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DIARY FOR APRIL.

3. Sun....5th Sunday in Lent.
4. Mon...County Court Terms begin, County Court sitt. without jury (ex. York) begin.
5. Tues...Canada discovered, 1499.
8. Fri.....Supreme Court Act assented to, 1875.
9. Sat.....County Court Terms end.
10. Sun.....6th Sunday in Lent.
17. Sun.....Easter Sunday.
22. Fri.....Beaconsfield Ministry resigned.
23. Sat....St. George's Day.
24. Sun....Low Sunday.
25. Mon...St. Mark
26. Tues....2nd Intermediate Exam.
27. Wed...2nd Intermediate Exam.
28. Thurs..1st Intermediate Exam.
29. Fri....1st Intermediate Exam.

TORONTO, APRIL 1st, 1881.

OWING to the number of cases in the "Notes of Cases," we are compelled to hold over much interesting matter until next issue.

William Wilkinson, Jr., Q. C., has been appointed Judge of the County Court for the Counties of Northumberland and Gloucester, and Restigouche, in the room of Hon. Edward Williston, resigned.

The vacancies on the Ontario Bench, actual and possible, have not yet been filled; this cannot, however, long continue. Various suggestions have been made. We would add another which we believe represents the general feeling of the Bar. It is that Mr. Dalton should be promoted to a seat on the Superior Court Bench—a sound lawyer with a judicial turn of mind, enlarged and liberal views, sound common sense, and great experience, he would seem peculiarly fitted for assisting in the working out and development of our new system of practice.

ATTENTION is called to the general rule of the Supreme Court of Canada to be found elsewhere.

Under its provisions the delays for taking the several steps required to mature an appeal for hearing are considerably shortened. The case is to be filed 20 clear days before the first day of next session, the notice of hearing given and factums filed at least 15 days before, and the appeal inscribed at least 14 days before. For instance, no appeal can be heard at the session beginning on the 3rd May next, unless the *case* be filed not later than the 12th April, notice of hearing given and factums deposited not later than the 16th of April, and the appeal duly inscribed on the 18th of April. The object of requiring the *case* to be filed so many days before the factums are deposited is to give an opportunity of referring to line and page of the printed *case* in the factums, when such reference is considered desirable. In some factums considerable portions of the evidence have been printed. This the registrar, we understand, has refused to tax when a mere reference to line and page would have been sufficient.

It will be as well to bear in mind that the obligation still rests upon an appellant, under rule 5, of filing his *case* within one month after the security required by the Act shall have been allowed, and that a *case* is not *filed* until the fee of $10 required on entering every appeal be paid to the registrar.

The new rule does not apply to Election Appeals or Criminal Appeals.

In framing the rule the judges have shewn every desire to consider the convenience of the Bar, and we believe the amendments will meet with general approval.

LEGAL LEGISLATION.

In the Dominion Legislature the Statute book, so far as the practising lawyer is concerned, is remarkable for what is *not* there, for which we tender our hearty thanks. The only acts worth referring to at present are, one "to amend the Insolvent Act of 1875 and amending Acts," which repeals sections 15 and 15 of 40 Vict., cap. 41, and revives sec. 58 of the act of 1875, thus bringing back the law of that date, as to the circumstances under which an insolvent can obtain his discharge; also a carefully drawn act establishing the rule of decision in the North-West Territories.

In the Local Legislature the year 1881 will be remarkable for the most important act that has been passed (so far as we are concerned) since the Common Law Procedure Act. Several other important changes in the law have also been made, which it is hardly worth dilating upon, as the acts as passed are given *in extenso* in a supplement to the *Ontario Gazette*, already in hands of most of our readers. These statutes may be shortly summarised as—Acts respecting Interpleader; to regulate the fees of Deputy Clerks of the Crown, and County Court cases, in certain cases, &c; to make provision for the administration of justice in the new county of Dufferin; to amend the Registry Act as to the execution of discharges of mortgages, and to provide further for the release of dower by married women; in reference to chattel mortgages; respecting the appointment of guardians for infants, and lastly, an act to extend the powers of the Law Society of Upper Canada.

ELECTION OF BENCHERS.

The quinquennial disturbance of the serene atmosphere of Osgoode Hall is again upon us. The principle involved in the present mode of selecting Benchers was not originally to our taste, but it cannot be said that it has made any marked difference in the *personnel* of the Bench. There has been much discussion as to those who should be elected on this occasion, the lay press has been filled with letters on the same subject, and various lists have been distributed. A great deal also has been said and written about making an election from the Junior Bar, as such. It is a pity that any issue of this sort should have been raised. The real evil has, we fear, been to a great extent lost sight of in a useless wrangle about the words Senior and Junior. It would be as absurd, (or even more so, as "vidth give visdom,") to select a man simply because he is a junior as it would be to do so because he is a senior. The evil we speak of, and one which we have never ceased urging, is the claims of the profession to protection from an army of unprofessional invaders, both in the matter of Division Court business and as to conveyancing: and we again repeat that these are the main points to which attention should have been directed. We trust that those who wish to see justice done in the premises are keeping this matter prominently in view without reference to class distinctions.

