amend a registered plan was reversed.

Held, that the status of C. as a person who had registered the plan, or the assign of a person who had done so, was a question of law and fact combined for the county judge—as it would have been for the High Court or a judge thereof had the application been made to such judge or Court under the statute—to determine on the cause of the injury, and that his decision was not examinable in prohibition.

Semble, whether or not C. was an assign, he was entitled to apply for the amendment as being a person who filed or registered the plan.

Moss, Q.C., for the appellant.

Lash, Q.C., for the respondents.

QUEEN'S BENCH DIVISION.

Cameron, C.J.]

RE BECKETT AND TORONTO.

Corporation—Expropriation.

Upon the petition of the corporation of the city of Toronto praying to be allowed to pay into Court $32,370.50, balance of the compensation money awarded to the estate of the late Edward Beckett, for the expropriation of certain lands belonging to said estate for a Court House site, under the provisions of "The Consolidated Municipal Act, 1883," section 488, upon the ground that Mary Ann Beckett, the executrix and trustee under the last will and testament of the said Edward Beckett, deceased, had not the power under said will to sell the property until her son (then an infant eighteen years of age) attained the age of twenty-one years or died, or she herself married again, and therefore had not the absolute estate; and also that one McNeil had a rent charge or annuity charged upon the land of $216 a year for her life, payable to one Sinclair,

Held, that the Act does not expressly authorize the payment into Court of the amount awarded; that section 488 is imperative and imposes upon the corporation the obligation of ascertaining whether the person acting in respect of the property expropriated is the absolute owner or not; and if he or she be not such owner, then the corporation is created a statutory trustee of the principal, burdened with the payment of 6 per cent. interest, until the person entitled to the principal claims the same.

Held, further, that it was not intended that the Court should interfere at the instance of the corporation but at the instance of some party claiming the money or part thereof.

But, *semble*, that the Court might so interfere at the instance of the corporation, but that the facts in this case were not sufficient ground for such interference.

E. Eddis, for the city of Toronto.

George Morphy, for Mary Ann Beckett.

Henderson, for McNeil and Sinclair.

Alan Cassels, for execution creditors of Mrs. McNeil.

RE FENTON AND THE COUNTY OF SIMCOE.

Municipal law—Incorporation of village—46 Vict. c. 18 s. 9 (O.)—Census—By-law—Illegality—Matters not appearing on face of by-law—Power to quash—Estoppel—Laches.

On an application to quash a by-law incorporating a portion of township territory as a village,

Held, that the power of the Court to quash an illegal by-law is not limited to cases where illegality appears upon the face of the by-law, but extends to cases where the illegality shown is entirely extraneous.

Enquiry may in every case be had upon affidavits as to the existence of the facts constituting the statutory conditions precedent to the passing of the by-law, and as to any illegality in the manner of its being passed

The applicants in this case had all voted at the municipal elections holden for the village as incorporated by the by-law in question; one of them had been a candidate for the office of reeve, and another had been elected to the school board, but none of them had in any way promoted the passing of the by-law, or had any part in the taking of the census objected to.

Held, that the applicants were not estopped from moving to quash the by-law.

Semble, that the by-law incorporating the village was not necessarily illegal by reason of the mere fact that the census was in reality taken before the by-law authorizing the enumeration of the people had been passed by the county council.

But where the census was shown to be wholly unreliable, and untrue in fact, effect was given to this objection.

Semble, that although a motion to quash a by-law cannot be entertained unless made within a year from the passing of the by-law, it does not follow that an application made within the year may not be successfully answered by showing laches of the applicant, though in this case no such laches existed.

Aylesworth, for motion.

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

Wilson, C.J.]

Municipal law—Railway—Illegal by-law.

RE SCOTT AND TILSONBURG.

Where the municipality of a town agreed with T., if he would take their place with a railway company to pay the latter $1,800 and find them a free roadway, upon the company building a switch from their station into the town, to exempt from taxation for ten years two of T.'s mills,

Held, not within sec. 388 of Consol. Mun. Act, 1883, amended by the Act of 1884, and that there was not a proper public consideration from T. for the exemption. A by-law passed by the municipality for the purpose, but not passed upon by the ratepayers, was therefore quashed, with costs.

Norris, for motion.

Osler, Q.C., contra.

CHANCERY DIVISION.

Proudfoot, J.] [Sept. 3.

MCARTHUR V. THE QUEEN.

Application for timber license—Notice of acceptance—Assessment for value—Petition for issue of same—Demurrer—Rule as between subjects and as between Crown and subject.

