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A DECISION of the Chancellor in the case of *Spratt* v. *Wilson*, recently tried before him at the Hamilton sittings, is of great importance to trustees or executors to whom moneys are left by will for investment at their discretion. The Chancellor holds that they are bound to invest in such securities as are sanctioned by the Court. The discretion given them does not warrant an investment (as in the case decided) by deposit of funds in a savings bank at three and a half or four per cent.; so that the failure to invest in securities allowed by law makes them liable, however innocent and honest their conduct may be, to pay the legal rate of interest. They are not released, where infants are interested, by the acquiescence in the investment of the statutory guardian of the infants.

IT appears from the decision in the *Central Press Agency* v. *The American Press Association* that the Consolidated Rules do not provide a remedy for the failure of the officer of a foreign corporation, who is liable to be examined, to comply with an order for his examination for discovery. The action was brought for damages for libel published by the defendants of the plaintiffs. In the usual course an order was made for the examination for discovery of the President of the defendant Association at New York, where the Association has its headquarters, and where the President resides. He did not appear for examination, and the plaintiff then moved to strike out the statement of defence. The Master in Chambers dismissed the motion, on the ground that the Consolidated Rules 499, 520 and 648 do not give any power to strike out the defence of a corporation for default of its officer for examination, and that the remedy is against the defaulting officer personally. As the defendant corporation and its officer in this case were resident out of the jurisdiction, the personal remedy was clearly not available. The Master also held that under Rule 3 all former practice which might be applicable has been superseded. An appeal was taken to Falconbridge, J., who dismissed the appeal on the above grounds and affirmed the decision of the Master in Chambers, following *Badgerow* v. *Grand Trunk Ry. Co.*, 13 P. R., 132. The result is that the plaintiffs have to go down to trial without the advantage of examining the opposite party, an advantage of which they are deprived by defect in the Rules. It is true that the plaintiffs might have enforced the attendance of the officer of the defendant Association by letters rogatory to the foreign Court, a tedious and expensive method of obtaining a remedy which ought to be provided by the Rules.

THEORY OF CONTRIBUTORY NEGLIGENCE.

In actions for damages for injury caused by negligence, no defence is more frequent than that the defendant contributed to the accident which caused the injury. The law on this point is considered to be settled by Mr. Davies' donkey, "whose memory is embalmed in the delightful pages of 10 Meeson and Welsby" (Hagarty, C.J.O., in *Follet* v. *Toronto Street Railway Co.*, 15 A.R., p. 347). The decision in *Davies* v. *Mann*, and the limitation with which it must be taken, are discussed in a recent article in the *Harvard Law Review*, which we cite in full, adding some of the principal cases in our own courts:

The importance of the case of *Davies* v. *Mann** consists in this, that it led the way in introducing a principle, now firmly established in England, which was a distinct addition to the theory of contributory negligence. The general result of the cases before *Davies* v. *Mann*, none of them, however, being of commanding importance, except, perhaps, *Butterfield* v. *Forrester*,† is embraced in the proposition, that if the plaintiff was guilty of any negligence contributing to cause the injury complained of, he could not in any circumstances recover.

Davies v. *Mann* was decided in 1842. The facts, substantially as set forth in the reported case, are as follows: The plaintiff, having fettered the fore-feet of an ass belonging to him, turned it into a public highway, where at the time of the injury it was grazing, on the off side of a road about eight yards wide. The defendant's wagon, with a team of three horses, coming down a slight descent at what a witness termed "a smartish pace," ran against the ass and knocked it down, inflicting injuries from which it died soon after. The ass was fettered at the time, and it was proved that the driver of the wagon was some little distance behind the horses.

In addition to other instructions, the Judge of the trial directed the jury that, "if they thought that the accident might have been avoided by the exercise of ordinary care on the part of the driver, to find for the plaintiff." The jury returned a verdict for the plaintiff, and the defendant moved for a new trial on the ground of misdirection.

During the argument in the Court of Exchequer, Parke, B., pointed out that it must be assumed that the ass was lawfully in the highway, as it was so alleged in the declaration, and that allegation was not denied by the defendant. The Court of Exchequer sustained the direction to the jury, and Baron Parke, in his opinion, which is more full than that of Lord Abinger, the other barons delivering no reported opinions, says:—

"This subject was fully considered by this court in the case of *Bridge* v. *The Grand Junction Railway Co.*, where, as it appears to me, the correct rule is laid down concerning negligence; namely, that the negligence which is to preclude a plaintiff from recovering in an action of this nature, must be such as that he could, by ordinary care, have avoided the consequences of the defendant's negligence." "The Judge simply told the jury that the mere fact of negligence on

* 10 M. & W. 546.

† *Butterfield* v. *Forrester*, 11 East, 60 (1809.)

the part of the plaintiff in leaving his donkey on the public highway, was no answer to the action, unless the donkey's being there was the immediate cause of the injury; and that, if they were of opinion that it was caused by the fault of the defendant's servant in driving too fast, or, which is the same thing, at a smartish pace, the mere fact of putting the ass upon the road would not bar the plaintiff of his action. All that is perfectly correct; for, although the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify the driving over goods left on a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road."*

Since the ass was lawfully in the highway, the words "although the ass may have been wrongfully there," in the above passage, must mean negligently there, and the argument of the Court, supposing it to be addressed directly to the defendant, may be stated thus: Granting that the plaintiff was negligent in leaving the ass in the highway, and that his negligence contributed to the injury he now complains of, it was still your duty to travel along the road with due care, so as to avoid accidents; and not having done so, you are liable for the injury resulting.

There is nothing in the facts to show that the defendant's conduct was wilful, and the last clause of the passage quoted has therefore no application to the case. The passage is also open to criticism upon another ground. The argument there suggested is, that if the defendant were not held responsible for running over the ass negligently, he could not be held for running over it purposely or wilfully. But that does not follow; for the law is well settled that if a man purposely or wilfully does damage to another, contributory negligence of the plaintiff is not a defence.† If the act of a defendant sounds in *dolus, culpa* is out of the case.

Bridge v. *Grand Junction Railway Co.*, although referred to by Baron Parke in support of his decision, has not usually been cited as an important case in connection with the rule in *Davies* v. *Mann*. It is chiefly conspicuous for the support it lent to *Thorogood* v. *Bryan*,‡ and was an important authority for consideration in the decisions‖ overruling that case.

The rule in *Davies* v. *Mann* was received with approval by the English courts, and has been applied in a number of important cases,§ one of which, and the last in which the principle was directly involved, was carried to the House of Lords, where that principle was distinctly affirmed. In one of the intervening

* 10 M. & W. 541.

† 2 Thompson, Negligence, 1160; *Ruter* v. *Foy*, 46 Iowa, 132.

‡ 8 C. B. 115.

‖ *The Bernina*, 12 P. D. 58; s. c. *nom. Mills* v. *Armstrong*, 13 App. Cas. 1.

§ *Mayor of Colchester* v. *Brooke*, 7 Q.B. 339 (1845); *Dimes* v. *Petty*, 15 Q.B. 276 (1850); *Dowell* v. *Steam Navigation Co.*, 5 El. & Bl. 195 (1855); *Tuff* v. *Warman*, 2 C.B. N.S. 740 (1857); 5 C.B. N.S. 573 (1858); *Witherly, admxr.*, v. *Regents Canal Co.*, 12 C. B. N.S. 2 (1862); *Springett* v. *Ball*, 4 F. & F. 472 (1865); *Radley* v. *London & Northwestern Ry. Co.*, L. R. 9 Ex. 71 (1874); L. R. 10 Ex 100 (1875); 1 App. Cas. 754 (1876). See also *Spaight* v. *Tedcastle*, 6 App. Cas. 217 (1881); *Cayzer* v. *Carron Company*, 9 App. Cas. 873 (1884).

cases, *Dowell* v. *Steam Navigation Co.*, *Davies* v. *Mann* was explained as a case where the negligence of the plaintiff was not contributory within the meaning of the law of contributory negligence. But in *Radley* v. *London & Northwestern Railway Co.*, Lord Penzance, in moving for judgment and stating the established law of contributory negligence, forever set aside that explanation of *Davies* v. *Mann*. His Lordship said:—

"The law in these cases of negligence is, as was said by the Court of Exchequer Chamber, perfectly well settled and beyond dispute. The first proposition is a general one, to this effect, that the plaintiff in an action for negligence cannot succeed if it is found by the jury that he has himself been guilty of any negligence or want of ordinary care which contributed to cause the accident.

"But there is another proposition equally well established, and it is a qualification upon the first, namely, that though the plaintiff may have been guilty of negligence, and although that negligence may in fact have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him.

"This proposition, as one of law, cannot be questioned. It was decided in the case of *Davies* v. *Mann*, supported in that of *Tuff* v. *Warman*, and other cases, and has been universally applied in cases of this character without question."*

This opinion was assented to by Lord Blackburn and Lord Gordon, and emphatically by Lord Cairns. In the recent case of *The Bernina*, Lord Esher† and Lord Justice Lindley‡ stated the law substantially in the same terms.

The case of *Davies* v. *Mann* being thus approved and established in England, and also in Ireland,‖ is generally stated to be law in the United States;§ but a very brief examination of cases will show that *Davies* v. *Mann*, although cited without criticism by our courts, is generally cited as an authority for the proposition that if the plaintiff is guilty of any negligence contributing directly, or as a proximate cause, to the injury complained of, he cannot recover. The further question, whether the defendant could by the use of due care avoid the consequences of the plaintiff's negligence, is ignored; and *Davies* v. *Mann* is explained as a case where the plaintiff was allowed to recover because his negligence was not contributory.¶

From American text-writers, on the other hand, the case of *Davies* v. *Mann*

* 1 App. Cas. 758-9; *Nicholls* v. *G. W. Ry. Co.*, 27 U.C.R., 382; *Rastrick* v. *G. W. Ry. Co.*, 27 U.C.R., 396; *Winckler* v. *G. W. Ry. Co.*, 18 U.C.C.P., 250; *Bradley* v. *Brown*, 32 U.C.R., 463; *Anderson* v. *Northern Ry. Co.*, 25 U.C.C.P., 301; *Beckett* v. *G. T. Ry. Co.*, 13 A.R., 174; *Ryan* v. *Canada Southern Ry. Co.*, 10 O.R., 745; *Casey* v. *C. P. Ry.*, 14 O.R., 574; *Blake* v. *C. P. R.*, 17 O.R., 177; *Atkinson* v. *G. T. Ry.*, 17 O.R., 220; *Hutchinson* v. *C. P. Ry.*, 17 O.R., 341; *Jones* v. *G. T. Ry.* 16 A.R., 37; *Crawford* v. *Upper*, 16 A.R., 440; *Weir* v. *C. P. Ry.*, 16 A.R., 100; *St. John* v. *Macdonald*, 15 S.C.R., 1.

† 12 P. D. 61, (5.) ‡ 12 P. D. 89, 3 (*b.*)

‖ *Scott* v. *Dublin & Wicklow Ry. Co.*, Ir. R. 11 C. L. 377.

§ "We know of no court of last resort in which this rule is any longer disputed." Shearman and Redfield, Negligence, (4th ed.), § 99.

¶ *Marble* v. *Ross*, 124 Mass. 44, 48, per Morton, J.

has met with great disapproval. It has been attacked upon various grounds, but principally as being a nullification of the whole doctrine of contributory negligence.