We are glad to know that though late in their official life, and after much urging through our columns and from individual sufferers, the present Benchers awoke to the necessities of the case, and passed a resolution from which we hope to see good fruit. This step, however, must be followed up with vigor. The profession is not as a class alive to its own interests. We move also slowly, but we think *surely* as well; and when once we begin to realize the enormous power we can wield, we shall probably see that things are put right. In the meantime we have great faith in the good sense of the profession, and have good hopes that the selection now to be made will show that an honest independent vote has been given, to result in a choice free from sectional feeling, false sentiment, or the curse of party politics

The following is a list of the present Benchers: H. C. R. Becher, Q. C; T. M. Benson; James Bethune, Q.C.; B. M. Britton, Q. C.; Hector Cameron, Q. C.; John Crickmore; Thos. Ferguson, Q. C.; A. S. Hardy, Q. C.; J. A. Henderson, Q. C.; John Hoskin, Q. C.; Æ. Irving, Q.C.; J. K. Kerr, Q. C.; Robert Lees, Q. C.; Andrew Lemon, Q.C.; D'Alton McCarthy, Q.C.; F. MacKelcan, Q. C.; D. McMichael, Q.C.; James Maclennan, Q. C.; E. Martin, Q.C.; W. R. Meredith, Q. C.; T. B. Pardee, Q.C.; D. B. Read, Q. C.; S. Richards, Q. C.; Thomas Robertson, Q.C.; L. W. Smith, D. C. L.; Alex. Leith, Q. C.; B. B. Osler, Q.C.; James Beaty, Q.C.; and Chas. Moss.

The ballot papers are to be sent in not later than the 6th April.

MORTGAGEE IN POSSESSION.

Readers of the LAW JOURNAL may remember our notice of a touching epitaph commemorative of the woes of a mortgagee in possession, who preferred "the grave and death's dark gate" to a longer continuance of his unhappy estate. Those who still survive under so heavy a burden may find some slight consolation in a recent decision of the Master of the Rolls in *The Union Bank of London* v. *Ingram* reported in the January number of the *Law Journal* Reports. In that case the plaintiffs, who were second mortgagees, claimed redemption against the defendant, a mortgagee in possession, in whose mortgage there was a proviso for the acceptance of a lower rate of interest in the event of punctual payment by the mortgagor. Default having been made, the mortgagee entered into possession and received punctually rents equal in amount to the higher rate of interest. It was claimed by the plaintiffs on the authority of *Stains* v. *Banks*, 9 Jur. (N. S.), 1049, that in taking the account the defendant should only be allowed interest at the lower rate. Fortunately for the defendant it happened that Sir Geo. Jessel had been engaged as counsel in *Stains* v. *Banks*, and had an impression that the reported decision had been over-ruled. A reference to the registrar's book shewed that the memory of the learned judge was not at fault, and that in addition to his other calamities, the mortgagee in possession had false witness borne against him by the printed report. The Master of the Roll, in following the final decision in *Stains* v. *Banks*, expressed his entire concurrence with its principle, considering, to quote the language of the English *Law Journal*, "that it would be unjust and a mockery, to treat a mortgagee, who has been forced to undertake all the responsibilities and dangers of an entry into possession, as if he were a lender who had received the interest on his loan punctually to the very day."

DIVISION COURT JURISDICTION.

[COMMUNICATED.]

Small fear there is of lawyers starving so long as we have a body of men in the halls of our Legislature who are burning with desire to immortalize themselves by making changes in laws as to which very few of them understand either the old law, the mischief or the remedy—or, in fact, whether there is a mischief which requires a remedy. Division Courts being courts for the people, are peculiarly subject to this "worrying" process. The doctor has then to be called in in the shape of a judge, aided by a large staff of nurses in the shape of lawyers, and the consequence often is that the last state of the litigant public is worse than the first.

The enactment that has been most before the profession lately in the way spoken of is sub-section 3 of section 2 of the Act of 1880. It provides that Division Courts shall have jurisdiction in "all claims for the recovery of a debt or money demand, the amount or balance of which does not exceed

$200, and the amount, or original amount, of the claim is ascertained by the signature of the defendant," &c. The construction to be placed upon these words comes up in a variety of ways. One is as to the taxation of costs.

Some clerks of County Courts tax plaintiffs full costs in cases where the debt claimed exceeds $100 and does not exceed $200 on bills of exchange and promissory notes where the amount is not *all* ascertained by the signature of defendant. Others refuse to do so if there is only a claim for interest, postage, cost of protest, &c.

The decision given last year (*Elliott* v. *Gray*) by the learned Senior Judge of York, under this sub-section (the case is referred to at length in O'Brien's D. C. Manual, page 14,) has been acted on by both judges and clerks in several of the outer counties, whilst there is a conflict of decision in others, so that before a suit is brought in any county involving questions under it, it seems to be necessary to inquire how the sub-section is there interpreted.

Under the decisions hereinafter referred to we think there is sufficient analogy between previously existing statutes, and the present section to make the line of duty to the taxing officer or to the judge in granting an order for costs, tolerably certain. The words, "a debt or money demand, the amount or balance of which does not exceed $200 and the amount or original claim as ascertained by the signature of the defendant," &c., appear, in the light of decided cases, to be so obvious in their import, that there is room for little doubt on the subject. We are not aware that up to the present time any adverse or authoritative decision by either of the Superior Courts, has been given on the question which was involved in *Elliott* v. *Gray*, or on other points arising under the sub-section named. Claims are frequently forwarded to or placed in the hands of Clerks of Division Courts for suit, which do not seem to come within the extended jurisdiction of those Courts, and on the authority of many decided cases in England and this Province are not subjects for their cognizance. We are aware that claims on open accounts have been put in suit in which for want of the disputing note by the defendant, Division Court Clerks have taken upon themselves to sign judgment although they have been for sums exceeding $100, and $200; although there have been no signatures of the defendants shewing that the amounts were ascertained and sanctioned by them. These are so plainly and obviously illegal that it were idle to speak of them, as they have grown out of the mixed ignorance and rapacity of those (few in number we are happy to think) who would do anything to get fees and make costs for themselves.

There is, however, another class of cases wherein as to part of the plaintiff's claim, the sum has been ascertained by the signature of the defendant to an amount exceeding $100, and not exceeding $200, and charges have been added—for postage, expenses of protest, for noting—and we have even seen in one case a claim for "Attorneys Charges." It is questionable with us under the decision we have read, whether any of these charges can be legally claimed as accretions or as accessary to the principal debt demanded; — it is even doubtful whether interest can be added to the debt "ascertained by the signature of the defendant" where the payment of interest is not part of the contract itself. Of the right to add Attorney's charges we make no doubt whatever; there is no sanction for any such under this head. Some even doubt whether a note for a sum over $100 payable with interest can be recovered in the Division Court if interest is demanded. We propose, therefore, to lay before our readers an epitome of some of the decided cases bearing on the question, which we think may be useful to our readers at the present time.