McA. filed an application with the proper Government official for a license to cut timber upon two berths, and complied with the usual regulations, one of which was the payment of

a certain sum for ground rent, and his application was duly forwarded to the Commissioner of Crown Lands; but, owing to a defective survey, it was impossible then to convey the berths. Subsequently the survey difficulty was removed, and his application as to one of the berths was accepted in the year 1861, but he having removed to the United States never received any notice of such acceptance. In 1881 he first heard of the acceptance, and in 1884 sold all his interest therein for $4,000. B. afterwards became entitled by subsequent assignments for value to all McA.'s interest, the assignment being duly filed in the Crown Lands Department. McA. and B. in 1884 joined in a petition of right for the issue of the license, and the Attorney-General demurred to the same.

Held, that there was no laches on the part of McA. in not enforcing a right which he did not know existed, and there was no intention on his part to abandon the right when he did become aware of it, as he treated it as a valuable asset. As between subjects a delay of four years would probably be, under ordinary circumstances, a defence to a claim for specific performance; but if a vendor was aware that the purchaser was treating the right as existing, making sale of it for valuable consideration, and made no objection, he would not be allowed to set up such a defence.

Held, also, that as the assignments were filed in the Crown Lands Department, and the Commissioner had the power of forfeiting the claim for non-payment and did not do so, if the rule between subjects were to apply it would not be a bar in this case.

Semble, it may be doubted whether the same rule should apply to the Crown, and whether the subject should not have the right to a completion of the purchase at any time before it has been forfeited.

Irving, Q.C., for the demurrer.

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

Ferguson, J.] [Sept. 7.

HARGRAFT v. KEEGAN.

Will—Devise—Illegitimate child as legatee—Death of illegitimate child during life of testator leaving legitimate issue—Lapse of legacy—R. S. O. c. 106, sec. 35.

R. B. by his will devised his property to executors upon trust as follows:

"Fifthly, in trust to pay to each of my two surviving children, F. A. B. and M. A. B., the sum of $1,000.

"Sixthly, in trust after the payment of the said debts, funeral and testamentary expenses, and the said legacies to pay to my four sisters (naming them) and their female heirs respectively, equally share and share alike all the est, residue and remainder of the moneysr arising from the sale of my said estate, save and except the sum of $200 hereinafter bequeathed to my said executors."

F. A. B. and M. A. B. were illegitimate children, and M. A. B. married and died during the lifetime of the testator, leaving children surviving.

In a suit for administration and construction of the will it was

Held, that the words "child or their issue," in R. S. O. c. 106, sec. 35, do not apply to an illegitimate child, and that the legacy lapsed.

J. Hoskin, Q.C., for the infants.

Riddell, for the residuary legatees.

Porteous, for the executors.

Boyd, C.] [Nov. 4.

TAYLOR v. MAGRATH.

Trust for sale—Wilful default—Delay of many years—Account rendered—Appropriation.

C. M. invested money of H. in a third mortgage of the E. property. Afterwards, in 1862, the property was put up for auction under a decree for sale at the suit of the first mortgagor. A. M. held the mortgage on the property next after the first mortgage. Finding that owing to the great depreciation of the value of the E. property, it would, if sold then, scarcely fetch enough to pay off the first mortgage, it was agreed between C. M. and A. M. that C. M. should, out of his own moneys, buy in the property by paying off the first mortgage, and then hold the same in trust to sell, and out of

the proceeds to first repay himself the amount so advanced by him, with interest from the date of the sale, then to pay A. M. his claim on the property, with interest, and then to pay T. his claim, with interest. C. M. accordingly advanced sufficient to buy in the property as aforesaid. In 1864 a formal deed of trust was drawn up and executed by the first mortgagee, and by C. M., A. M. and T., whereby the property was conveyed to C. M. on trust to sell "without delay," and apply the proceeds as aforesaid, and giving him power to lease in the meanwhile, and making him answerable only for loss resulting from his own "wilful neglect and default."

C. M. leased the property from time to time, but he did not sell it until 1883, when T.'s executrix brought an action charging him with default and breach of trust, and claiming an account and damages.

The evidence showed that the property had all through been of a very unsaleable kind, consisting of a farm, very stumpy, and badly fenced, and an old mill which had quite lost its value for milling purposes. It also appeared that C. M. had never advertised the property for sale, but at the same time that it was well known in the neighbourhood that it was for sale, and that it was not the sort of property that was likely to be bought by a stranger. There was, also, no positive evidence that at any time C. M. could have effected a more advantageous sale than that he effected in 1883; and it appeared that up to 1880 neither A. M. nor T. had complained of the delay, but if anything, acquiesced in it.