As this case is a qualification upon the general doctrine of contributory negligence, let us first inquire what is the foundation of that doctrine itself. One view, and perhaps the prevailing view, is, to ascribe it to the maxim, *in jure non remota sed proxima causa spectatur.** The plaintiff cannot recover because he is himself the proximate cause of the injury; and conversely, a plaintiff's negligence in order to defeat his action must be a proximate cause. Another view is, that the plaintiff is in the condition of a joint tort-feasor, seeking to recover indemnity for his own wrong. A third view is, that the plaintiff is disentitled because he is himself partly to blame for the injury. This last may not be properly classified as a distinct view or theory of the subject, but rather as another method of stating either or both of the first two views; but it is a form of statement which points to a moral standard as the foundation of the law, and has the sanction of use by a Judge of the highest rank and authority.† Still other views have been advanced, as that the plaintiff falls under the maxim *volenti non fit injuria.* But a series of cases in England under the Employers' Liability Act of 1880 has brought out so clearly the distinction between contributing to an injury by an act or omission, which is or may be contributory negligence, and consenting to it without a negligent act or omission, which is the case intended by the maxim, that further discussion of that view is superfluous.‡

In the light of those theories let us examine *Davies* v. *Mann.* The plaintiff's negligence consists in the act of leaving the donkey fettered in the highway. That is the last act done by him before the accident, and his subsequent intervening conduct has no connection with the case. For the accident which follows, applying the test of moral or personal blame, if he had ordinary intelligence, he is to blame at least in part, and there are strong grounds for holding him as much to blame as the defendant. His want of care and the defendant's want of care are each necessary elements in the result. Remove either, and the mischief would not have happened.

If again, a man guilty of contributory negligence is to be treated as a joint tort-feasor, the plaintiff in *Davies* v. *Mann* is a joint tort-feasor, and is seeking to obtain indemnity for his own wrong. The damage complained of is the result of his negligence and the defendant's negligence conjoined. But this is an inapt and unfortunate form of statement; for a joint tort-feasor the plaintiff cannot be.

* "It [contributory negligence] rests upon the view that though the defendant has in fact been negligent, yet the plaintiff has by his own carelessness severed the causal connection between the defendant's negligence and the accident which has occurred; and that the defendant's negligence accordingly is not the true proximate cause of the injury." *Thomas* v. *Quartermaine*, 18 Q. B. D. 685, 697, per Bowen, L. J. So Pollock, Torts, 374; and Wharton, Negligence, § 133.

† Lord Blackburn, in *Cayzer* v. *Carron Company*, 9 App. Cas. 873, 880, 881.

‡ *Weblin* v. *Ballard*, 17 Q. B. D. 122; *Thomas* v. *Quartermaine*, 17 Q. B. D. 414; 18 Q. B. D. 685; *Yarmouth* v. *France*, 19 Q. B. D. 647; *Thrussel* v. *Handyside*, 20 Q. B. D. 359; *Osborne* v. *London & Northwestern Ry. Co.*, 21 Q. B. D. 220; *Membery* v. *Great Western Ry. Co.*, 14 App. Cas. 179.

He owes no legal duty to himself to take due care of himself or of his property, and as he has violated no legal duty to the defendant and done him no damage, he has committed no tort. Whatever of truth there is in this theory of contributory negligence—the same principle being also sometimes put in the forms that the plaintiff must come into court with clean hands, and that no man can take advantage of his own wrong—is embraced under another principle, not yet mentioned, to be discussed below.

Finally, if a plaintiff cannot recover because his negligence is a proximate cause of the injury, the negligence of the plaintiff in *Davies* v. *Mann* is, in the legal meaning of the phrase, though not perhaps in its logical or metaphysical meaning, a proximate cause. Speaking generally, if a man does or omits to do an act which is likely to result in damage, under all the circumstances known and which ought to be known to him at the time, his act or omission is the legal cause of that damage. Now in *Davies* v. *Mann* the plaintiff did an act which was likely to result in damage, and which did so result. The opinion of the court conceded that it was an act of negligence, and it was contributory negligence; for although not directly conceded by the court to be contributory, that concession is understood by the English courts to be involved in the principle of the case, particularly by the House of Lords, in the passage above quoted from Lord Penzance. If the negligence of Davies was contributory, it was also a proximate cause, for on the theory of proximate causes remote negligence is not contributory, and is not, legally speaking, a cause at all, but is disregarded. *In jure non remota sed proxima causa spectatur.* It follows that in *Davies* v. *Mann* the plaintiff violates every one of the principles thus far given as the foundation of the law of contributory negligence. Yet he is allowed to recover.

It is submitted that there is another principle upon which to rest the law of contributory negligence. When a plaintiff seeks redress in a court of law for a tort, the rule which the court may apply will not only settle the dispute against him or in his favour, but it will have a further and more lasting office as a precedent binding upon all members of the community in a similar case. The community, therefore, has an interest in the result, and the needs of the community should have an influence upon the rule to be laid down. That they do have an influence is beyond dispute.

In an action for negligence it is of no consequence to the law whether the particular defendant shall be compelled to pay damages, or whether the loss shall be allowed to lie where it fell. The really important matter is to adjust the dispute between the parties by a rule of conduct which shall do justice if possible in the particular case, but which shall also be suitable to the needs of the community, and tend to prevent like accidents from happening in future. The reason why a plaintiff who is guilty of contributory negligence can recover no damages is to a large extent a matter of sound policy or legislation; and this view has been suggested at least, if not directly stated, by judicial authority. In the Ohio case of *Davis* v. *Guarnieri*, Owen, C.J., in laying down three considerations upon which the doctrine of contributory negligence is based, gives this as the last: "(3) The policy of making the personal interests of parties dependent

upon their care and prudence."* Why the common law in cases of contributory negligence should not divide the loss is a question to which different answers have been suggested, but which remain a puzzle to Judges of great ability;† just as the opposite rule in Admiralty, which does divide the loss, has perplexed high authorities among the civilians.‡ But the practice being thus established of depriving the plaintiff of all remedy, the ultimate justification of the rule is in reasons of policy, viz., the desire to prevent accidents by inducing each member of the community to act up to the standard of due care set by the law. If he does not, he is deprived of the assistance of the law. How much influence the rule exerts to accomplish the object aimed at cannot be known. That it does exert some influence is sure. A plaintiff who has learned the law of contributory negligence by the hard experience of losing a verdict, is likely to be more careful in the future. From his negligence, at least, accidents will be less likely to happen.

The general doctrine of contributory negligence being thus founded upon considerations of policy, the rule in *Davies* v. *Mann*, which is a part of that doctrine, rests upon the same ground. The plaintiff negligently left the donkey fettered upon the road, and the defendant some time afterward carelessly ran over it. To prevent an injury is a better service than to award compensation for an injury already done; and if it be any part of the policy of the law to prevent accidents, and if it have any means at its command to accomplish the object, the negligence of the defendant in *Davies* v. *Mann* is the negligence at which the law ought to strike. The negligence of the plaintiff having placed the animal in a situation of danger, the defendant had a full opportunity to avoid the peril by due care, which he did not use. The negligence of each is a necessary element, but that of the defendant is nearer to the accident. The plaintiff did an act from which harm was likely to follow; from the defendant's negligence harm was bound to follow.

It may be said that this is merely another way of stating that the negligence of the defendant is the sole proximate cause, and that of the plaintiff remote, and therefore the whole question comes back to the theory of proximate cause. The answer is, that although the negligence of the plaintiff is more remote from the accident than that of the defendant, it is still near enough to be contributory negligence, and is so conceded to be by the House of Lords, and is therefore a proximate cause; and on the theory of contributory negligence which holds that a plaintiff is disentitled to recover whenever his own negligence is a proximate cause of his injury, the plaintiff in *Davies* v. *Mann* ought not to recover. Another suggestion which may be made by the advocate of proximate causes is, that the negligence of the defendant in *Davies* v. *Mann* succeeded that of the plaintiff in time, and that the effect of the case is to decide that where there are several causes, the last cause to operate in point of time is the true proximate cause. The answer is, that the rule in *Davies* v. *Mann* does not inquire whether the

* 45 Ohio St. 471, 489. † Per Lindley, L. J., 12 P. D. 58, 89.
‡ See Marsden, Law of Collisions (2d ed.), 132-134.

defendant was guilty of the last negligence, but only whether he had an opportunity to avoid the accident by the use of due care. If he had, and the plaintiff had not, which was the fact in *Davies* v. *Mann*, he is liable.

Before proceeding to examine more closely the application of the rule in *Davies* v. *Mann* to different conditions of fact, a matter by no means free from difficulty, two other points of a general nature must be noticed.

1. To compel the defendant in *Davies* v. *Mann* to pay the whole damage, when the plaintiff is also at fault, may be said to operate as a punishment upon the defendant. So it may also be said that to deprive the plaintiff of all compensation in other cases of contributory negligence, where the rule in *Davies* v. *Mann* does not apply, and where the negligence of the plaintiff may be only a small element in the accident, operates as a punishment upon him. It may be conceded that there is a punitive element in each of those cases; and if the law of contributory negligence is founded upon considerations of policy, the punitive element can be readily explained and understood.

2. But it may be asked, if the idea of punishment is involved in *Davies* v. *Mann* at all, why does not that admit the doctrine of comparative negligence which prevails in Illinois and several other States? By that rule, "the degrees of negligence must be measured and considered; and wherever it shall appear that the plaintiff's negligence is comparatively slight, and that of the defendant gross, he shall not be deprived of his action."* It is perfectly plain that there is no logical connection between the rule in *Davies* v. *Mann* and the doctrine in the passage quoted, which is from the case where comparative negligence first appeared. No comparison of the negligence of the plaintiff and of the defendant is made in *Davies* v. *Mann*. The question is, Can the defendant avoid the consequences of the plaintiff's negligence? If he can, then, although his negligence may be slight in comparison with that of the plaintiff, he is obliged to pay the whole damage.

It remains to apply the rule in *Davies* v. *Mann* to cases with different facts.

1. Suppose the defendant, or the driver, in *Davies* v. *Mann*, instead of being a short distance behind his horses, had stopped by the way in a public house, and allowed the horses to go on ahead, and that when the accident occurred he was a mile behind them, and they were not in sight. What rule is to be applied? Neither plaintiff nor defendant is on the ground at the time of the accident, and the negligence of the defendant consists in allowing the horses to go on alone. His negligence is equally remote from the accident with that of the plaintiff, and although it may be more blameworthy to allow a team of three horses to go alone upon the highway than to leave a donkey fettered there, that cannot affect the result. The rule in *Davies* v. *Mann* requires the defendant to use due care to avoid the consequences of the plaintiff's negligence, but in this case he could not, after the peril was imminent, do anything to avoid the accident. The principle of *Davies* v. *Mann* has therefore no application, and the case falls under the

* *Galena & Chicago Union R. R. Co.* v. *Jacobs*, 20 Ill. 478, 497, per Breese, J. (1858).

general proposition of contributory negligence. The plaintiff's negligence contributes to his injury, and he cannot recover.

In the Pennsylvania case of *Stiles* v. *Geesey*,* the facts were similar to those here supposed, and the plaintiff failed in his action upon the general ground that he was guilty of contributory negligence. The relation of *Davies* v. *Mann* to the case was not considered.

2. Suppose the plaintiff in *Davies* v. *Mann* was himself actually present by the roadside at the time of the accident, and negligently allowed the donkey to remain in the way of the approaching team, the other facts remaining unchanged. In this case, by the use of due care, he could avoid the injury as well as the defendant. It is his duty so to do, and on these facts it is submitted he could not recover. It would be the grossest inequality and injustice to impose upon the defendant the duty of avoiding the consequences of the plaintiff's negligence where he can do so by the use of due care, unless a corresponding duty were imposed upon the plaintiff.

This result also follows as a matter of authority from *Butterfield* v. *Forrester*.† There, the plaintiff, while riding violently through the streets of Derby at nightfall, ran against an obstruction which had been placed across the highway by the defendant, and fell, with his horse. After a verdict for the defendant, Lord Ellenborough, in refusing a rule for a new trial, said: "One person being in fault will not dispense with another's using due care for himself. Two things must concur to support this action: an obstruction in the highway, and no want of ordinary care to avoid it on the part of the plaintiff."‡ In *Butterfield* v. *Forrester*, the defendant was not present at the time and place of the injury, and in that respect the case differs from the one here supposed; but *Butterfield* v. *Forrester* imposes upon the plaintiff the same duty of avoiding the consequences of the defendant's negligence, which in *Davies* v. *Mann* is imposed upon the defendant to avoid the consequences of the plaintiff's; and that duty, if it exists at all, must exist when the opposite party is present as well as when he is absent. *Butterfield* v. *Forrester* has been said to be irreconcilable with *Davies* v. *Mann*;‖ but in answer to that criticism it may be observed that *Butterfield* v. *Forrester* was referred to with approval by Baron Parke in *Bridge* v. *Grand Junction Ry. Co.*, in a passage which he quotes and reaffirms in *Davies* v. *Mann*. Moreover, it is one of the oldest cases in the law of contributory negligence, having been decided in 1809, and has ever since been unquestioned law. So far from being in conflict with *Davies* v. *Mann*, it is the exact converse§ of *Davies* v. *Mann;* and the two cases are to be considered as illustrations of the working of the same great principle—the duty of one person to avoid the consequences of another's negligence—applied to different facts. ¶

*71 Penn St. 439.