Postages and expenses of noting and notarial charges form no part of the debt, but

may be recovered as damages on the dishonor of a bill or non-payment of a promissory note. It has been usual to allow these in the Courts of Record, in computing principal and interest on a promissory note or bill of exchange or instrument set forth in the pleadings or special endorsement of the summons. Formerly they were only allowed where they had been specially laid in the form of a claim for damages; but it will be admitted that this stands upon its own peculiar ground, as accretions, or as accessory to the principal cause of action; they are, in fact, no part of the debt, because, if the debt or principal sum were paid after it became due, and the payee of a note or obligee of a bond were to receive the principal debt after it had become payable, he could not maintain an action afterwards *on the instrument* for the interest or charges; for, in such a case, the defendant might plead *solvit post diem*, and the plaintiff would be barred from recovering the interest, he having received the principal; it would not, as we have said, *form part of the debt*, but merely entitle the plaintiff to a special claim for damages (see *Dixon* v. *Parker* 1 Esp. 110, *Kendrick v. Lomax* 2 Cr. & J. 405, and *Rogers* v. *Hunt* 10 Ex. 474). In the case last named the summons was specially endorsed for £31 8s. 9d., claimed as due for balance of principal, interest, expenses of noting and commission due on a bill of exchange for £75 9s. accepted by defendant. Judgment by default was signed as for want of appearance. In an application to set aside the judgment as irregular, because the special endorsement was not such as was contemplated by Imp. Stat. 15 & 16 Vict. c. 76, which authorized the signing of judgment *for a debt* or *liquidated demand in money*, the plaintiff having no right to claim the expenses of noting; it was held by Parke B., that it ought to have appeared on the face of the endorsement itself, that the claim was for a *liquidated demand*, and that the plaintiff had no right to add the claim for the expenses of noting

In our Superior Courts of common law the meaning of the words, "ascertained by the signature of the defendant" has been considered and to a great extent settled. The two leading cases seem to be *Wallbridge* v. *Brown* in the Court of Queen's Bench, and *Cushman* v. *Reid* in the Court of Common Pleas. The first of these seems to have reached the utmost verge of what might be considered as ascertaining an amount by the act of the parties or by signature of the defendant—that is to say, if the defendant's act or signature is to be the attestation of the sum to be paid as a debt due to the plaintiff, for we do not see how a sum can be said to be ascertained which has not been redueed to a fixed certainty between the parties. The case is found reported in 18 U. C. R. 160, and was brought in question on an application for a prohibition as not being within the provision and meaning of 19 Vict. ch. 90., sec. 20, which gave the County Courts jurisdiction in all cases and suits relating to debt, covenant and contract to $400, where the amount was liquidated or ascertained by the act of the parties or by the signature of the defendant. The defendant had by writing bound himself to pay for a lathe, pulleys, etc., the "invoice price and the charges of freight, duties, etc.," and to give his note for the articles as well as others he might purchase from the plaintiff at six months from date, payable at a bank with interest. At the trial it was found necessary for the plaintiff to prove the amount of his claim, and he called a witness to shew the invoice price of the lathe and the amount of charges and duties paid, from which it was contended that if this proof were required the case was beyond the jurisdiction of the court, the amount not having been "ascertained by the act of the parties, or signature of the defendant." The court, however, held otherwise, and discharged the application. Were it not for this decision one would have supposed that what the jury were obliged to ascertain by the evidence of a witness, the statute intended that the parties

themselves should have ascertained by their own act, or should have been settled by the signature of the defendant before the suit was brought, and it must be remarked that in the case cited no sum of money whatever was mentioned in the writing signed by the defendant. The subsequent case of *Cushman* v. *Reid* 5 Prac., R. 121 and 20 C. P. 147, was an action on a promissory note made at Chicago, whereby the defendant twelve months after date promised to pay the plaintiff $900, with interest at ten per cent. It had been mutually admitted between the parties, that (although the sum mentioned in the note *was* ascertained by the signature of the defendant and the note in fact signed by him), the amount was payable in United States Treasury Notes—termed "greenbacks;" and that whatever plaintiff was entitled to recover, (if anything) the amount should be such sum in Canadian or British currency, as would be equivalent to greenbacks, &c. The cause was carried down for trial to the County Court, under the Law Reform Act of 1868, and damages assessed at $743.53. Application was afterwards made in Chambers to stay proceedings because it was contended the Act did not apply, the amount for which the action was brought not being "liquidated or ascertained by the signature of the defendant" within the 17th section of the Law Reform Act, 1868. A rule was subsequently obtained to set aside the verdict for irregularity:—it was held that the case was distinguishable from *Wallbridge* v. *Brown*, inasmuch as it appeared that the sum for which the defendant was bound, was not $900 of Canadian money but such amount in Canadian money as having regard to the value of United States treasury notes and Canadian currency the $900 expressed in the note, with interest, should be worth; which value was so constantly varying, and an element of uncertainty existing about it, that it was rendered impossible to say that the amount sued for was ever "liquidated or ascertained by the signature of the defendant." It is very plainly set forth in the judgment of GWYNNE J. (page 152) that if so "ascertained" *it must have been when the defendant affixed his signature to the instrument*; that it was obvious that at the time it was not only not ascertained but it was *unascertainable* what would be the amount payable and due under the instrument twelve months afterwards, because the value of the U. S. Treasury notes fluctuated every day, and some days more than once or twice.