Held, under all the circumstances of the case, affirming the decision of the Master in Ordinary, that C. M. was not proved to have been guilty of neglect and default as trustee, nor did the evidence afford any basis for assessing damages against him.

It also appeared that in 1880, on T.'s solicitors demanding an account from C. M. of his dealings with the trust estate, C. M. employed S., a professional accountant, to make out from his books a detailed account, and S., in so doing, applied receipts from time to time in liquidation of the principal moneys due to C. M. under the trust deed, instead of applying them in the first instance in liquidation of the interest accruing due thereon, and the account so drawn up was delivered to the solicitors of T. An affidavit of C. M., moreover, was produced in the Master's office, wherein he stated that this account was correct, and made out under his supervision. After judgment in this action, which referred it to the Master in Ordinary to take the account of C. M.'s dealings as trustee, and before the same was taken into the Master's office, C. M. died, and on return of the Master's warrant to bring in the account C. M.'s executors brought in a new account, differing from that rendered as aforesaid to T.'s solicitors, in that they applied receipts in liquidation in the first instance of the interest accruing on C. M.'s claim, which method made a difference in the result of many thousand dollars. No account had been rendered to A. M.

Held, that as against T., C. M. and his executors were bound by the account previously rendered to T.'s solicitors and by the method of appropriation of receipts to principal contained therein, but were not so bound as against A. M., as against whom the account brought in by C. M.'s executors could stand.

McGregor v. *Gaulin*, 4 U. C. R. 380, distinguished.

C. Moss, Q.C., and *Lefroy*, for the executors of C. M.

Lash, Q.C., and *H. Cassels*, for the plaintiff.

McPhillips, for A. Mitchell.

Boyd, C.,] [November 11.

BANK OF TORONTO v. COBOURG AND PETERBOROUGH R. W. CO.

Company—Directors—Issue of debentures to directors at discount—Locus standi of other creditors.

The judgment in this action directed an enquiry as to who, other than the plaintiffs, were the holders of the bonds of the same class of the defendant company, and an account of what was due to such bondholders.

It appeared that the managing director of the company issued a great number of debentures to J. H. S., G. J. S., and J. S., who were themselves directors of the company, at a discount of 25 per cent. The plaintiffs, who were also debenture holders of the same class, contended before the Master that these parties could only claim the amount actually advanced by them, and that they could not, as directors, sell the debentures to themselves at a discount.

The plaintiffs did not become debenture holders until after J. H. S., G. J S., and J. S.

Held, affirming the decision of the Master in Ordinary, that inasmuch as the company did not complain of the transaction, nor any shareholders, it was not competent for the holders of other debentures of the same class (such as the plaintiffs were) to impugn the position of J. H. S., G. J. S. and J. S.

If the directors abused their position, so as to get an advantage at the expense of the company it was for the corporation or its corporators to complain. To permit the plaintiffs to attack on this ground would be to recognize the validity of the transfer of a right of action to complain of a fraud, actual or constructive.

Moss, Q.C., and *T. P. Galt*, for the appeal.

Maclennan, Q.C., and *T. Langton*, contra.

Boyd, C.] [November 11.

FOSTER v. ALLISON.

Admissions before Master—Practice—Necessity of memorandum in writing.

As in the case of admissions between solicitors, so in the case of admissions before the Master, the matter agreed upon should be put into writing and signed. Such indeed was the wisdom of our ancestors, for in an order of 1696 it was provided "when upon reference any matter of fact shall be admitted and agreed to before the Master he shall take memorandum of the fact so admitted and agreed to in his books of minutes, and the party so admitting and agreeing shall subscribe such minutes or memorandum in the presence of the Master, which subscription shall be binding and conclusive to the party on whose behalf the same was so subscribed, so as that the other side shall not be put to any further proof to make good the same."

Proudfoot, J.] [November 11.

WOODWARD v. CLEMENT.

Patent law—Absence of novelty—Mechanical equivalent.

Action for infringement of patent called Arnold's Improved Automatic Boiler. It appeared that the only portion of the defendant's combination which was not identical with the plaintiff's patented machine was a mere variation in arrangement, or a mechanical equivalent of a corresponding portion of the plaintiff's machine—a device containing no element of invention, but effecting the same purpose by a slightly different method.