† 11 East, 60; *Castor* v. *Uxbridge*, 39 U.C.R., 113. ‡ 11 East, 61.

‖ "The two rules, placed side by side, as some courts are in the habit of placing them, contradict each other and make nonsense." † Thompson, Negligence, 1155.

§ See *The Bernina*, 12 P. D. 58, 62, (8) per Lord Esher; and *id.* 89, 3, (*a*) per Lindley, L. J

¶ An article reviewing Beach on Contributory Negligence, 2 Law Quarterly Review, 506, presumably from the pen of Sir Frederick Pollock, by adding certain facts in *Radley* v. *London &*

3. Suppose that the plaintiff in *Davies* v. *Mann* was present by the roadside with the donkey, and that half an hour before the accident occurred he had fallen asleep, and was asleep at the time of the accident, the other facts remaining the same. What rule is to be applied? In *Davies* v. *Mann*, Baron Parke puts the case of negligently running over a man lying asleep in the highway, and implies that the injured man could recover. If so, it follows that the duty of the plaintiff to avoid the consequences of the defendant's negligence exists only when the plaintiff has full capacity, after the peril is imminent, to use due care.

4. Again, it may be supposed that the plaintiff in *Davies* v. *Mann* was present at the time of the accident, but so intoxicated that he was incapable of exercising care. What rule is to be applied? This case is like the last in this respect, that the plaintiff in point of fact has no capacity to avoid the accident, any more than if he was not upon the ground. But in this case the incapacity was due to a cause which the law ought to restrain. The general rule undoubtedly is, that if a man is injured while intoxicated, the intoxication alone is not a bar to his action.* But an intoxicated man is in constant danger of inflicting harm

North Western Ry. Co., presents a case similar, but not identical, with that presented above, by changing the facts in *Davies* v. *Mann*. The Radley case was an action for negligently pushing empty trucks against the plantiff's bridge, whereby it was thrown down, the plantiff or his servants not being at the time on the ground. The additional facts supposed were, that a servant of the plaintiff was on the bridge after it was in imminent peril, but stood by and failed to give the alarm; while the defendant's servants felt the resistance of the bridge soon after the plaintiff's servants saw it in danger, and instead of stopping the trucks to investigate, stupidly passed on. The learned author of the article referred to assumes that the plaintiff could still recover, and sums up the law in this general rule: "The result is, that the party *who last has a clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent*, is considered solely responsible for it; and this will be found, we believe, to be true in all such cases, whether the series be long or short." This rule apparently rests upon the theory that contributory negligence is wholly a question of proximate cause, and if the assumption is correct, it follows logically that the person guilty of the last negligence, whether it be an act or an omission, is alone responsible; for his negligence is the sole proximate cause. It also follows logically that wherever the plaintiff's negligence precedes that of the defendant, it is not *contributory* negligence; and that the rules of contributory negligence can apply only where the negligence of the plantiff, is concurrent and simultaneous with that of the defendant. But the cases of *Davies* v. *Mann* and *Radley* v. *London & North Western Ry. Co.* are cases of successive negligence, and are considered by the courts to be cases of contributory negligence also. This shows that the logical theory of proximate causation is not the basis, or at any rate, not the sole basis, of contributory negligence.

In the cases where both plaintiff and defendant have been guilty of negligence contributory to the accident, and both are present at the time of the accident, the true question is believed to be this: Could the accident, after the peril was imminent, be avoided by either party, by the use of due care? If it could, the one who fails to use due care to avoid cannot recover. It cannot be said as matter of law, when both parties are present, that it is negligence on either side not to avoid, or to take precautions to avoid, the consequences of the other's negligence. Thus in *Spaight* v. *Tedcastle*, 6 App. Cas. 217, both parties were present at the time of the accident, and the plaintiff recovered, but on the ground that he, or the pilot in charge of his vessel, was not guilty of any negligence when the peril was imminent. *Washington* v. *Baltimore & Ohio R. R Co.*, 17 W. Va. 190, which presents similar facts, and contains an elaborate review of authorities goes upon the same ground.

* 2 Thompson, Negligence, 1174.

through negligence, and if, while in that state, he receives an injury through negligence of another, which he has no capacity to avoid, why may not the law say, upon grounds of policy, that his incapacity, being due to his own folly, shall be no excuse? Upon authority, however, it must be said that this case has been put several times by Judges, and always with the implication that the plaintiff could recover.* In *Nashville & Chattanooga Railway* v. *Smith*,† plaintiff's intestate was intoxicated and on the track of the defendant at the time of the accident, and the same was the fact in *O'Keefe* v. *Chicago, Rock Island & Pacific R.R.*,‡ and in *Button* v. *Hudson River R.R. Co.*‖ But in each of those cases the result was made to depend upon general questions, the rule in *Davies* v. *Mann*, or the duty or capacity to avoid the accident after the peril is imminent, not being clearly presented or discussed.

5. It is obvious that the last two cases considered may also arise with reference to the defendant. Suppose that in *Davies* v. *Mann* the driver at the time of the accident had been asleep upon his wagon, or so drunk that he was incapable of using due care to avoid the donkey, the other facts remaining the same. The case where the driver is intoxicated has been put by way of illustration from the bench,§ with a strong implication that the plaintiff might recover. There can be little doubt that this is the result which would be reached by the court in a case like the one supposed. But it is submitted that the same rule should be applied to a plaintiff in the like situation; and that wherever one person, present at the place of the accident, is incapacitated, by a cause due to his own fault, from using due care to avoid the consequences of another's negligence, he should be held to the same standard of care as if the incapacity did not exist.

The results of these several cases, and of the discussion thus far, may be summarized thus:

The general rule of contributory negligence, founded largely, if not wholly, upon considerations of public policy, is this: that if a plaintiff has been guilty of any negligence which contributed proximately to the injury, he cannot recover. But it is the duty of both plaintiff and defendant to use due care to avoid the consequences of each other's negligence. If the defendant alone can avoid the

* "If a man is lying drunk on the road, another is not negligently to drive over him. If that happened, the drunkenness would have made the man liable to the injury, but would not have occasioned the injury." Coleridge, J., in *Clayards* v. *Dethick*, 12 Q.B. 439, 445. So Blackburn, J., in *Radley* v. *London & North Western Ry. Co.*, L. R. 10 Ex. 100, 105; Ellsworth, J., in *Isbell* v. *New York & New Haven R. R.*, 27 Conn. 393, 404; *Ridley* v. *Lamb*, 10 U.C.R., 354; *McGunigal* v. *G. T. Ry. Co.*, 33 U.C.R., 194.

† 6 Heisk. 174 ‡ 32 Iowa, 467. ‖ 18 N. Y. 248.

§ "If in *Davies* v. *Mann* the driver of the wagon, if in *Tuff* v. *Warman* the crew of the steamer, had become half an hour before the collision so drunk that their arms were powerless, and if they were still in the same state of drunkenness when the collision occurred, the defendant in each of those cases, according to the argument of the present defendants in support of this exception, must have been exempt from responsibility. Nay, more; if they had been only partially drunk, so as to have retained the voluntary use of their arms, the defendants would be liable; but if they were so thoroughly drunk as to have lost muscular power, the defendants would be exempt from all responsibility, according to rule of instruction for the jury suggested by the thirteenth exception." *Scott* v. *Dublin & Wicklow Ry. Co.*, Ir. R. 11 C. L. 377, 395, per Pigot, C. B.

accident by the use of due care, and does not, the plaintiff may recover. If the plaintiff alone can avoid it, and does not, he cannot recover. If both can avoid it, neither can recover. If neither can avoid it, the general rule applies, and the plaintiff cannot recover.

A few more questions remain to be considered. It has already been said that the principal objection to the rule in *Davies* v. *Mann* is, that it does away with the entire law of contributory negligence. *Davies* v. *Mann*, it is said, decides that the plaintiff can recover damages for an injury sustained by him if the defendant by the use of due care could avoid doing the injury. But a defendant is never liable for negligence except in the case where he could avoid doing the injury by the use of due care. Therefore negligence of a plaintiff is never a bar to his action. The answer is, that the rule of *Davies* v. *Mann* does not apply to every case of contributory negligence, but only to those cases where the defendant is on the ground and by the use of due care can avoid the injury. Outside of that limited class of cases the general rule, embraced in the first proposition of Lord Penzance, has full and unrestricted application.

It has been suggested that the rule in *Davies* v. *Mann* should be modified in the manner following: "Although the plaintiff has negligently exposed himself or his property to an injury, yet if the defendant, *after discovering the exposed situation*, inflicts the injury upon him through a failure to exercise ordinary care, the plaintiff may recover damages."* In *Davies* v. *Mann* the defendant did not discover the peril before the accident, but he was held bound to use due care independent of the fact of discovery, so that the rule here suggested is a different rule from that in *Davies* v. *Mann*.† If the defendant had discovered the peril and had not used due care to avoid it, that fact would be strong evidence, and in some cases almost conclusive evidence, of wilfulness. And, as has been already stated, if the act of the defendant is wilful, negligence is out of the case. The discovery of a danger, under the rule in *Davies* v. *Mann*, is of no importance except in so far as it tends to prove wilfulness.

Finally, it is urged that the rule in *Davies* v. *Mann* should be discarded, and that there are two other well-established principles "which fix liability upon a defendant in every case where liability can properly be imposed."‡ Those principles are: (1) that remote negligence of the plaintiff is not in law contributory, and (2) that contributory negligence is no defence for a wilful wrong. But if the suggestions here offered are well founded, the rule in *Davies* v. *Mann* has a field of usefulness outside of either of those principles; and it rests upon sufficient grounds.

* 2 Thompson, Negligence, 1157, note 1.

† The rule requiring the defendant to use due care to avoid the consequences of discovered negligence prevails in several States. See *Isabel* v. *Hannibal & St. Joseph R. R.*, 60 Missouri, 475; *Morris* v. *Chicago, Burlington, & Quincy Ry.*, 45 Iowa, 29; *Woods* v. *Jones*, 34 La. Ann 1086.

‡ Sprague, Contributory Negligence and the Burden of Proof, p. 7 (in pamphlet).

COMMENTS ON CURRENT ENGLISH DECISIONS.

The Law Reports for February comprise 24 Q.B.D., pp. 141-271; 15 P.D., pp. 13-25; 43 Chy.D., pp. 97-186.

TRADE MARK—MERCHANDISE MARKS' ACT—(50 & 51 VICT., C. 28) S. 2, S-SS. 1, 2, S, 3, S-SS. 1, 3—R.S.C., C. 166, S. 6.)—OFFENCE OF SELLING GOODS TO WHICH A FALSE TRADE DESCRIPTION IS APPLIED—INTENT TO DEFRAUD.