It had been argued for the plaintiff that *Wallbridge* v. *Brown* was decisively in favor of the plaintiff, but the court held not—for in that case the defendant had agreed in writing to pay to the plaintiff the invoice price of the lathe and the charges for freight and duty, and reference could be had to the certain price named in the invoice and to the fixed charges for freight and duty paid by the plaintiff, for the purpose of determining that the amount claimed by the plaintiff was sufficiently liquidated, and ascertained by the act of the parties, within the amount for which an action could be brought in the County Court, so as to give that Court jurisdiction to try the case; but that in the case in question there was nothing certain or ascertained by the signature of the defendant, by which the amount demandable could be determined;—that with the varying quotations of the value of United States funds or greenbacks as compared with Canada currency, the defendant could have nothing to do, and evidence must necessarily be called for the purpose, which might show great variation; and the Court held quite decisively that the Law Reform Act did not contemplate removing from the Superior Court, for trial in an inferior court at the will of the plaintiff alone, a cause of action where the whole principal amount demanded by the plaintiff in the action was not clearly "ascertained by the signature of the defendant."

It would seem hard to reconcile these decisions in what they may seem to conflict in

so far as logic is concerned, but in law we are bound to accept them as we find them, and from the whole of them we deduct the following: 1st. That a suit may be brought under the Division Court Act of 1880, where the instrument plainly sets forth that the sum demanded, which the plaintiff has a right to recover, had been ascertained when the defendant affixed his signature to it, and not otherwise. 2nd. That no other sum can be added by way of damages, or as an accretion, or accessary to the principal. 3rd. That if any such sum is claimed it must be set up in the form used in a Court of Record and can only be used there and not in a Division Court.

The general tenor of the law on the subject is, we think, clear, and there need be no difficulty under the cases to which we have referred. It deserves to be particularly noted that the cases of *Wallbridge* v. *Brown* and *Cushman* v. *Reid* were decisions under two different Provincial statutes—that the one under which the first was decided gave the County Court jurisdiction over sums *liquidated by the act of the parties as well as ascertained by the signature of the defendant*, and that the statute under which the second case was decided was, like the Division Court Act of 1880, more limited in its provisions, and these elements of difference may have guided the learned judges very extensively in the conclusions which they reached in each case which stood on its own peculiar merits. We make no doubt that ere long cases will come up which will settle the law on the subject, if it be not already considered to be settled.

ON MARRIAGE WITH A WIFE'S SISTER.

Marriage with a deceased wife's sister is as unlawful in Canada as it is in England. But the actual state of the law on this question is not generally known. In 1862, the Court of Chancery in Upper Canada decided —in the case of *Hodgins* v. *McNeil*—that Lord Lyndhurst's Act of 5 & 6 Will. IV., c. 54, which declared such marriages to be thenceforth not merely voidable but actually null and void *ab initio*, was not applicable to this country, not having been extended to colonies possessing local legislatures. Accordingly, in Canada, the law previously in force governs; and the combined action of a civil and of an ecclesiastical court is required to be invoked for the purpose of invalidating a marriage of this description.

The ancient law of the realm pronounces marriage with a deceased wife's sister to be unlawful, and voidable upon the issue of a judgment of nullity from an ecclesiastical court, which may be pronounced at any time during the life of both parties. But inasmuch as no ecclesiastical court has been established in Canada, the machinery for dissolving these unlawful connections does not exist. And by the common law, such a marriage, if not previously annulled, may not be impeached after the decease of either of the parties thereto. This is a merciful provision to prevent the bastardizing of the children, who are thenceforth accounted, for all practical purposes, as legitimate. (See 9 Grant 310.) But my object in this article is to direct attention to the Divine law upon this momentous question.

That law is contained in the 18th chapter of Leviticus, which enumerates certain degrees of consanguinity and of affinity within which intermarriage is forbidden. The list therein given includes relationships by blood (or, consanguinity) as well as by marriage (or, affinity). But, before animadverting upon this distinction, it may be well to state that the restrictions laid down in this portion of Holy Scripture were formally incorporated into the law of England by the Statute of 32 Henry VIII., c. 38, which prohibits all marriages between persons within "the Levitical degrees."

In the interpretation of this law the legal tribunals in England have uniformly upheld

and repeatedly affirmed one principle. They have insisted that the express Levitical prohibition of marriage between persons of a specified degree of relationship is to be extended to all marriages which are *in paritate rationis*; *e.g.*, marriage being expressly forbidden between a woman and her husband's brother, it is also forbidden, by necessary implication, between a man and his wife's sister, as being within the same degree of relationship as a marriage between the parties first named.

It was in conformity with this principle, that the table of forbidden degrees of marriage, contained in the Church of England Prayer Book, was framed and promulgated by Archbishop Parker, in 1563. This table includes several prohibitions not expressly mentioned in Leviticus xviii: but which are nevertheless strictly deducible from the Levitical prohibitions by the application of the aforesaid rule of interpretation. That this interpretation is not overstrained, but is in accordance with the declared will of the Supreme Lawgiver, is manifest, on referring to the sixth verse of the chapter, wherein it is said "none of you shall approach to any that is *near of kin* to him [literally, to any flesh of his flesh,] to uncover their nakedness; I am the Lord."

The Scripture then proceeds to enumerate, —as examples of the rule thus declared,— thirteen instances of persons who are forbidden to intermarry, because they are either directly or indirectly, "near of kin." Six of these relations, only, are 'blood relations,' the remaining seven are persons related only by marriage. It has been argued that it is unwarrantable to add, by inference, to the prohibitions set forth in God's Word. This assumption is refuted by the fact, that Scripture does not expressly forbid a man to marry his own daughter, or his own sister. But a man is expressly forbidden to marry his brother's widow, or, in other words, a woman is forbidden to marry her deceased husband's brother. This prohibition, indeed, is twice repeated in Holy Scripture; once, as we shall presently notice, with a special malediction; and the reason given is, that the wife of a brother is *one flesh* with him. Can it be denied that his wife's sister is as near to a man as his brother's wife? God has forbidden the former of these marriages as abominable; how can He be supposed to approve of the latter?