Held, that the plaintiff was entitled to judgment.

Quære, whether it is correct to say that there can be no infringement of a combination unless the whole be pirated.

Boyd, C.] [Nov. 11.

FUCHER v. TRIBUNE COMPANY.

COPP'S CASE.

Company—Compromise—Contributory.

A shareholder and director who had originally subscribed for $4,000 worth of shares in the company, resisted contribution to more than $2,000 on the ground that his shares had been reduced to this amount by the President of the company with the authority of the Board of Directors. This was alleged to have been done by way of compromise, but there did not appear to be any facts whereon to support such compromise, which was never communicated to or approved by the shareholders.

Held, that whether directors of a company have inherent power to effect compromises or not, in the circumstances of the present case they had no power to bind the company by their unauthorized and uncommunicated action. The alleged compromise manifestly could not have any effect on the rights of creditors antecedent to its date, and very shortly after its date the company became insolvent.

The whole transaction appeared to be rather the cancellation of an actual asset than the compromise of a matter of doubtful obligation.

Boyd, C.] [November 11.

STIMSON v. BLOCK.

Conversion—Measure of damages.

In this action the plaintiff complained that the defendant wrongfully detained and converted certain goods of his by refusing to allow the same to be removed, pursuant to the plaintiff's demand, on December 23rd.

It appeared that when the plaintiff sent for the goods on December 23rd he was allowed by the defendant to remove a considerable portion of them, but that the defendant refused to allow him to remove any of the bulkier goods until after Christmas, deeming that this would interfere with his own trade. On December 26th the defendant notified him that he could remove the balance of his goods. The plaintiff thereupon sent for the goods, but found a bailiff in possession under process issued by certain attaching creditors.

The plaintiff contended that he was entitled to recover the value of the goods plus expenses.

Held, affirming the judgment of the Master in Ordinary, that the plaintiff was only entitled to nominal damages plus the expenses actually incurred by him in consequence of the detention of his goods. For by acting on the letter of December 26th he condoned the previous wrong of the defendant, and thus there did not appear to have been any disposal of the goods in the sense of their destruction or removal adverse to the plaintiff's property, but the plaintiff was ultimately prevented from getting the goods, not because of the defendant's misconduct, but because the claim of attaching creditors intervened.

The old learning on the subject of "conversion" need not be imported into the system introduced by the Judicature Act, which provides for redress in case the plaintiff's goods are wrongfully detained, or in case he is wrongfully deprived of them. In all such cases the real question is whether there has been such an unauthorized dealing with the plaintiff's property as has caused him damage, and if so, to what extent has he sustained damage.

Read, Q.C., and *W. Read*, for plaintiff.

Watson, for defendant.

COMMON PLEAS.

GRAHAM v. LANG.

Landlord and tenant—Forfeiture of term and rent due on assignment—Distress.

The defendant made a lease under seal to R., dated 8th November, 1884, for five years from 12th November, at the rent of $400, payable half-yearly in advance on the 12th November and May in each year. The lease contained a covenant that "if the lessee shall make any assignment for the benefit of creditors . . . the said term shall immediately become forfeited and void, and the full amount of the current yearly rent shall be at once due and payable." R. paid the first half-year's rent. On the 5th May, 1885, R. made an assignment for the benefit of creditors; and on the 8th May the defendant, claiming to do so under the terms of the above covenant, distrained for the half-year's rent, which, in the regular course of time, would have been payable in advance on the 12th May.

Held, that the distress was valid.

PRACTICE.

Ferguson, J.] [Sept. 21.

BARBER v. BARBER.

Purchaser—Compensation—Vesting order—Advertisement.

The advertisement of a judicial sale stated that the property was in possession of a tenant who would give the purchaser possession on the 1st of November. The purchaser, however, was prevented by the tenant from taking possession till the month of January following. About the middle of November the purchaser obtained a vesting order.

Held, that the purchaser was entitled to compensation from the vendor for being kept out of possession, and that he had not waived his right by taking a vesting order. The failure to give possession was a breach of representation in the advertisement, a representa-

tion on account of which it was to be assumed that the purchase money was greater.

Hoyles, for the purchaser.

Holman, for the plaintiff (vendor).

Boyd, C.] [October 26.

IRWIN v. SPERRY

Action in Chancery Division—Cross action—Jury notice—Claims for damages—Trial.