Passing by some Parliamentary registration of voters' cases, and a couple of cases on shipping law, which do not seem to call for any notice here, the first case which we think needs attention is *Wood* v. *Burgess*, 24 Q.B.D., 162, which is an interesting decision under the Merchandise Marks' Act. The facts of the case are, that Wood and Burgess were rival manufacturers of mineral waters. Wood, for the purposes of his trade, used glass bottles on which were moulded his name and address. A considerable number of these bottles got into the hands of Burgess, who filled them with mineral water of his own manufacture, and issued them so filled to his customers, having a paper label affixed to each bottle in the following words, "Burgess's Lemon, 215 Brick Lane, Bethnal Green Road." Mr. Burgess was prosecuted under the Act, and the magistrate found, as a fact, that the name, "T. Wood," was a false trade description within the meaning of the Act, and that Wood had not authorized Burgess to use it, but he acquitted Burgess on the ground that he had no intention to defraud. But on appeal to the Divisional Court (Lord Coleridge, C.J., and Mathew, J.), it was held that intent to defraud is not a necessary ingredient of the offence charged.

WEIGHTS AND MEASURES—FALSE WEIGHTS—PROPERTY OF GENERAL POST OFFICE—WEIGHTS AND MEASURES' ACT, 1878—(41 & 42 VICT., C. 49), SS. 25, 29, (R.S.C., C. 104, S. 25).

Regina v. *Justices of Kent*, 24 Q.B.D., 181, was an application to prohibit Justices from entertaining an information under the Weights and Measures' Act, 1878—(R.S.C., c. 104, s. 25) under the following circumstances: The defendant was a postmaster, and on the same premises as the post-office he also carried on the trade of a baker; an information was laid against him for having in his possession, for the purposes of his trade, an unjust scale. The scale in question belonged to the post-office, and was the property of the Crown—and was used solely for the purposes of the post-office. Lord Coleridge, C.J., and Mathew, J., granted the prohibition, holding that the Crown and its property are not subject to the provisions of the statute, and therefore the magistrate had no jurisdiction.

FRIENDLY SOCIETY—ILLEGAL RULES—RESTRAINT OF TRADE.

The principle laid down in *Swaine* v. *Wilson*, 24 Q.B.D, 252, is one which will apply to other cases than those arising under the particular statute in question in that case. That principle is this, that where the general objects of a society are legal, the fact that some of its rules are illegal does not constitute the society an illegal society, or prevent a member of the society from recovering a sum of money payable to him under a rule of the society which is not illegal.

In this case the action was to recover a sum payable by the defendants to the plaintiff, under the rules of a friendly society, of which the defendants were the officials. The defendants resisted payment, on the ground that some of the rules of the society were illegal, as being in restraint of trade and contrary to the provisions of the Trade Union Acts, but the Court of Appeal (Lord Esher, M.R., and Lindley and Lopes, L.JJ.) held that this furnished no defence. They were, moreover, of opinion that rules made for the *bona fide* purpose of protecting the funds of the society from claims, which might be avoided with reasonable care are not illegal, because they are incidentally to some extent in restraint of trade, provided that their provisions go no further than is reasonable and necessary for that purpose.

SHIP—COLLISION—DAMAGES, MEASURE OF.

The Lincoln, 15 P.D., 15, is a decision of the Court of Appeal on the proper measure of damages in the case of a collision. A steamer collided with a barque, the steamer being alone to blame. The steering compass, charts, log, and log-glass of the barque were lost through the collision. The captain of the barque made for a port of safety, navigating his ship by a compass he found on board. While on her way, and without any negligence, and owing to the loss of the requisites for navigation, the barque grounded and had to be abandoned. The Court of Appeal (Lord Esher, M.R , and Lindley and Lopes, L.JJ.), reversing the decision of Butt, J., held that the grounding of the barque was a natural and reasonable consequence of the collision, and that the owners of the steamer were liable for the damages caused thereby.

WILL—REVOCATION—DESTRUCTION OF WILL WITHOUT TESTATOR'S AUTHORITY—SUBSEQUENT RATIFICATION—WILLS' ACT (1 VICT., C. 26), S. 20, (R.S.O., C. 109, S. 22)—PROBATE OF DESTROYED WILL.

In *Mills* v. *Millward*, 15 P.D., 20, the will of a testatrix was destroyed by a relative, in her presence, but without her authority or consent. Subsequently, though pressed to do so, the testatrix refused to make a new will, saying that she could not bring her mind to it and that it must remain as it was. The question was whether there had been a sufficient revocation of the destroyed will. Butt, J., held there had not, and that there was no sufficient evidence of a subsequent ratification of the destruction of the will so as to constitute it an act done by the direction and authority of the testatrix, and he therefore granted probate of the destoyed will, the contents of which were proved by the affidavit of the executor.

WILL—EXECUTORS ACCORDING TO THE TENOR.

In re Leven, 15 P.D., 22, the will of the testator did not specially appoint any executors, but nominated four persons to act as his trustees, and bequeathed to them his residuary estate. The will contained directions to "my executors" as to the payment of debts and as to the manner they were to deal with the residue and other portions of the estate, and it appeared that the testator had used the

terms "executors" and "trustees" as referring to the same persons. Under these circumstances, Butt, J., held that the trustees were executors according to the tenor, and entitled to probate.

COMPANY—WINDING UP—CREDITOR—ATTACHING CREDITOR IS NOT A CREDITOR OF THE GARNISHEE (R.S.C., c. 129, s. 8).

In re Combined Weighing and Advertising Machine Co., 43 Chy.D., 99, the Court of Appeal (Cotton, Bowen and Fry, L.JJ.), affirming North, J., were of opinion that a person who has obtained a garnishee order absolute, directing a company to pay him the debt due by it to the judgment debtor, does not thereby become a creditor of the company so as to entitle him to present a petition for the winding up of the company, on the failure of the company to comply with the garnishee order. In the opinion of their Lordships, the effect of the garnishee order is not to transfer, or create an equitable assignment of, the debt attached, but merely gives the attaching creditor a lien on it, which he may enforce by execution.

STATUTE OF LIMITATIONS—PRINCIPAL AND SURETY—MORTGAGOR AND MORTGAGEE—COVENANT FOR PAYMENT OF MORTGAGE DEBT—PAYMENT OF INTEREST BY PRINCIPAL (R.S.O., c. 111, s. 23, *Ib.* c. 123, s. 2).

In re Frisby, Allison v. *Frisby*, 43 Chy.D., 106, the Court of Appeal (Cotton, Bowen, and Fry, L.JJ.) affirmed a decision of Kay, J. The question being whether a surety who had given a covenant for the payment of a mortgage debt could claim that the debt was barred by the Statute of Limitations, where interest had been paid by the mortgagor up to within twelve years of the commencement of the action, no payment or acknowledgment having ever been made or given by the surety. On the part of the surety it was claimed that the debt was barred, under the Real Property Limitation Act, 1874, s. 8 (R.S.O., c. 111, s. 23), and that under the Mercantile Land Amendment Act, 1856 (see R.S.O., c. 123, s. 2), the payment of interest by the mortgagor could not prevent the statute running as against the surety. The Court of Appeal, without determining conclusively whether s. 8 of the Real Property Limitation Act, 1874, applied, were unanimously agreed that the liability of the surety was kept alive by the payment of interest by the mortgagor. Perhaps the key of the decision may be found in the concluding sentence of the judgment of Fry, L.J., "It is usual for the mortgagor—not the surety—to pay interest, and it would be contrary to good sense and the common understanding of mankind that, while he is doing so, the statute should run in favor of the surety, unless he makes a payment or gives an acknowledgment."

EQUITABLE EXECUTION—APPOINTMENT OF RECEIVER—ABATEMENT—RULES ORD. XVII., R. I., ORD. XLII., R. 23 (ONT. RULES 620, 886).

In re Shephard, Atkins v. *Shephard*, 43 Chy.D., 131, the Court of Appeal (Cotton, Bowen, and Fry, L.JJ.) were called upon to consider the law relating to what is called Equitable Execution, and have judicially explained its nature and legal effect. From this exposition of the law it appears that what is familiarly

called "equitable execution" is not in fact execution, but equitable relief, which is granted because there is a hindrance in the way of execution at law, and it is subject to the ordinary rule that equitable relief can only be granted when the proper parties are before the Court. In this case the judgment creditor applied, shortly before the death of his judgment debtor, for the appointment of a receiver by way of equitable execution; the motion was adjourned, and before it was heard and disposed of, the debtor died, and two days after his death an order was made for the appointment of a receiver, without reviving the action or bringing the representatives of the debtor before the Court. Their Lordships held that under these circumstances the order was ineffectual; and that even assuming that execution can issue at law against the estate of a deceased person without any leave of the Court (as to which Fry, L.J., expressed some doubt), a receiver by way of equitable execution cannot be appointed of a deceased debtor's estate, in the absence of the person on whom the estate has devolved.

COMPANY—NOTICE OF MEETING—CONDITIONAL NOTICE, INVALIDITY OF.

Alexander v. *Simpson*, 43 Chy.D., 139, is an important decision on a point of company law. By the articles of association, it was provided that "seven days, notice in writing, specifying the place, the day, and the hour of meeting, and in case of special business, the general nature of such business, shall be given to the members before every general meeting." Notice was given that an extraordinary general meeting would be held on the 12th July, for the purpose of considering, and if deemed advisable, of passing the resolutions set forth in the notice; and concluded, "should such special resolutions be duly passed, the same will be submitted for confirmation, as special resolutions, to a subsequent extraordinary general meeting which will be held on Monday, the 29th July, at the same time and place." The meeting on the 12th July was held, and the resolutions were adopted, and a newspaper, containing the report, was mailed to the members. On the 29th July a meeting was held, and the resolutions confirmed. This was an action to restrain the carrying out of the resolutions, on the ground that the meeting of the 29th July was not validly called. Chitty, J., held that this objection was well taken, because the notice of the holding of the meeting was conditional on the resolutions being passed at the meeting on the 12th, and, being bad when sent, could not be made good by sending the newspapers containing the report of the meeting on the 12th, because the members were under no obligation to take any notice of the report contained in the newspaper. This view was upheld by the Court of Appeal (Bowen and Fry, L.JJ).

AGREEMENT TO REFER TO ARBITRATION—STAYING PROCEEDINGS—C.L.P. ACT, 1854 (17 & 18 VICT., C. 125) S. 11, (R.S.O., C. 53, S. 38).

Turnock v. *Sartoris*, 43 Chy.D., 150, was an application to stay proceedings under the C.L.P. Act, 1854, s. 11, (R.S.O., c. 53, s. 38), on the ground that the parties had agreed to refer the matters in dispute to arbitration. The plaintiff was lessee under a lease, whereby the lessor (the defendant) covenanted to supply the lessee with water. The lease contained a clause providing that if any

difference should arise between the parties touching the lease or anything therein contained, or the construction thereof, or in any way connected with the lease, or the operation thereof, it should be referred to arbitration. Some years after the date of the lease, disputes having arisen as to the water supply, a written agreement was entered into, binding the lessor to take steps to secure a better water supply, and in some respects varying the rights of the plaintiff as to the supply. The plaintiff brought his action for breach of this agreement, and also alleging that the lessor had not supplied the stipulated quantity of water, and claiming an inquiry as to the damages sustained by the plaintiff "by reason of the matters aforesaid." Under these circumstances, the Court of Appeal (Cotton, Bowen, and Fry, L.JJ.), were of opinion that North, J., had rightly refused to stay proceedings, because the plaintiff was suing for damages for breach of the agreement as well as for breach of the covenant in the lease; and that the arbitration clause only applied to the latter, and therefore the whole subject matter of the action could not be referred, and that it would not be right to split up the action by referring part only of the matters in question; and that even if the arbitration could be construed so as to cover all the matters in respect of which damages were claimed, it would not be proper to refer them to an arbitrator, as he would have no power to determine the construction of the agreement and its effect upon the provisions of the lease. *Wade-Gery* v. *Morrison*, 37 L.T.N.S., 270, was distinguished on the ground that, although there were there two agreements, one of which contained an arbitration clause, and the other did not, they were contemporaneous, and constituted in law but one agreement, and therefore the arbitrative clause applied to both.

INFANT—APPRENTICESHIP DEED—COVENANT OF INFANT TO SERVE—CONTRACT—INJUNCTION TO RESTRAIN BREACH OF NEGATIVE CLAUSE IN CONTRACT BY INFANT.