I need scarcely advert—in this connection—to the peculiar circumstances under which, for special tribal reasons, God thought fit to dispense with His own law, and to *command* a Jew, in a certain exceptional case, to marry the widow of his brother, in order "to raise up seed unto his brother." God is the "One Lawgiver," and whatsoever He directs must always be right. He commanded Abraham to slay his son; but that would not justify any man, without similar authority, in taking human life. But this particular command was given only to Jews, and to them only when the brother had died without issue. Moreover, to Jews themselves, under other circumstances, it was forbidden, with an additional penalty, for it is written (see Levit. xx. 21), "If a man shall take his brother's wife, it is an unclean thing: he hath uncovered his brother's nakedness; *they shall be childless.*"

There is another point worthy of mention in this connection, upon which some confusion of ideas prevails. It is in regard to the 18th verse of Leviticus, chap. xviii., which, in the authorized version, reads thus:— "Neither shalt thou take a wife to her sister, to vex her, * * beside the other, in her lifetime." Some have supposed that this verse justifies marriage with a deceased wife's sister, by forbidding, merely, marriage with two sisters during the life of the one first espoused; and thus, by inference, permitting such an alliance to the widower. This is quite a mistake. The best Hebrew scholars are agreed that the verse in question has nothing whatever to do with the matter we are now considering. The true rendering of this verse assigns a very different meaning to

it, similar, in fact, to that which is indicated in the marginal note in our English Bibles. This note suggests, as an alternative translation, "one wife to another," instead of, "a wife to her sister"; reference being subjoined to the passage in 1 Samuel i. 2-6, concerning Elkanah's two wives, Hannah and Peninnah, of whom we read that the one provoked the other, and caused her to fret. Thus, by the revised translation—which is amply warranted, not only in itself, but by its agreement with Hebrew idioms in corresponding passages—this verse is found to embody a declaration of the mind and purpose of God against polygamy. It is true that Jewish practice did not conform to this rule: it is also true that, during the Mosaic, as also under the Patriarchal dispensation, God permitted a departure from it; but "from the beginning it was not so."

When Christ came, He lifted up a higher moral standard. This He did, not by introducing a new law, but by leading His disciples back to the old. He showed that because of the hardness of men's hearts, Moses had been allowed to sanction certain deviations from God's holy and perfect law; but this was only by sufferance, and for a time. Christ, as the Revealer of the Father's mind and will, then proceeded to point out the true law of marriage, at its original institution, in these words:—"At the beginning," God created man "male and female;" and "for this cause shall a man . . cleave to his wife: and they twain shall be one flesh. Wherefore they are no more twain but one flesh." (Matt. xix. 4–6.)

Since this reiteration by our Lord of the primary law of marriage, polygamy has been prohibited in all Christian nations, and may no longer be practised, either by Jew or Gentile, wherever Christian law prevails. In this very passage of St. Matthew's Gospel we have the clue whereby we may determine upon the propriety, or otherwise, of marriage with a deceased wife's sister.

Christ asserts a man and his wife to be "*one flesh.*" This is obviously a spiritual and not a physical truth, for in respect to their material substance their duality remains. But their union in marriage is effected by a spiritual action of the personal will, ratified by the law of God, which is so real and permanent that they are declared to have been "joined together" by God Himself, and may not, therefore, be "put asunder" by man's authority.*

The words in Genesis, as explained and enforced by Christ, are obviously the basis—not only of the injunctions against marriages within the prohibited degrees in the book of Leviticus—but likewise of all Christian legislation on the subject. Such alliances are expressly forbidden because it is "wickedness" for a man "to approach to any that is *near of flesh* to him to uncover their nakedness." We are, therefore, bound to believe that within whatever degree it is unlawful for a man to marry his blood relations, within the same degree he is forbidden to marry the relations of his deceased wife: and that within the same limits, a woman, by parity of reason, is forbidden to marry the relations of her husband. This, indeed, is the well understood conclusion of Christian antiquity; and the law as interpreted by Christian courts of justice, in various able judgments within the present century.

One further objection, however, must be noticed. It has been contended that the moral code, set forth in Leviticus, was designed merely for Jews, and is not binding

* We remember seeing in the lay press, the answer to a question propounded to Professor Owen, the well known physiologist, which has seemed to some to show that the expression "one flesh" has a physical as well as a spiritual meaning. The question asked him was whether a woman is so indelibly imbued with the characteristics of her husband that her offspring by a second husband are influenced thereby. The answer of Mr. Owen is said to have been as follows:—

"The interchange between the maternal and fœtal circulations in placental mammals impresses so much of the male's nature upon the female as the mixed product, the fœtus, can impart. The evidence of this is shown by the reappearance of more or less of the father's character in subsequent offspring of other male parentage. Observations of this fact may have suggested the high value set on the virginity of a wife by various ancient races of mankind. After a woman has conceived she and her husband literally become one flesh (as the Bible asserts they do), and in the course of years they resemble each other in some slight degree." We are not prepared to say that the prohibitions in Leviticus warrant the assertion that this view explains all the difficulties of the subject, but it is at least an interesting addition to the learning on this much vexed question.—Eds. C. L. J.

upon Christians. The 18th chapter of Leviticus plainly refutes this objection, for it declares that the heathen nations, in breaking the law embodied therein, had become guilty of heinous sin, for which their very land was defiled, and they themselves were subjected to God's judgments.