The plaintiff claimed in the action which was in the Chy. Div.: (1) Foreclosure of three mortgages. (2) Payment of an account. (3) Damages for breach of a contract. The defendant claimed in a cross action, in the Q. B. Division, damages for breach of the same contract in respect of which the plaintiff sought relief.

The defendant in this action served a jury notice, which the plaintiff moved against.

BOYD, C., directed that the jury notice should stand as to the claim for damages, and that that claim should be tried along with the cross action; the other claims in this action to be disposed of according to the usual practice in the Chancery Division.

W. H. Lockhart Gordon, for the plaintiff.

Watson, for the defendant.

Boyd, C.] [November 4.

SNIDER v. SNIDER.

SNIDER v. ORR ET AL.

Alimony—Setting aside conveyance—Separate actions—Costs—Taxation—Rules 447-9 O. J. A. —Local officer—Revision—Special circumstances—Defence—Striking out—Embarrassment—Technical applications—Interim alimony —Disbursements—Desertion—Offer to resume cohabitation—Multiplication of orders.

Claims on behalf of a wife for alimony and to set aside a conveyance of the husband's property as fraudulent may be joined in one action, and therefore where separate actions were brought for such claims, and separate orders to the same effect were made as to the same defendant in both actions, the plaintiff was allowed the costs of only one order.

Rules 447-449 O. J. A. are not necessarily applicable to a taxation had under 48 Vict. ch. 13 sec. 22, and where, upon a taxation by a local officer, these rules had not been complied with by the party objecting to the taxation, a revision was nevertheless ordered when there was the special circumstance that two sets of costs had been taxed where only one was proper.

A paragraph of the defence submitted that "the plaintiff had made out no case entitling her to relief."

Held, that this was neither scandalous nor prejudicial nor embarrassing under Rule 178 O. J. A., and should not have been struck out

The modern practice is to discourage applications merely technical and unmeritorious, and even if successful, not to reward them by exemplary costs.

A wife is not entitled to *interim* alimony and disbursements, when she is suing on the ground of desertion and not alleging cruelty, and where the husband offers by his defence and affidavit to resume cohabitation with her.

Remarks upon the multiplication of orders and summonses in actions.

Shepley, for the defendants.

E. Douglas Armour, for the plaintiff.

Proudfoot, J.] [November 9.

LALONDE v. LALONDE.

Interim alimony—Disbursements—Counsel fees—Solicitor as counsel.

An order of a local Master directing the defendants in an alimony suit to pay *interim* alimony and disbursements was affirmed, except as to a sum of $40 which the Master allowed as a prospective disbursement for counsel fee, it being admitted that the plaintiff's solicitor would act as counsel.

Magurn v. *Magurn*, 10 P. R. 570, not followed.

Holman, for the defendant.

E. Douglas Armour, for the plaintiff.

Osler, J.A.] [November 10.

BANK OF MONTREAL v. HARVEY.

Signing judgment—Interest—Duty of clerk.

In an action on a promissory note the plaintiffs, in their statement of claim, claimed interest at the rate of seven per cent. without showing any legal right to charge more than six per cent. The statement of defence having been held bad on demurrer, and leave to amend not having been asked or granted the plaintiffs entered judgment for default of defence for the full amount of the principal and interest claimed.

Held, that it was the duty of the Deputy Clerk at the office where judgment was signed not to permit judgment to be signed for what the plaintiffs were not entitled to, and that there was no objection to the plaintiffs limiting their claim to six per cent. when they came to sign judgment.

Holman, for the plaintiffs.

Aylesworth, for the defendants.

CORRESPONDENCE.

ULTRA VIRES.

To the Editor of the LAW JOURNAL:

DEAR SIR,—I continue the discussion of this subject, commenced in the issue of your journal of the 1st October.

II. The appointment of judges.—Sec. 96 of the B. N. A. Act provides that "the Governor-General shall appoint the judges of the Superior, District and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick."

Sec. 99 provides that "the judges of the Superior Courts shall hold office during good behaviour, but shall be removable by the Governor-General on address of the Senate and House of Commons."

Sec. 100 provides that "the salaries, allowances, and pensions of the judges of the Superior, District and County Courts shall be fixed and provided by the Parliament of Canada."

And by section 92 the Provincial Legislatures may *exclusively* make laws in relation to the administration of justice in the Province, including the constitution, maintenance and organization of Provincial Courts, both of civil and of criminal jurisdiction, but not including criminal procedure.

The first question I wish to put as arising out of these provisions is: Can any person exercise jurisdiction or authority as a judge in any of the Courts mentioned who has not received the Governor-General's commission as such? The answer to this question must, of course, be in the negative.