In *De Francesco* v. *Barnum*, 43 Chy.D., 165, the plaintiff applied for an interim injunction to restrain the defendant, Barnum, and another, from inducing or allowing two infant defendants to perform as dancers, and to restrain the infant defendants from performing as dancers, and the mother, who was also a defendant, from permitting them to perform as dancers, in violation of articles of apprenticeship, whereby the infants were bound to the plaintiff for a term of seven years as pupils, on the terms that he should teach them to dance, and whereby the infants purported to bind themselves not to contract or accept any professional engagement during the term without the plaintiff's consent. The deed also contained mutual covenants by the plaintiff and the mother of the infants, who was also their guardian, whereby the plaintiff agreed to properly instruct the infants, and make certain payments to the mother for dancing engagements during the term, and the mother agreed that the infants' services should be entirely at the plaintiff's disposal during the term, and she was to enter into no professional engagements for the infants during the term without the plaintiff's consent. On the authority of the old case of *Gylbert* v. *Fletcher*, Cro. Car. 179, Chitty, J., decided that, inasmuch as no action could be brought against an infant on a covenant to serve, the negative clause in the apprenticeship deed could not be enforced

by injunction, and he therefore refused the motion as to all the defendants. At p. 172, he says, as regards the case against the infants, "the right to an injunction depends upon the legal right to sue, and if there be no legal right to sue, there can be no right to an injunction. Injunction in cases of this kind to restrain a breach of a negative clause in a contract for service is granted because, first, it is a negative clause; and secondly, because damages are not an adequate remedy, and it is considered right in cases of that kind to interfere directly by preventing a breach, which the person has bound himself not to make. Therefore, as there is no right to sue for damages, there is no right to an injunction." Furthermore, on the balance of convenience he thought it would be improper by an interim injunction to restrain the infants; because by doing so he might be depriving them of their means of support, and for the like reason he declined to restrain the defendant, Barnum, from employing them, and as he refused to restrain the infants or Barnum, he thought it would be idle to grant an injunction against the mother.

SEQUESTRATION—CONTEMPT—NON-PAYMENT OF MONEY BY TRUSTEE PURSUANT TO ORDER—DEATH OF CONTEMNOR—REVIVOR.

In *Pratt* v. *Inman*, 43 Chy.D., 175, Chitty, J., following *Hyde* v. *Greenhill*, 1 Dick, 106, held that where a sequestration had been granted against a trustee, for non-payment of money into Court pursuant to order, and the sequestrators were subsequently authorized to sell certain sequestrated chattels, but before sale the contemnor died, that the sequestration was not determined by the death, but that the proceedings under the sequestration might be continued against the personal representatives of the deceased. In this case the trustee had died insolvent, and a creditor had brought an administration action in which a receiver had been appointed, and the receiver and administrator now applied to restrain the sale under the sequestration proceedings, but Chitty, J., refused the motion, and, by consent of the parties, the application was treated as the hearing of the action, and the action was dismissed with costs.

PARTIES—TRUSTEE REPRESENTING CESTUI QUE TRUST—FORECLOSURE ACTION—RULE ORD. XVI., R. 8, (ONT. RULE, 309).

In *Francis* v. *Harrison*, 43 Chy.D., 183, North, J., determined that in a foreclosure action, brought by a prior mortgagee against a subsequent mortgagee, when the latter is a trustee, and is bankrupt, he does not sufficiently represent his *cestui que trust*, and he declined to give judgment of foreclosure in the absence of the latter. The learned judge even doubted whether the trustee would sufficiently represent the *certui que trust*, even though he were solvent.

COMPROMISE OF ACTION—APPLICATION TO SET ASIDE—JURISDICTION.

In *Emeris* v. *Woodward*, 43 Chy.D., 185, the plaintiff attempted, upon motion, to obtain specific performance of an agreement of compromise, which had been come to in the course of the action, or to have the compromise set aside and be allowed to proceed with the action. This, North, J., was of opinion could not

be done, but that the plaintiff's proper course was to bring a new action. The cases of *Gilbert* v. *Endean*, 9 Chy.D., 259; *Pryer* v. *Gribble*, 10 Chy., 534, seem to show that this is the proper practice; although in *Scully* v. *Dundonald*, 8 Chy.D., 658, a motion to enforce a compromise was entertained. In the Ontario case of *Small* v. *Union Permanent Building Society*, 6 P.R., 206, Spragge, C., allowed a defendant, after a compromise had been agreed to, to put in an answer in the same suit, setting it up and claiming performance of it by way of cross relief, but this decision does not seem to be quite reconcilable with the later English cases.

Notes on Exchanges and Legal Scrap Book.

JOINT TENANCY.—The essentials of a joint tenancy are unity of possession, unity of interest, unity of title, and unity of time of commencement of such title. Therefore, it appears that an attempt to vest the joint tenancy in a corporation and an individual fails, for the reason that the two grantees take in different capacities; the grant to a corporation is a grant to a corporation and its successors; the grant to an individual is a grant to him and his heirs, and those two estates cannot be blended together, as is absolutely necessary in the case of a joint tenancy; further, there cannot be a right of survivorship, which is indispensable to the creation of a joint tenancy (Co.Litt., 190*a*). In an action tried last week (*The Law Guarantee and Trust Society (Lim.)* v. *The Bank of England*) the plaintiff's counsel stigmatised these rules as obsolete and musty. Now, it appears to us that such first principles of the common law should be regarded with the strictest conservatism. They are the real guides to a "level consideration" of the legal aspect of cases, and any attempts to set them aside or disregard them are subversive of precedent and tend to lead to complications in the future, though such may not seem apparent or probable in the present. The judgment of Mr. Justice Mathew in the above case is a forcible exposition of the manner in which the principles of law should be upheld.—*Law Journal.*

THE LATE SIR HENRY MANISTY.—*The Law Journal* in an obituary notice of Mr. Justice Manisty, says: "The history of the life of Justice Manisty has the not very common features that he was in turn solicitor, barrister, and judge. It has been said that he did not come to the bar through the usual avenues. No doubt, at the time when he was called, it was not usual for an attorney or solicitor to be called to the bar, but in these days a solicitor of five years' standing may be called to the bar, without keeping any terms, upon passing the examination for admission to an Inn of Court. Even this slight barrier can be overcome on the certificate of two members of the council of the Incorporated Law Society that he is a fit and proper person to be called to the bar. The reason why Mr. Manisty, who in 1847 had for twelve years prospered as a solicitor, entered his name as a student at Gray's Inn, it is said, was that he wished as a barrister to win a case which he had lost as a solicitor. Three years afterwards he was called to the bar. As a junior he had a large practice in Westminster Hall and on

the Northern Circuit, in the class of cases usually called heavy commercial cases. His acuteness in detecting the real points of his case and his energy in enforcing them, with the store of learning which he had accumulated, brought him success. His fame at this period of his career is commemorated in a song which is still sung on the Northern Circuit, in which all the briefs were said to fall into Manisty's red bag. He rapidly, twelve years afterwards, obtained a silk gown in 1857, and although he did not become the leader of the Northern Circuit, except, perhaps, in the sense that he was senior Queen's Counsel, he held his own on circuit and in Westminster Hall in cases requiring careful treatment of knowledge of the law or a knowledge of the place where to find it, which is almost equally good, and the power of putting the point and driving it home on the bench. It has been said that he had no humour; but there is a tale told of the judge that some time ago he consulted an eminent physician on the state of his health. When questioned as to his diet, he replied that he drank a good part of a bottle of port a day. The physician said, "That will not do; we must knock off that." The judge complied for a fortnight, and came back to say that he was no better and rather worse. The physician suggested that perhaps after all the change of habit had done more harm than good and advised him to return to his usual habit. Whereupon the judge said, "That is all very well; but how about the arrears?" The physician shook his head at this judicial devotion to clearing his list, but it is not impossible that the second prescription helped the judge to do what is the duty of every good judge—"keep down the arrears." The *Law Times* on the same subject, in reply to an article in the *Times*, makes a vigorous defence of those who have entered the profession without taking a University course.

REPORTING—THE MAKING OF HEAD-NOTES.—Judge Seymour D. Thompson has uttered a vigorous malediction in the current *Green Bag* against many minor errors and deficiencies in law reporting. We assent to every one of his criticisms. Especially do we join with the writer in his denunciation of the use of "*ubi supra*," etc. It frequently entails considerable turning back. The Latin form is all that saves it from derision. Suppose the judge or reporter should say "up there." But he has not included the greatest and commonest fault, that is, the construction of the syllabus. There are very few reporters who know how to make a head-note. The English head-notes are generally very poor. In this country there are not above six or eight reporters who know how to do it, and at the head of these we have always put Mr. Chaney, of Michigan, and he never can be surpassed. The radical difficulty with most reporters is that they begin to make the syllabus before they have read the opinion through, and so they build up the syllabus as they go along, by the same process as the judge builds up his opinion, giving every step of the legal reasoning, with all the ifs and buts, all the principles and conclusions of law lying in and around about the point to be desired, and then at the conclusion they give, or attempt to give, the facts and state the point. It is not an exaggeration to say that three-quarters of most head-notes may usefully be struck out or skipped in reading. It is also not an exaggeration to say that many head-notes do not give the slightest hint of what

the case is about. We have in mind one State of whose reports this last assertion is very often true. The head-note ought explicitly or inferentially to disclose whether the action is on a note or for assault and battery or specific performance, but we can show head-notes that give not the faintest glimmering of the subject of the action. Now, the office of the head-note is not to furnish a digest of legal principles, nor a summary of the Judge's reasoning, but a disclosure of the facts and the legal conclusions. In other words, what busy men want when they glance at the head-note is the point, *the point*, THE POINT, and nothing but the point. But it is not always necessary to state the facts, for sometimes a statement of the legal conclusion involves the facts—is pregnant with them, so to speak. As for example: "A mechanics' lien does not attach to railroad rolling stock;" or, "The doctrine of lateral support does not apply as between owners of adjoining gold-mining claims where the process of working is to tear down the soil and wash it;" or, "One servant may maintain an action for an injury negligently inflicted on him by a co-servant." Such statements sufficiently imply the facts, and no useful purpose would be served by adding a long and detailed statement of the particular facts, as was very likely done in the original reports from which we derive these. But sometimes it is shorter and more comprehensible to state the facts, as for example: "A boy eight years old jumped upon the steps of a passenger railway car, and sat upon the platform to steal a ride. The conductor or brakeman kicked him off the car while the train was moving some ten miles an hour, and he was injured. Held, that a recovery against the railway company was warranted;" or, "A pedestrian on a city sidewalk, at night, intentionally turned off the street to take a by-path, and was injured by falling off the projecting end of a culvert. Held, that the city was not liable by reason of not having erected a railing at that point." Sometimes a statement of the facts would be necessarily long, while the conclusion of law is simple, and in such cases the conclusion alone may be given, as for example: "The same degree of care is required of a woman as of a man." It is undoubtedly easier to make a long head-note than a short one, and, beside, it helps fill up the book, but it is not good reporting. Another common fault Judge Thompson does not refer to. That is, repetition. The average reporter puts the whole statement of facts into a head-note, then into a statement proper, and, finally, you get it all sufficiently in the opinion. Some very ingenious gentlemen also put it into the catch-lines. This is no exaggeration; we can point out instances where the catch-lines are a sufficient head-note, even a better one than the professed syllabus. The office of the catch-line is to indicate the subject, not the decision. This repetition is an intolerable fault. There may be intellects so dull that they desire to be told of a thing thrice, but, if so, let them read it thrice in the opinion. This saves space and time at least. If it is necessary or discreet to state the facts substantially in the head-note, it may well be referred to in the preliminary statement, as "The head-note states the facts," —in many cases this is sufficient—or, "The head-note and opinion show the facts." There is no peculiar sacredness in a separate statement of facts, but reporters are such creatures of imitation and habit, and frequently so little sure

of themselves, that they go on repeating like a parrot. *Dicta* should never be put into a head-note. It is bad enough to put them into the opinions. No "semble" or "it seems" for us, if you please. In our multitude of decisions and modern theory of pleadings we have outlived the old-fashioned "scientific" style of reporting, which gave a statement of the pleadings; but there are a few reporters who still cling to it, and are years behind their Courts. We must say here that the worst statements are not infrequently those made by the Judges, who are in the attitude of a witness under cross-examination, who cannot answer a question directly, but must fortify himself as he goes along, lest his counsel shall not take care of him. Their head-notes, too, are never the best. We admire the discretion of the Indiana Judges, who refuse to obey a statute requiring them to make head-notes. One thing more: no Judge should ever interfere with a reporter's head-notes. If he is not sufficient for his office, turn him out and get one who is. But Judges never touch a head-note but to disfigure it, except in a few cases where it is already so bad that human ingenuity cannot make it worse. We say this from personal acquaintance with the proof-reading of Judges. They may tinker their opinions as they please, but they never should touch our head-notes or catch-lines. If they persisted we would discharge them.—*Albany Law Journal.*