This leads to the unavoidable inference that at some earlier period, God had unmistakably revealed His will to the heathen nations concerning this matter, and that the law given by Moses was but a reiteration and reinforcement of the substance of an earlier code, in relation to marriage, which was binding upon all nations. For Scripture teaches that "sin is the transgression of the law," (1 John iii. 4); that "sin is not imputed where there is no law," (Rom. v. 13); and that "where no law is there is no transgression," (Rom. iv. 15). It is evident, then, that the heathens of old fell into their abominable ways in respect to marriages by departing from a law once given by God for their guidance.

The precise circumstances of this Divine communication to the heathen are not known to us. But it is worthy of remark that the decree issued by the first Council at Jerusalem, as to the obligations incurred by Gentile converts to Christianity, throws light upon this question. While absolving such converts from the need of obeying the ceremonial law of Moses, the apostles and elders, speaking by the Holy Ghost, agreed that it was sufficient that they should refrain from certain objectionable practices, of which one was "fornication." This sin consists in "going after forbidden flesh." And the apostolic injunction obviously points to those "seven precepts given to the sons of Noah," to which Selden, Hooker, and others learned writers refer, as embodying the primitive patriarchal religion. Of these precepts, one was specially directed "against certain incestuous marriages:" (see Bp. Wordsworth, on Gen. ix.4: McClintock and Strong, Biblical Cyclop. verbo "Noachian Precepts.") This command, it is reasonable to suppose, contains the substance of the primitive law concerning marriage: and for their turpitude in breaking this law, in the several details enumerated in the 18th chapter of Leviticus, Moses declared that the land of the heathen was defiled. He also warned God's people that "whosoever shall commit any of these abominations, shall be cut off."

I venture to hope that these brief suggestions on the Divine law of marriage, may be useful in removing the vague ideas which too commonly prevail, on this vital question. Marriage affects the welfare of human society, because it concerns man as a moral and accountable being. If we believe that God is the source of all law, we must look to His precepts to guide us, both in regard to the things we may lawfully practise, and those from which we must refrain.

ALPHEUS TODD.

NOTES OF CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

SUPREME COURT.

QUEBEC CASES—FEBRUARY, 1881.

GINGRAS V. DESILETS ET AL.*

Damages—Judgment of the Court of first instance.

This was an action brought by appellant against the late P. O. Desilets, the original defendant in the cause, claiming a sum of $4,000 damages: 1st, by injurious words, threats and false arrest; 2nd, by violence and wounds causing the appellant to have one of his fingers amputated, as well as a long and excessively painful disease, to wit: the lock-jaw, which put him for a long time in imminent danger of death, and left him crippled and with his general health gravely affected for the future.

The defendant appeared by his attorney, but did not file any plea. After taking the evidence, the Superior Court at Three Rivers

*In all cases the appellants' names appear first.

condemned the respondents, (the present cause having been continued against them by *reprise d'instance*, as heirs and testamentary executors of the said P. O. Desilets), to pay to the appellant the sum of $3,000 damages.

On appeal to the Court of Queen's Bench, the judgment of the Superior Court was reduced to $600, the amount allowed to the appellant, and he was condemned to pay all the costs of appeal.

Held, that inasmuch as the damages awarded were not of such an excessive character as to show that the judge who tried the case had been either influenced by improper motives or led into error, the amount so awarded by him ought not to have been reduced. [TASCHEREAU J., dissenting.]

O'Gara, Q. C., and *Hould*, for appellant.

Angers, Q. C., for respondents.

Appeal allowed with costs.

MARCH, 1881.

LEVI v. REED.

Jurisdiction—Right of appeal by plaintiff, respondent in Court of Queen's Bench—Slander

The present appellant had sued the respondent before the Superior Court at Arthabaska, in an action of $10,000 damages for verbal slander. The judgment of the Superior Court awarded to the appellant a sum of $1,000 for special and vindictive damages.

By the judgment of the Court of Queen's Bench, the amount awarded was reduced to $500, and costs of appeal were against the present appellant.

Held, on appeal, 1. That the plaintiff, although respondent in the Court of Queen's Bench, was entitled to appeal, as in determining *the amount of the matter in controversy* between the parties, the proper course was to look at the amount for which the declaration concludes, and not at the amount of the judgment. *Joyce* v. *Hart*, 1 Can. S. C. R. 321, reviewed. [TASCHEREAU, J., dissenting.]

2. That, as in the case of *Gingras* v. *Desilets*, the amount of damages fixed by the judge who tried the case ought not to have been reduced.

Irvine, Q. C., and *Gibson*, for plaintiff.

W. Laurier, Q. C., for respondent.

Appeal allowed with costs.

ABRAHAMS v. THE QUEEN.

Indictment—Delegation of authority by Attorney General—32 & 33 Vict. cap. 29, sec. 28—Obtaining money by false pretences.

Appeal from the Court of Queen's Bench, Montreal.

The indictment contained four counts for obtaining money by false pretences.

On this indictment was endorsed: "I direct "that this indictment be laid before the Grand "Jury.

Montreal, 6th October, 1880.

L. O. LORANGER,
Atty. General.

"By J. A. Mousseau, Q. C.
"C. P. Davidson Q. C.

Defendant moved to quash the indictment. The motion was supported by affidavit, and the learned Chief Justice rejected it, intimating at the time that as he had some doubts, he would reserve the case, should the defendant be convicted. The defendant was found guilty, and the following questions *inter alia* were submitted for the consideration of the Court of Queen's Bench:

1. Whether the Attorney General could delegate his authority, to direct that the indictment in this case be laid before the Grand Jury, and whether the direction as given on the indictment, was sufficient to authorize the Grand Jury to enquire into the charges and report a true Bill.

2. Whether if the indictment was improperly laid before the Grand Jury it should have been quashed on the motion made by the defendant.

It was admitted that the Attorney General gave no direction with reference to this indictment, and that the gentlemen who put the endorsement on the indictment, did so merely because they were representing the Crown at the current term of the Queen's Bench under a general authority to conduct the Crown business at such term, but without any specia authority over, or any directions from the Attorney General in reference to this particular indictment.