The next question is: What is a judge within the meaning of these provisions? There being in the Act no interpretation of the meaning of the word, does it not mean any person exercising any judicial functions in any of the Courts in the Province having either civil or criminal jurisdiction. With this qualification, however, that where, as in Ontario, there were at the time of Confederation certain officers of those Courts not styled judges, who then exercised certain limited *quasi*-judicial powers (see Ont. Judicature Act, 1881, s. 62), it would be presumed that it was not intended to interfere with the appointment of these officers by the local authority as theretofore.

In Manitoba, on the contrary, the Courts at present existing were not constituted or organized till after 1870, and it seems impossible to hold that the word judge in section 96 does not, in Manitoba, include every person exercising any undoubtedly judicial powers in the Courts of that Province. If this be so, the question arises: Was it competent for the Manitoba Legislature in constituting and organizing a Superior Court for the Province to distribute, or empower the Court to distribute, the judicial powers amongst several persons, and to style some judges and others master and referee, and to provide that the latter should be appointed by the Lieutenant-Governor in Council during pleasure?

Section 3 of chapter 16 of the statutes of 1881 provides: "The Court of Queen's Bench may make and publish general orders for empowering the referee in chambers to do any such thing, or to transact any such business, and to exercise any such authority and jurisdiction in respect of the same as by virtue of any statute or custom, or by the practice of the said Court, is now or may hereafter be done, transacted or exercised by a *judge* of the said Court sitting in chambers, and as may be specified in any such order," except in the four matters there set out; and section 4 of the same Act provides that "every order or decision made or given under this Act by the referee in chambers *shall be as valid and binding* on all the parties concerned as if the same had been made or given by a *judge* sitting in chambers," with a right of appeal.

The Court under said section 3 did make a general order (No. 196); but in their wisdom they made eleven exceptions to the jurisdiction of the referee instead of four. For example, the judges withheld "*ex parte* injunctions" from the referee, also "opposed applications for administration orders."

Not content with this the Legislature in 1885 has withdrawn the safeguard of a general order of the Court, and now the Queen's Bench Act, section 54, enacts directly that "the referee in chambers may do any such thing," etc., the rest, as in section 3 of the Act of 1881, with only the same four exceptions. Accordingly, the referee can entertain, and does entertain, motions for *ex parte* injunctions, and exercises many other judicial functions. If this legislation is *intra vires*, what is there to prevent the Local Legislature from transferring other judicial powers to the same officer—such as granting writs of *habeas corpus* or writs of arrest, hearing cases in the first instance, motions to continue injunctions, hearing *pro confesso*, and a score of other matters no whit more important than some of those now entrusted to him? As master he now has to adjudicate from time to time on matters of the highest importance, and in many cases the chief contest on the law and the facts takes place in his office. Questions of pedigree, legitimacy, heirship, fraud, title to land, rights of lien, and a hundred other questions of fact or law, involving the very pith and marrow of the suit, no matter what the amount at stake, are constantly referred to the master. Upon his report the judge bases his formal decree or order. These adjudications, whether in chambers or in the master's office, are final, unless appealed from. The time for appealing is strictly limited, and the mode of appealing prescribed must be carefully followed or the litigant is concluded.

The same authority which assumed to confer this jurisdiction upon these officers and provided for such appeals, could equally provide that there should be no appeal. Similarly, if the legislation in question is *intra vires*, provision might be made for the appointment of an officer to exercise all the powers now exercised by the judges in common law chambers, to take trials of causes, to take accounts and references between parties, etc., etc., and to relieve the judges of a great proportion of the work now done by them, and it would be all right if only the officer so appointed be not styled a *judge*. These considerations give rise to a grave doubt whether the Acts of the Local Legislature referred to are not *ultra vires* and void, and whether every judicial act performed by those officers is not without jurisdiction, and therefore unwarranted. Even in Ontario it may be questioned whether it is competent to confer any new judicial powers upon the referee or master in any of the Courts as has been done by the Judicature Act and Orders; because if that could be done, where must the line be drawn, and what judicial powers cannot be legally conferred upon them?