LITHOGRAPHED SIGNATURES.—What a vast amount of trouble a few shillings can raise! From the County Court to the Court of Appeal has a solicitor fought for his contention (value 4s.) that his name lithographed on the particulars is sufficient signature to satisfy the County Court Rules. The Master of the Rolls said: "The point seems to me so contemptible that I can hardly bring my mind to consider it." But it turned out that, contemptible as the point was, there was enough consideration left in it to divide the opinion of the Court, and Lord Justice Fry, having stooped to the point, gave an opinion directly contrary to that of Lord Esher. Both judges thought it a subject upon which no two men could differ, and yet they differed. The Master of the Rolls had no doubt that such a form was perfectly good; and he characteristically summed up the opposite contention by saying: "Their argument comes to this, that it is not a signature because it is not a signature." On the other hand, Lord Justice Fry had just as little doubt that as a signature the lithographed form was bad. Unfortunately, Lord Justice Bowen was not present to settle the dispute. After the judgments there arose a doubt, and another diverting disagreement between their lordships, as to the effect of the judgments ot the Courts. If the opinion of the Master of the Rolls, as the senior judge, prevailed, as is the case in the Divisional Courts, then his lordship's judgment would supersede those of no less than three judges of the High Court, including the Lord Chief Justice. Whereas, if Lord Justice Fry's judgment was to be accepted as the result of the appeal, being the same as that in the Divisional Court, his lordship's judgment would override that of a senior Judge in his own Court. Eventually the point was left to be inquired into, which, in the face of the incessant and unyielding difference of opinion throughout the case, sounded like an intimation that their lordships were "going to have it outside."—*Pump Court.*

DIARY FOR MARCH.

1. Sat.....St. David.
2. Sun.....*Second Sunday in Lent.*
3. Mon.....Serfdom abolished in Russia, 1863.
4. Tues ...Court of Appeal Sits. General Sessions and County Court Sittings for trial in York.
5. Wed.....York changed to Toronto, 1834.
9. Sun.....*Third Sunday in Lent.*
10. Mon.....Prince of Wales married, 1863.
13. Thu.....Lord Mansfield born, 1704.
16. Sun.....*Fourth Sunday in Lent.*
17. Mon.....St. Patrick's Day.
18. Tues ...Arch. McLean, 8th C.J. of Q.B., 1862. Princess Louise born, 1848.
23. Sun.....*Fifth Sunday in Lent.*
26. Wed.....Bank of England incorporated 1694.
28. Fri .....Canada ceded to France 1632.
30. Sun.....*Palm Sunday.* B.N.A. Act assented to 1867. Reformation in England began 1534.
31. Mon.....Slave Trade abolished by Britain 1807.

Early Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE.

Common Pleas Division.

GALT, C.J.] [Oct. 26, 1889.

DAWSON *v.* SAULT STE. MARIE.

High schools—Incorporated town in judicial district—Right to appoint high school board, and erect school—Necessity of appointment by by-law—Sufficiency of—Proof of ownership of land—Aprropriation of money.

On a motion to continue an injunction to restrain the corporation of S. in the judicial district of Algoma, from paying over to the High School Board of said town, and the said board from receiving the sum of $15,000, raised by by-law of said town for acquiring a site and erecting a high school thereon,

Held, that under the provisions of ss. 4 and 10 of R.S.O., c. 226, taken in connection with s. 1 of 50 Vict., c. 64 (O) incorporating said town, the corporation were authorized to appoint a high school board therefor, and to pass the by-law for the erection of said school; and that the consent of the Lieutenant-Governor, provided by s. 8, was not required, as this was not an additional high school.

Held, also, that the appointment of the board must be by by-law, but a by-law therefor passed after the motion was made but before the hearing thereof was sufficient.

The Court refused to entertain an objection that the board were about to build the schoo on land not acquired by them, for it would not be assumed that the money would be spent until the title to the land had been acquired; and also, it was not necessary to shew that specific portions of the $15,000 had been appropriated to the purchase of the land and the erection of the building.

Shepley for plaintiff.

Masten for defendants, the town of Sault Ste. Marie.

Douglas for defendants, the High School Board.

ARMOUR, C.J.] [Dec. 24, 1889.

MAXWELL *v.* SCARFE.

Creditors' Relief Act—Entry by sheriff of moneys received under execution—Forthwith, meaning of.

Held, that the word "forthwith" contained in s. 4 of the Creditors' Relief Act, R.S.O., c. 65, with reference to the entry of money levied under execution, under the circumstances under which it is used, and to the purposes and provisions of the statute, and abuses which different construction would give rise to, must receive a strict construction and means without any delay; but even if it should receive a free construction and be equivalent to "within a reasonable time," the sheriff did not in this make the entry within such time.

John Crerar for plaintiff.

Heyd for defendant.

ROSE, J.] [Nov. 16, 1889.

CAMERON *v.* CUSACK.

Sale to defeat creditors—Setting aside—Seduction—Exemplification of judgment.

C. knowing that a claim was to be made against him by W. C., for the seduction of his daughter, some six days before the writ issued therefor, arranged with his brother, who was aware of all the facts, to sell out to him his estate, receiving for himself $150, and to apply the balance in payment of his liabilities, but the intention was not to acknowledge or treat W. C.'s claim as a liability. W. C. proceeded with his action and recovered judgment.

Held, that W. C. was a creditor within the meaning of the statute; and the sale having been made with intent to defeat W. C.'s claim, the sale must be set aside.

Barling v. *Bishopp*, 29 Beav., 417, followed. *Ex parte Mercer*, 17 Q.B.D., 290, distinguished.

After the evidence had been taken the learned Judge reserved his decision and permitted written arguments to be put in, in which there was an objection that an exemplification of the judgment in the seduction action was not evidence herein. The daughter was present in Court and could have proved the cause of action. The learned judge was therefore of opinion that the objection was too late, but to prevent the question hereafter arising, leave was given to put in the evidence, the giving of judgment in the meantime suspended.

Glenn for the plaintiff.

Colin Macdougall for the defendant.

STREET, J.] [May 3, 1889.

CAMERON *v.* ROWELL.

Will—Estate—Meaning of real or personal estate—Limitation of action—Express trustee.

The word "estate" used in a will, even when associated with words relating to personal property, is sufficient to pass real estate, unless there is a clear intention from other parts of the will, or from the way the word is used in the particular part of the will, or in some other way it is shewn that it is restricted to personal estate.

J. E. D., under the will of his mother, became entitled, on attaining his majority, in 1873, to a legacy of one-half the unexpended estate comprised in the will. In 1877 he assigned all his interest therein, both real and personal, to J. C., and the latter's interest became vested in G. C.

Held, that under the terms of the will the word estate, being entirely applicable to personal estate, and inapplicable to real estate, it only applied to the former; and, therefore, G. C.'s claim, under J. E. D., was limited to the personal estate, and as to this he had no claim either, for as J. E. D.'s legacy was payable in 1873, and it appeared that no payment was then made, nor any acknowledgment since of any right thereto, nor had the fund been set apart for J. E. D. so as to constitute the executor an express trustee for him; the claim was barred by the statute.

Aytoun Finlay for plaintiff,

Beard, Q.C., for defendant.

STREET, J.] Nov. 9, 1889.

BROWN *v.* MCLEAN.

Mortgagee—Paying off prior mortgages and taking mortgage for advance—Neglect of solicitor in searching for execution—Effect of.

The plaintiff advanced the amount necessary to pay off two existing mortgages on certain land, taking a mortgage for his advance, the prior mortgages, at plaintiff's request, being discharged in the statutory form. The defendant, at the time, had a *fi. fa.* lands in the sheriff's hands, of which the plaintiff was ignorant, his solicitor having neglected to search in the sheriff's office.

Held, that the plaintiff was entitled to a declaration that to the extent of the advance to pay off the prior mortgages he was entitled to priority over the defendant's execution, for that the plaintiff advanced his money and had the prior mortgages discharged under the mistaken belief that he was obtaining a first charge, and that he was not disentitled to relief because, by using ordinary care, he might have discovered the mistake, the defendant not being prejudiced thereby.

W. Cassels, Q.C., and *Milligan* for the plaintiff.

Garrow, Q.C., for the defendant.

MACMAHON, J.] [Dec. 14, 1889.

STONEHOUSE *v.* LOVELACE.

Limitation, statute of—Possession, sufficiency of.

Under a verbal agreement made in 1871, between plaintiff and his father, the owner of a farm, the plaintiff was to enter into possession, work, and treat same as his own, the father promising to devise it to him by his will. The plaintiff, in pursuance of the agreement, entered into and continued in possession up to 1884, expending, as he said, a large sum of money in improvements and paying the taxes. The evidence however, shewed that the father never intended relinquishing his title to the land during his lifetime, his actions being such as to indicate that he deemed himself still the owner, namely, by mortgaging it, leasing it, etc., his intention being that the plaintiff should only own it when he received it as a devisee under his will; and the father having by his will devised the land to the plaintiff, the plaintiff accepted thereunder.

Held, that the plaintiff had not held by that, adverse to possession as enabled him to claim that his possession had ripened into a title.

Keffer v. *Keffer*, 27 C.P., 257, distinguished.

Fullerton for the plaintiff.

G. H. Watson for the defendant.

Div'l Ct.] [Nov. 28, 1889.

REGINA *v.* FERRIS.

Canada Temperance Act—Conviction—Costs of conveying to jail.

A conviction for a breach of the second part of the Canada Temperance Act imposed a fine of $100, and directed distress on non-payment of the fine, and in default of sufficient distress, imprisonment in the common jail for two months, unless the fine and costs, including the costs of commitment and conveying to jail, were sooner paid.

Held, there was no power under the Act to include the costs of commitment and conveying to jail, and the conviction was therefore bad and must be quashed. The reasoning in *Regina* v. *Tucker*, 16 O.R., 127, and *Regina* v. *Good*, 17 O.R., 725, followed.

V. Mackenzie, Q.C., for defendant.

T. D. Delamere for the Crown.

Div'l Ct.) [Dec. 12, 1889.

REGINA *v.* FREEMAN.

Criminal law—Selling property by lot or chance—R.S.C, c. 159, s. 2—Conviction, form of—R.S.C., c. 178, s. 87.

S. 2, of R.S.C., c. 159, prohibits the sale of "any lot, card, or ticket, or other means or device for selling or otherwise disposing of any property, real or personal, by lots, tickets, or any mode of chance whatsoever."

The complainant went to the defendant's place of business, and having been told by defendant that on certain spaces on two shelves there were cans of tea containing a gold watch, a diamond ring, $20 in money, he paid $1, and received a can of tea, which, containing an article of small value, he handed the can back, paid an additional fifty cents, and received another can, which also contained an article of small value; he handed this can back also, paid another fifty cents, and received another can, which also contained an article of small value. He then refused to pay any more money, and went away taking the third can and the article in it with him. On a complaint, laid by him before the police magistrate, the defendant was convicted in that he unlawfully did sell certain packages of tea, being the means of disposing of a gold watch, a diamond ring, $20 in money, by mode of chance against the form of the statute, etc.