Held, on appeal, that under 32, 33 Vict., c. 29, sec. 28, the Attorney General has no authority to delegate to the judgment and discretion of another the power which the Legislature has

authorized him personally to exercise; that no power of substitution had been conferred, and therefore the indictment was improperly laid before the Grand Jury.

Appeal allowed.

J. Doutre, Q. C., for appellant.
C. P. Davidson, Q. C., for respondent.

SHAW v. MACKENZIE ET AL.

Capias—Damages—Want of probable and reasonable cause.

This was an appeal from a judgment of the Court of Queen's Bench for the Province of Quebec, affirming the judgment of the Superior Court by which the plaintiff's action was dismissed.

The plaintiff (present appellant) claimed damages from the respondent for the malicious issue and execution of a capias against him, the plaintiff, at Montreal, in July, 1878.

The defendants, on appeal, relied on a plea of justification, alleging that when they arrested the appellant, they acted with reasonable and probable cause. In his affidavit, the reasons given by the deponent Kenneth Mackenzie, one of the defendants, for his belief that the appellant was about to leave the Province of Canada were as follows:—"That Mr. Powis, the deponent's partner, was informed last night in Toronto by one Howard, a broker, that the said W. J. Shaw was leaving immediately the Dominion of Canada, to cross over the sea for Europe or parts unknown, and deponent was himself informed, this day, by James Reid, broker, of the said W. J. Shaw's departure for Europe and other places." The appellant Shaw was carrying on business as wholesale grocer at Toronto, and was leaving with his son for the Paris Exhibition, and there was evidence that he was in the habit of crossing almost every year, and that his banker and all his business friends knew he was only leaving for a trip; and there was no evidence that the deponent had been informed that appellant was leaving with *intent to defraud*. There was also evidence given by Mackenzie, that after the issue of the capias, but before its execution, the deponent asked plaintiff for the payment of what was due to him, and that plaintiff answered him "that (Shaw) would not pay him, that he might get his money the best way he could."

Held, on appeal, that the affidavit was defective; the fact of a debtor, about to depart for England, refusing to make a settlement of an overdue debt, is not sufficient reasonable and probable cause for believing that the debtor is leaving *with intent to defraud his creditors.* Judgment reversed; $500 damages awarded.

Maclaren, and *Rose*, for appellant.
Doutre, Q.C., for respondents.

Appeal allowed.

NEW BRUNSWICK CASES.

SNOWBALL v. STEWART.

Evidence—Misdirection.

This was an action brought by Mr. Stewart against Mr. Snowball, to recover a quantity of logs alleged to have been cut by parties named Sutherland and Kirwan, on lands held by plaintiff under license from the Government. On the trial, the admissions of these parties were admitted on the plaintiff's counsel undertaking to connect the defendant with these parties This he failed to do, but called an agent of the plaintiff, to depose as to certain statements of Mr. Snowball. The Chief Justice withdrew the evidence of these admissions from the jury, and directed them that if they thought Snowball admitted he had the logs, the plaintiff was entitled to a verdict. The jury found a verdict for the plaintiff. A new trial was moved for on the grounds: 1. That the Chief Justice had no right to withdraw the objectionable evidence admitted by him from the jury. 2. That outside of these statements there was no evidence, and the learned Judge misdirected the jury on that point.

The Supreme Court of New Brunswick discharged the rule.

Held on appeal, that there was no evidence that the logs sought to be recovered had been cut on plaintiff's premises, and that while the Chief Justice had the right to withdraw the objectionable evidence from the jury, he had misdirected the jury as to the effect of the statements made by Snowball to plaintiff's agent.

Weldon, Q. C., for appellant.
Wetmore, Q. C., for respondent.

Appeal allowed.

TEMPLE v. NICHOLSON, ET AL.

Bill of sale—License to grantee to take possession—Progeny—Trover.

Trover. The declaration charged the appellant with the wrongful conversion of a horse and colt, the property of the respondents. The defendant pleaded, *inter alia*, that the colt was the property of one Thomas Hackett, and the defendant, as Sheriff of York, took the same under an execution against Hackett. The plaintiffs claimed the property was vested in them by a mortgage bill of sale, and given to them by Hackett as collateral security with other mortgages which they had on his real estate. The colt was the progeny of a mare which was mentioned in the bill of sale, and which always remained in the possession of Hackett. In the mortgage there was a proviso that until default the said Thomas Hackett might remain in possession of all the property mortgaged or intended so to be; but with ful power to the plaintiffs, in default of payment, to take possession and dispose of the property as they would seem fit. At the time this colt was foaled it was proved that there had been default in payment of both principal and interest money secured by the chattel mortgage.

Held, that the plaintiffs, being under the bill of sale the absolute owners of the mare, and after default entitled to take possession of her, and the foal having been dropped while plaintiffs were such owners and entitled to the possession of the mare, the colt was their property,—"*Partus sequitur ventrem.*"

Gregory, for appellant.

Wetmore, Q. C., for respondents.

ALMON v. LEWIS.

Will—Annuities—Sale of corpus to pay.

Bill by the executors and trustees under the will of John Robertson, deceased, to obtain the direction of the Court as to the rights of the several persons interested under the will.