There is another Manitoba statute which seems to me unconstitutional for a similar reason. I refer to the statute of 1883, known as the Master and Servant Act, which, as amended in 1885, assumes to confer jurisdiction upon a police magistrate or justice of the peace appointed by the Local Government to adjudicate upon any claims for wages up to the limit of one hundred dollars, and that too in a summary manner, and by proceedings of a *quasi*-criminal character. This jurisdiction is not taken away from the County Courts. Of course the Legislature can constitute any new Courts it pleases, either to try civil or criminal matters; but the point I make is that the person who presides in the Court which entertains such a matter as a claim for wages is really a judge, and must be appointed by the Governor-General before he can adjudicate at all in such a matter. In fact it is a serious question whether, in any of the cases referred to, the local legislation would be any protection to a master or a magistrate who should be sued for damages for any act done by him under colour thereof.

In anything I have here said, of course, no word of disparagement is intended for any of the officers personally, it is only the legislation that is criticised. Several decisions have been given holding that the Provincial authorities have the right of legislating with respect to the appointment of police magistrates and justices of the peace; but, so far as I am aware, the questions raised in this paper have not yet come up for judicial consideration.

Yours, etc., GEORGE PATTERSON.

Winnipeg, Oct., 1885.

PAPER TITLES.

To the Editor of the LAW JOURNAL:

DEAR SIR,—It is very provoking in dealing with titles to come across so many title deeds, abstracts and probates of wills written on this wretched straw paper. The profession ought to boycot any stationers dealing in such trash. The saving effected by purchasing these forms is so very infinitesimal that surely no practitioner or even unlicensed conveyancer would consider the price for a moment, compared with the satisfaction of

handling good material. I have had probates of wills written on this wretched stuff that were in pieces one year after issued.

This is all the more provoking to the profession as we put wills into the Surrogate Court on good paper and in return get probates miserably written and on miserable paper. Our ancestors believed in parchment, but surely we have gone to the other extreme with a vengeance. I am just handling a deed made in July last which is in pieces.

Yours, etc.,

November, 1885. SOLICITOR.

UNLICENSED CONVEYANCERS.

To the Editor of the LAW JOURNAL:

DEAR SIR,—Below is a true copy of an instrument filed in the office of the clerk of the County Court here, as a chattel mortgage, prepared by an unlicensed conveyancer in our county. I think the instrument would look well in print:—

"THIS INDENTURE, made this first day of October, one thousand eight hundred and eighty-five,

BETWEEN of the Township of Bayham, County of Elgin, Province of Ontario, of the first part; and of the Township of Bayham, County of Elgin, and Province of Ontario, of the second part,

WITNESSETH, that the said party of the first part, in consideration of the sum of $13.51, to him duly paid, hath sold and by these presents, doth grant and convey to the said party of the second part the following described goods, chattels and property, namely: A black mare with one white hind foot, being the only horse

Now in the possession of the said party of the first part, together with all estate, title and interest, of the said party of the first part therein.

This grant is intended as a security for the payment of $13.51, on or before the expiration of three months, from the date hereof, which payment, if duly made, will render this conveyance void.

In witness thereof, the said party of the first part, hath hereunto set his hand and seal, the day and year above written.

SEALED, SIGNED AND DELIVERED in presence of, etc. Seal. sd.

There were no affidavits filed with this document.

Yours, etc., J. M.

[There is a silver lining to most clouds. That which a parsimonious layman gains by cheap conveyancing, he generally loses, with much more in addition, in expensive litigation. We trust this is the case in reference to the above amazing effort of genius.—Ed., L.J.]

FLOTSAM AND JETSAM.

VICE-CHANCELLOR BACON, one of the most incisive, but not most youthful, of the English judges, after listening, the other day, to three foreigners giving an immense mass of irrelevant and unintelligible evidence, exclaimed, in Mistress Quickly's words, "Here is an old abusing of God's patience and the King's English."—*Irish L. T.*

REPRESENTATIVE REED, of Maine, thus describes his admission to the Bar in California, adding that no one was ever admitted to the Bar with so simple an examination: "When I went up for examination the great question of the hour was the Legal-tender Act. Everybody was discussing its constitutionality. Some said it was constitutional, others said it was unconstitutional. The first question Judge Wallace asked me was, 'Is the Legal-tender Act constitutional or unconstitutional?' I didn" hesitate a moment. I said simply, 'It is constitutional.' 'You can pass,' said Judge Wallace. 'We always pass a man who can settle great constitutional questions off-hand.'"—*San Francisco Chronicle.*

THE JUDGE HAD BEEN THERE.—A laughable passage-at-arms occurred between Judge Armour and Mr. Garrow recently at an assize in Western Ontario.

On the question of the brevity of some legal documents, Mr. Garrow said that the modern practice was to cut them as short as possible.