Held, that the defendant came within the terms of said section 2, so as to be liable to conviction thereunder; and that it was unnecessary to consider the form of the conviction, for under s. 87 of R.S.C., c. 178, no conviction is to be invalid for any irregularity, informality, or insufficiency therein, so long as the Court or Judge is satisfied, as they were here, that an offence of the nature described has been committed, over which the justice had jurisdiction, and that the punishment is not in excess of that which can be legally imposed.

Lount, Q.C., and *Bigelow* for the defendant.

G. W. Badgerow and *Curry* for the Crown.

Div'l Ct.] [Dec. 21, 1889.

PAYNE *v.* MARSHALL.

Gift inter vivos—Sufficiency of.

The defendant, having in her possession a large sum of money which her husband had given her, went with him to the bank to deposit it, and was about to do so when, on a question arising as to the power of withdrawing it in case of the wife's illness, the money, at the bank agent's suggestion, was deposited in both their names, subject to the withdrawal by either of them; and it remained on deposit uninterfered with by the husband at the time of his death, which occurred some months after.

Held, that there was a good gift *inter vivos* to the wife.

G. T. Blackstock for the plaintiff.

Ball, Q.C., for the defendant.

Div'l Ct.] [Dec. 21, 1889.

REGINA *v.* BOYD.

Justice of the Peace—Conviction—Carts used for hire to be licensed under city by-law.

The defendant was convicted for breach of a by-law, passed under s. 436 of R.S.O., c. 184, which provided that no person should, after the passing thereof, without a license therefor, "keep or use for hire any carriage, truck, cart," etc. The defendant was the owner of wagons

and horses which, at the date complained of were employed in hauling coal and gas pipes for the gas company, for which defendant was paid by the hour or day. The defendant also engaged carts and horses which he hired out to haul earth, and which were so being used on the date complained of.

Held, that the defendant came within the terms of the by-law, and was therefore properly convicted thereunder.

W. N. Miller, Q.C., for the defendant.

Mowat for the City of Toronto.

Div'l Ct.] [Dec. 21, 1889.

REGINA *v.* RUNCHY.

Criminal law—Common Pleas Division—Jurisdiction in criminal matters—One or more Judges sitting in absence of others.

The jurisdiction to hear motions for orders in criminal matters vested in the Common Pleas Division of the High Court of Justice for Ontario is the original jurisdiction of the Court of Common Pleas prior to Confederation, and by virtue of s. 5 of C.S.U.C., c. 10, the Court may be holden by any one or more of the Judges thereof in the absence of the others.

On the return of an order *nisi* to quash a conviction, the Court was composed of two of the Judges thereof, the third Judge being absent attending to other pressing judicial work.

Held, that the Court was properly constituted to dispose of the order.

Marsh, Q.C., for the defendant.

Delamere, Q.C., for the Crown.

Div'l Ct.] [Dec. 21, 1889.

DOAN *v.* MICHIGAN CENTRAL RY.

Pleading—Defence of contributory negligence—Not guilty.

In an action against a railway company for damages sustained by the plaintiff, by the death of his father, by reason, as alleged, of the defendant's negligence in omitting to give the necessary warnings of the approach of their train at a railway crossing, the defendants pleaded "not guilty," and referred to the statutes incorporating the company, and to the C.S.C., c. 66, ss. 1 to 83 inclusive, and s. 131.

Held, that the plea was not a compliance with Rule 418; and also, that the defence of contributing negligence could not be set up under it, but must be specially pleaded.

G. T. Blackstock and *Crothers* for the plaintiff.

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

Div'l Ct.] [Dec. 21, 1889.

REGINA *v.* KING.

Constable—Acting under warrant of commitment—Protection of, when jurisdiction of magistrates over offence, and warrant valid on its face.

A warrant of commitment, issued by two justices of the peace, for non-payment of a fine and costs imposed on J. D., who had been indicted and found guilty of an offence under the Indian Act, directed the constables of the county of B. to take and deliver J. D. to the keeper of the common jail of the county, to be kept there for two months unless the fine and costs imposed, including the costs of conveying to the jail, should be sooner paid.

Held, that the justices having had jurisdiction over the offence, and the warrant being valid on its face, it afforded a complete protection to the constable executing it, notwithstanding that the awarding of the punishment may have been erroneous in directing imprisonment for non-payment of the fine and costs of conveying to jail, as not authorized by the said Act.

V. Mackenzie, Q.C., for the prisoner.

No one appeared for the Crown.

LIPSETT *v.* PERDUE.

Infant—Lease by, for benefit of—Avoidance of—Costs—Order for payment by infant.

An infant cannot, during infancy, avoid a lease made by him, reserving rent for his benefit.

Hartshorn v. *Early*, 19 C.P., 139, and *Stator* v. *Brady*, 14 I.R., C.L.R. 61, 342, followed.

The discretion given by Rule 170, as to costs, authorizes the imposition against the infant of the costs of an action to avoid such lease.

Lash, Q,C., for the plaintiff.

Moss, Q.C., for the defendant.

MACMAHON, J.] [Jan. 2.

WALTON *v.* HENRY.

Injunction—Concealment of fact—Setting aside—Damages—Debt—50 Vict., c. 23, s. 3 (O.)—O.J. Act—Counter-claim.

The defendant having distrained for rent in arrear, the plaintiff claimed that defendant was

indebted to him in damages for breach of the covenants of the lease and obtained *ex parte* an interim injunction restraining proceedings under the distress.

On its being shewn that in the statements made on which the injunction was granted, there was, if not misrepresentation, at least a concealment of an important fact as regards the alleged breach of one of the covenants, the injunction was dissolved with costs.

Semble, the injunction should not have been granted, as the plaintiff had a complete remedy in damages.

Semble, also, that the damages claimed by the plaintiff were not a "debt" within s. 3, of 50 Vict., c. 23 (O.), so as to constitute a set-off against the rent; and, although under the Ontario Judicature Act, they might possibly be the subject of counter-claim, they would not justify an injunction as against a distress levied as here.

The direction that the injunction was dissolved with costs, meant costs payable at the time.

Gordon Hunter for plaintiff.
E. D. Armour for defendant.

Chancery Division.

FERGUSON J.] [Feb. 11.

THE LINCOLN PAPER MILLS *v.* ST. CATHARINES & N. C. R. CO.

Railways and Railway Companies—Default in payment of compensation moneys—Rights of land-owners—Injunction—Order for possession.

Held, that where a Railway Co. had failed to pay the compensation awarded to land owners, in accordance with a judgment obtained for the same, although the Railway Co. had, pursuant to order of the court, entered into possession of the lands, and were operating their railway over them; the land owners were entitled to an order declaring them to have a vendor's lien on the land for the amount, with such provisions as were necessary to realize by means of a sale, but they were not entitled to an injunction restraining the Railway Co. from operating their railway on the lands, nor to an order for the delivery of possession.

McClive for plaintiffs.
Aylesworth for defendants.

Practice.

FALCONBRIDGE J.] [Feb. 28.

ROBB *v.* MURRAY.

Parties—Joint Contractors—Rule 324 (a).

Under an incomplete agreement with the plaintiff, the defendant and one R. went into possession of the plaintiff's shop, intending to carry on business as partners.

The agreement was never completed, the defendant and R. were put out of the shop, and the plaintiff brought this action to recover the amount received by the defendant from sales of goods while in possession of the shop.

The defendant asserted that the contract was a joint one on the part of himself and R., but the plaintiff and R. denied this.

Held, that an order under Rule 324 (a) compelling the plaintiff to add R. as a party defendant, in the character of a joint contractor, was under the circumstances a proper order.

Hoyles, Q.C., for plaintiff.
Shepley, for defendant.

MR. DALTON.] [Feb. 29.

PAYNE *v.* NEWBERRY.

Motion—Renewal of, where refused—Judgment under Rule 739.

Where the plaintiff's motion for judgment, under Rule 739, was dismissed because he had not observed the practice under the Rule 1251, of partly complying with an order upon him for security for costs by paying $50 into Court, and he subsequently paid the money in and renewed the application upon the same material:

Held, that the dismissal of his first application was no bar to the second one.

Semble, it would have been otherwise had the plaintiff failed in his first application by reason of defects in his material, and made a second one upon new material supplying the defects.

E. Taylour English for plaintiff.
Douglas Armour for defendant.

FIRST DIVISION COURT OF THE COUNTY OF CARLETON.

MOSGROVE, JJ.]

CHARLEBOIS *v.* WHITNEY.

Statute of Limitations—Effect of payment as a bar.

In an action in which the benefit of the

Statute of Limitations was claimed by the defendant, but a part payment within the six years was proved, it was contended on behalf of the defendant, following the article which appeared in THE CANADA LAW JOURNAL, Vol. 25, page 322, that under our Ontario Act, R.S.O., c. 123, a payment on account is not sufficient to stop the running of the statute.

Held, apart from the question of the effect of the statute, the effect of part payment as a bar to the Statute of Limitations must be taken as a matter of common law, and the rule that express statutory enactment is required to change the Common Law must apply.

Judgment for the plaintiff accordingly.

G. F. Henderson for plaintiff.

J. W. Ward for defendant.

Law Students' Department.

CALL.

Contracts—Evidence—Statutes.

Examiner—R. E. KINGSFORD.

1. A contract is stated to be void on grounds of "public policy." State the principles which are applied to a contract in order to ascertain whether or not the contract is void on that ground?

2. How far is evidence admissible to shew that the object of an alleged agreement was unlawful?

3. A. and B. are contracting parties. X. is the subject matter of a contract which is supposed by A. to exist, but which in truth does not exist, and is known by B. not to exist. What tests may be applied to this transaction in deciding upon its validity?

4. A. effects an insurance on the life of B. How far do false statements made by B. to the insurance company, concerning his own health, but not known by A. to be false, affect the contract?

5. What are the requisites for a sufficient acknowledgment to take a debt out of the operation of the Statute of Limitations?

6. To what extent, and under what restrictions, is forbearance to sue a good consideration?

7. How far does seven years' absence furnish satisfactory presumption of death?

8. How far are the Judge's notes of a trial evidence of what took place there? Why?

9. In a private action for a public nuisance, what must the plaintiff prove?

10. On a contract of sale state the obligations of the buyer and seller respectively, and state the requisites of proof in an action (1) for not accepting goods; (2) for not delivering goods.

Equity.

Examiner—P. H. DRAYTON.

1. A., who is a broker in Toronto, owns some stock. B., a customer of his, wishes to make an investment. On the faith of A.'s statement, recommending the stock as that of a customer's, he purchases the same. On discovering the true state of affairs he brings an action to set aside the contract. Should he succeed? Reasons for your answer.

2. A., B., and C. are sureties to D., in the sum of $9,000, for the due performance of a contract by E., who fails to carry out his contract. A. is sued by D., and judgment given against him for $9,000. In the meantime C. has died. State A.'s rights as against his co-sureties. Reasons for your answer.

3. A., who is a farmer by occupation, purchases from B. 100 acres of land, which he goes to see personally. The chief inducement to purchase the property is the representat on by B. that there is on it a valuable quarry, which is exposed, the stone of which is suitable for a certain purpose, and therefore valuable; it turns out that the stone is quite unfitted for such purpose, and comparatively of little value. On this state of facts A. seeks to have contract rescinded. Give your opinion, with reasons whether he should succeed, or not.

4. A., a trustee, with funds in his hands for investment, consults with his solicitor as to investing the same. The solicitor states he knows of an investment on a farm of $5,000, and states, as his opinion, that the farm is worth $8,000. The investment is made; the interest is not paid, and, on proceedings being taken to realize, only $4,000 is made. State the position of the trustee, with reasons for your answer.

5. A., the wife of B., brings against him an action for alimony. At what stage of the proceedings can she obtain interim alimony? And how, if in any way, can B. avoid the costs on application for the same?

6. A., who has been for years a confirmed drunkard, enters, when sober, into a contract

with B. for the sale of his farm to him. The price is not a good one, and A.'s friends advise him to bring an action to set the contract aside, which he does, raising, as a reason, that his intellect has become so impaired with drink that he was wanting in contractual power. Should he succeed? Reasons.

7. Distinguish between a mortgage and a pledge of personal property.

8. State fully the rights of a mortgagee to distrain upon the mortgaged premises for arrears of interest as against creditors.

9. A. grants a lease of certain lands to B., he afterwards mortgages them in fee to C. The interest becomes in default, and the property is sold under sale, proceedings of which B. had no notice. What is B.'s position as regards his rights under his lease?

10. Land is by will directed to be sold, and proceeds divided between A. and B. Can A. elect to take his share in land? Reasons.

Real Property.

Examiner—P. H. DRAYTON.

1. A., who is the owner of Blackacre, agrees verbally with B. to sell the same; he writes his solicitor, giving him particulars of the agreement with instructions to carry it out. A. writes B. that the title deeds of his property are at his solicitor's office, where they may be inspected. Nothing more is done. A. subsequently repudiates the contract. Can B. compel him to carry it out?

2. What was the reason and the effect of the statute declaring that corporations should be deemed to be capable of taking and conveying land by deed of bargain and sale?

3. A. dies intestate, leaving real estate, and infant children. B. is appointed administrator. He enters into a contract with a client of yours for the sale to him of a portion of the same. Presuming the title in A. to be good, what formalities would you require to be carried out before accepting the title from the administrator?

4. What recent statutory provision (if any) has been passed touching the husband's interest as tenant by the curtesy?

5. A. registers an agreement by B. to sell him Whiteacre. Owing to outstanding encumbrances, B. is unable to give possession, but on completion claims that A. is bound to pay interest from date of registration of agreement. How far is B. right? Why?

6. A., the owner of a valuable store in Toronto, in the course of negotiations with B. for its sale to him, states that the premises are let to a most desirable tenant, a contract is entered into, but before completion the tenant makes an assignment. B. refuses to carry out the contract, and A. brings an action for specific performance, which B. defends. Who should succeed? and why?

7. Distinguish between the right to vary a written agreement for the sale of lands by parol, and the right to rescind the same by parol.

8. A devise to A., and the heirs of her body, on condition that she marry and have issue male, by B. Construe this?

9. State the general law regulating the position of the signature of a testator in his will.

10. A. dies intestate without lawful descendants, leaving real estate, and leaving a father and mother him surviving. To whom will the inheritance go? Reasons for your answer.

Contracts—Evidence—Statutes.

HONOURS.

Examiner—R. E. KINGSFORD.

1. A. makes an agreement with B., the execution of which would involve an unlawful act on B.'s part. What is the effect?

2. A. assumes to enter into a contract for certain persons who are in existence, but who are incapable of contracting. What is the effect?

3. A. and B. come to an agreement, and one of the terms is that such agreement shall be embodied in a formal contract. The formal contracted is not executed. How far may the agreement be enforced?

4. An agreement is entered into in Michigan between two American citizens with a covenant in restraint of trade unlimited as to space. The party intended to be restrained commences the business in Ontario. How far will our Courts give effect to the covenant? Why?

5. Where a witness refuses to answer a question put to him on the ground that his answer might criminate himself, what are the rules as to his being compelled to answer?

6. What distinction is there between the Statute of Limitations and the Statute of Frauds, as to pleading same respectively as a defence?

7. A., in London, England, sells goods to B., in Toronto. At B.'s request these goods are shipped via Allan line and G.T.R. to Toronto. On arrival in Montreal they are warehoused in the premises of C., who is B.'s agent in Montreal. While there waiting transportation, B. becomes insolvent. A. desires to exert his right of stoppage in transitu. Can he legally do so? Why?

8. What difference is there as to the onus of proving the existence or non-existence of reasonable and probable cause in an action for false imprisonment from that in an action for malicious prosecution?

9. S. covenants under seal, in 1875, with B., for immediate payment of $1,000 on B.'s account. S. dies without paying the amount, and A., the executor of S., leaves S.'s estate, which is in bank stock, unconverted. The bank fails, and A. is sued by B.'s executors (B. having meanwhile also died) in 1887, for the amount of S.'s covenant. Is A. liable? Why?

10. On a conviction for selling liquor without a license, the only evidence given was that the party sold the liquor. The conviction is objected to on the ground that no proof was offered of the want of license. How far should the objection hold good? Why?

Broom—Harris—Blackstone.

HONOURS.

Examiner—R. E. KINGSFORD.

1. A. agrees in writing to enter into B.'s service at a salary payable yearly. A. on leaving B.'s service sues B., alleging a verbal agreement that the salary should be paid quarterly. How far can he legally claim under the last mentioned contract? Why?

2. B., an executor, requests A. to forbear suing him in respect of a debt due by the testator, and promises to pay interest thereon. What would have to be shown to make him liable as executor? Is he liable personally? Why?

3. Explain fully the liability of a Justice of the Peace in a well laid action for false imprisonment.

4. What is the liability of a railway company in the carriage of (1) passengers, (2) freight, (3) luggage?

5. Where the real principal in a contract for the purchase of goods is unknown at the time of contracting, what are the rights and liabilities of that principal when disclosed?

6. When may a vendee return a warranted chattel?

7. How far is the doctrine of estoppel applicable to the acceptor of a bill?

8. What was the common law of treason? How affected by statute?

9. Within what legal limitations have workmen the right to combine in order to determine with their employers the terms only on which they will consent to work for them?

10. To what extent (if any) is there a right of re-hearing a criminal case? What is the procedure?

Real Property.

HONOURS.

Examiner—P. H. DRAYTON.

1. A., a purchaser of a farm, before the time appointed for the completion of contract of sale, went into possession. A. sowed some of the land. He afterwards abandoned the possession entirely, in consequence of objections to the title not being removed. It was contended that he had thereby waived his right to enquiry as to title. Should such contention succeed?

2. A., the owner of Blackacre, mortgages the same. He afterwards marries, and contracts to sell the land to B. He tenders a deed to him without bar of dower, which B. declines to accept, insisting that the wife is bound to join to bar her dower. Is he right in this contention?

3. In searching the title to a property you find a deed executed by a married woman in 1870, but no certificate of examination. Would you be safe in accepting the title? Explain.

4. What is the effect in conditions of sale of the condition that "the vendor will not be bound to produce any documents not in his possession"?

5. A. contracts with B. to sell him a house and lot in Toronto. The property is insured for $5,000, and before completion is burnt. On whom will the loss fall, and what rights, if any, would the insurance company have in respect of the purchase money?

6. A., who is intending to marry B., wrote a paper commencing thus: In the event of a marriage between the undermentioned parties the following conditions as a basis for a marriage settlement are mutually agreed to. The

memorandum was signed by neither party. State the effect of this.

A devise to A. for life, and from and after his decease to B., if he shall have obtained the age of twenty-one years, or as soon as he shall arrive at that age. Construe this.

8. What are the conditions precedent to vendor's right of rescission in a contract for sale of land?

9. Illustrate the principle *falsa demonstratio non nocet.* Distinguish between patent and latent ambiguity in a will as to the reception of evidence, and give examples.

10. A. owns a farm in the township of York. His wife, B., is a lunatic confined in the Toronto asylum. He has contracted to sell the farm free of dower. In what way can he do so?

Equity.

HONOURS.

Examiner—P. H. DRAYTON.

1. An executor receives money which is supposed to be due from a debtor to the estate, and pays it out to creditors. It afterwards turns out that the debt which it was supposed was due to the estate had previously been paid. The supposed debtor brings an action against the executors to recover the money and the executor brings one against the creditors. What are the rights of the parties? Give reasons for your answer.

2. In the event of partial failure of the purposes for which conversion is directed, what distinction is there (if any) with regard to the character in which the object of conversion reverts between the case of conversion directed by deed *inter vivos*? Do you know of any legislation which might be held to affect the doctrine of conversion?

3. A. and B. are respectively first and second mortgagees of Blackacre. A. offers the property for sale under the power of sale in his mortgage. B. buys the property at the sale. The owner of the equity of redemption seeks to redeem. B. defends, claiming an absolute title. Who should succeed in the action? and why?

4. A., who thinks himself dying, hands his watch to B. to give to C. B. does not do so until after A.'s death. Is this a good *donatio mortis causa*? If so, why? If not, why?

5. A. is about to intermarry with a woman, B. He is possessed of a house and lot in Toronto, but at the time of his marriage, owing to difficulties in his business, is on the eve of insolvency. He settles his house and lot on B., who becomes his wife. The creditors, subsequent to his becoming insolvent and making an assignment, seek to have the settlement set aside. Can they succeed? Explain.

6. Illustrate the doctrine of appropriation of payments in the case of a partnership who have a running account with a bank, where one of the partners retires leaving a balance due by the firm to the bank, and the new firm continues dealing with said bank and paying in moneys, but afterwards becomes insolvent.

7. In an advertisement of an intended sale of land in lots, it was stated, "The soil is well adapted for gardening purposes, and a considerable portion of the property is covered with a fine growth of pine and oak which will yield a large quantity of cordwood, and the remainder is covered with an ornamental second growth of various trees." A purchaser at the sale, which took place on the grounds, set up as a defence to a suit for specific performance, that the soil was not such as was represented, that the soil was unfit for gardening purposes, and the trees not as described in the advertisement. Should he succeed in his defence? Explain.

8. A., by his will, devised "all the remainder of my real estate, being my 100 acre farm in the township of York, and my 100 acre farm in the township of Etobicoke" to B. He subsequently purchased several lots in Toronto; will they pass to B.? Explain.

9. A. becomes surety for B., a bank clerk in the employ of a bank in Toronto. B. is subsequently appointed local manager of a branch at Hamilton; he there embezzles some of the bank funds, and the bank seeks to make A. liable therefor. Can it succeed? Explain.

10. The directors of a bank issue a statement of the bank affairs to their shareholders which is in fact garbled, not representing the true state of affairs. A. sees this, and on the faith of it takes shares. What are his rights, supposing he suffers a loss on his shares?

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(COMPILED FOR THE CANADA LAW JOURNAL.)

Latest additions:

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Warvelle on Abstract of Title, Chicago, 1883.
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Weir's Quebec Municipal Code, Montreal, 1889.

Appointments to Office.

COUNTY JUDGE.

Elgin.

Charles Oakes Zaccheus Ermatinger, of St. Thomas, Junior Judge of the County Court of the County of Elgin, to be a Local Judge of the High Court of Justice.

POLICE MAGISTRATE.

Simcoe.

William John Frame, of Collingwood, to be Police Magistrate in and for the Town of Collingwood

ASSOCIATE CORONER.

Simcoe.

Charles Marcus Sandford, of Brighton, Doctor of Medicine, to be an Associate Coroner within and for the United Counties of Northumberland and Durham.

DIVISION COURT CLERKS

Haldimand.

Elgin Birdsall, of Canboro', to be Clerk of the Fifth Division Court of the said County of Haldimand, *vice* Seth K. Smith, resigned.

Middlesex

Robert J. McNamee, of Biddulph, to be Clerk of the Third Division Court of the County of Middlesex, *vice* John Flannigan, left the country

Walter R. Westlake, of Arva, to be Clerk of the Eighth Division Court of the County of Middlesex, *vice* Bamlet E. Sifton, deceased.

Peel.

Samuel Jefferson, of Albion, to be Clerk of the Fourth Division Court of the County of Peel, *vice* F. W. Bolton, deceased

Welland.

William Gearin, of Thorold, to be Clerk of the Fifth Division Court of the County of Welland, *vice* John J. Gearin, deceased.

BAILIFF

Haliburton.

Adam Graham, of Glamorgan, to be Bailiff of the Third Division Court of the Provisional County of Haliburton, *vice* John Dovell, resigned.

Ontario.

James D. Paxton, of Port Perry, to be Bailiff of the Third Division Court of the County of Ontario (re-appointed).

York.

Amos Hughes Wilson, of Newmarket, to be Bailiff of the Fourth Division Court of the County of York.