"I don't know about that," said His Lordship, "I think it is the practice for lawyers to make them long so as to get as many folios as possible."

The law clerks present winked at each other, and grinned and chuckled.

Mr. Garrow (with dignity)—"My Lord, I don't think that it is fair to say that of the profession."

Justice Armour—"Well, *I am speaking from my own experience!*"—*Goderich Signal.*

THE addition to the House of Lords of four legal members at one time, is doubtless unprecedented in English history. Sir Hardinge Giffard, the Lord Chancellor, has already taken his seat as Lord Halsbury, and will soon be followed by Mr. Gibson, henceforth to be known as Lord Ashbourne.

Flotsam and Jetsam.

With them will appear Sir Robert P. Collier, who has earned his distinction by fourteen years' service as a paid member of the Judicial Committee of the Privy Council, and Sir Arthur Hobhouse, who has been an unpaid member of the same distinguished body for four years only. Not one of the new law peers is at all likely to fill the place left vacant by Earl Cairns, but all of them give promise of useful service in the Supreme Appellate Court of the United Kingdom, so far as their other duties may allow them to attend its sittings.—*Law Times.*

Drunkenness on Wheels.—The justices of Hastings appear to have a keen appreciation of the subtleties of the law. Last week a man in a state of intoxication was found being wheeled about in a bath chair, and brought before the bench for adjudication. But, said the justices, he was not found drunk in the street, as the Act requires. The bath chair was in the street, and he was in the bath chair, but he was not in the street. This very pretty distinction would carry the severe logician far. A man in a pair of top boots is not in the street, wherever his boots are, and it would go hard if anyone should be convicted of drunkenness unless he went barefoot. Still no one, looking at the man's discretion in exchanging legs little to be relied on for the smooth rolling wheels of a bath chair, and at so pleasing a display of magisterial acuteness, will grieve at the escape.—*Law Journal* (London).

Mr. Arthur's quiet return to his law practice from the great office of President of the United States startles the Liverpool *Post*, and it remarks that such a spectacle can be afforded by no country on earth but the United States. Old World potentates are expected to feather their nests well in their days of power, and the idea prevails there that every man holding a high office is entitled to retire rich or in the enjoyment of great pensions. And this robbery of the people is permitted not only for the benefit of those who have served the State, but for those whose ancestors happened to be royal favourites or mistresses. Such ideas are gradually gaining a foothold in this country, as is manifest from the clamour for a civil pension list for ex-Presidents. The spectacle of an ex-President going to work for his living is needed once in a while to assure us that public office is still a public trust, and that we still have men who can hold the Chief Magistracy and retire with clean hands.—*Ex.*

A Remarkable Will.—"8th January, 1882. This is my will and testament. At the present moment I consider myself bodily healthy, but cannot swear that I am so in mind. Such ridiculous presumption I bequeath to others. My fortune amounts to 70,000 francs. How many hypocritical tears might I have purchased for such a sum? I intended at first to devote these 70,000 francs to a beneficent object; but I asked myself what would be the use of this? The only benefactors of mankind are war and cholera. Besides this, I am under great obligations to my dear wife, Celestine Melaine, of whose whereabouts I have not the slightest idea. She once did me a great kindness. She left me one beautiful morning and I have never heard of her since then. With the most heartfelt thankfulness I appoint her my heir-at-law but subject to the following condition, that she marry again immediately, so that at least there may be *one* man who will deeply deplore my death?"

"Obiter Dicta."—The Master of the Rolls (Rt. Hon. Sir Wm. Baliol Brett), whose elevation to the House of Lords received the hearty approbation of the legal profession, takes the title of Lord Esher, from the well-known village in Surrey, in which he formerly lived, and where his brother, Major Sir Wilford Brett, K.C.M.G., lives His predecessors in office who have been made peers are not numerous. They are Lords Romilly, Langdale, Gifford, Colepeper and Kinloss. The last-named, who lies in the Rolls Chapel under his effigy in his robes of office, was Edward Bruce, a Scotch lawyer, who came to England with King James. Lord Colepeper was Master of the Rolls in days when law gave way to arms, and earned his title by his services in the field to King Charles I. The rest of the peers named were, like the new peer, distinguished lawyers. The eldest son of the Master of the Rolls is Mr. Reginald Brett, M.P. for Penrhyn and Falmouth, and private secretary to the Marquis of Hartington. The creation not only bestows a well-earned distinction, but secures to the public in the future the services in the highest Court in the country of one of its ablest lawyers.—*Ex.*