John Robertson died on the 5th August, 1876, leaving a will dated 6th August, 1875, and a codicil dated 21 July, 1876. By the will he devised to his widow an annuity of $10,000 for her life, which he declared to be in lieu of her dower. This annnity the testator directed should be chargeable on his general estate. The testator then devised and bequeathed to the executors and trustees of his will certain real and personal property particularly described in five schedules, marked respectively, A. B. C. D. E., annexed to his will upon the trust, viz.: "Upon trust during the life of his wife to collect and receive the rents, issues, and profits thereof which should be and be taken to form a portion of his 'general estate;' and then from out of the general estate during the life of the testator's wife the executors are to pay to each of his five daughters the clear yearly sum of $1,600, by equal quarterly payments, free from the debts, control, and engagement of their respective husbands." Next reserving the statement of of the trusts of the scheduled property specifically given, the testator provides that from and after the death of his wife the trustees are to collect and receive the rents, issues, dividends, and profits of the lands, etc., mentioned in the said schedules, and to pay to his daughter Mary Allen Almon the rents, etc., appointed to her in schedule "A;" to his daughter Eliza, of those mentioned in schedule "B;" to his daughter Margaret, of those mentioned in schedule "C;" to his daughter Agnes, of those mentioned in schedule "D;" and to his daughter Laura, of those mentioned in schedule "E;" each of (his) said daughters being charged with insurance, ground rents, rates and taxes, repairs and other expenses with or incidental to the management and upholding of the property apportioned to her, and the same being from time to time deducted from such quarterly payments." The will then directed the executors to keep the properties insured against loss by fire, and in case of total loss it should be optional with the parties to whom the property was apportioned by the schedules, either to direct the insurance money to be applied in rebuilding, or to lease the property. It then declared what was to be done with the share of each of his daughters in case of her death. In the residuary clause of the will there were the following words:—"The rest, residence and remainder of my said estate both real and personal and whatsoever and wheresoever situated," I give, devise and bequeath the same to my said executors and trustees upon the trusts and for the interests and purposes following: He then gives out of

the residue a legacy of $4,000 to his brother Duncan Robertson, and the ultimate he directs to be equally divided among his children upon the same trusts with regard to his daughters as are hereinbefore declared with respect to the said estate in the said schedules mentioned.

The rents and profits of the whole estate left by the testator proved insufficient after paying the annuity of $10,000 to the widow, and the rent and taxes upon his house in London, to pay in full the several sums of $1,600 a year to each of the daughters during the life of their mother, and the question raised on this appeal was whether their executors and trustees had power to sell or mortgage any part of the corpus or apply the funds of the corpus of the property to make up the deficiency.

Held, on appeal, that the annuities given to the appellants and the arrears of their annuties are chargeable on the *corpus* of the real and personal estate subject to the right of the widow to have a sufficient sum set apart to provide for her annuity.

Weldon Q.C., for the Misses Robertson.
Gilbert, for Mrs. Almon.
Kaye, Q.C., for respondents.

TEMPLE v. CLOSE.

Trover—Vendor and purchaser—Property in goods.

This was an action of trover for bricks. The plaintiff agreed with one Thomas, a brick-maker, who had a kiln of bricks burnt, ready for use, containing somewhere in the vicinity of 100,000 bricks, to purchase, and paid for a portion of them, 50,000 according to sample. Thomas delivered to plaintiff 16,000, and the balance of the bricks was taken by the defendant as Sheriff of York, under an execution against Thomas. The question to be decided on this appeal was, whether the bricks were the plaintiff's property, under what had taken place between Thomas and him, so as to exempt them from seizure under the execution.

Held, that there was no sale of a specific property under the contract, and that the property in the bricks did not pass to the purchaser until the bricks had been selected.

G. F. Gregory, for appellant.
Wetmore, Q.C., for respondent.

Appeal allowed with costs.

DOMINION TELEGRAPH COMPANY v. GILCHRIST.

Trespass—Right of Company to cut ornamental trees.

The servants of the Company, in erecting their line through Norton, King's County, cut down ornamental trees on Dr. Gilchrist's property, claiming the right to do so under their act of incorporation. In an action of trespass, tried at King's County, Dr. Gilchrist obtained a verdict for $235 damages, which was sustained by the Supreme Court of New Brunswick. The Company appealed on the following grounds: 1. That the practice of the Court not to allow the defendant to cross-examine a witness to prove his plea, as decided in *Atkinson* v. *Smith*, 4 Allen, 309, was erroneous; 2. That as the Company had the right to cut down ornamental or shade trees where necessary for the erection, use or safety of their line, they were the judges of that necessity; and 3. That the plaintiff's remedy was under the clause in the Company's Act referring to arbitration, and ousted the jurisdiction of the courts.

Held, overruling these objections, that the Company should be held to a strict construction of their act of incorporation, and were bound to prove that it was necessary for the erection, use or safety of their line to cut these trees, and that having failed to do so, they were liable.

Hector Cameron, Q. C. for appellant.
C. W. Weldon, Q. C., and *Burbridge*, for respondent.

Appeal dismissed with costs.

POWER v. ELLIS.

Witness—Refusal to answer questions on cross-examination—Privileged communications—Misdirection.

Plaintiff, (respondent on appeal), a teller in a bank in New York, absconded with the funds of the bank, and came to St. John, N. B., where he was arrested by the defendant, (appellant on appeal), a detective residing in Halifax, N. S. and imprisoned in the police station for several hours; no charge having been made again him, he was released. While plaintiff was a prisoner at the police station, the defendant went to plaintiff's boarding house and saw his

wife and read to her a telegram, and demanded and obtained from her the money she had in her possession, telling her it belonged to the National Bank and that her husband was in custody.

In an action for assault and false imprisonment, and for money had and received, the defendant pleaded *inter alia*, that the money had been fradulently stolen by the plaintiff, at the City of New York, from the National Park Bank, and was not the money of the plaintiff, that defendant, as agent of the Bank, and acting for the Bank, received the money to and for the use of the Bank, and paid it over to them. Several witnesses were examined, and the plaintiff, having been called as a witness on his behalf, did not, on cross-examination, answer certain questions, relying, as he said, upon his counsel to advise him, and on being interrogated as to his belief that his doing so would tend to criminate him, he remained silent, and on being pressed he refused to answer whether he apprehended serious consequences if he answered the questions. The learned judge then told the jury that there was no identification of the money, and directed them that if they should be of opinion that the money was obtained by force or duress from plaintiff's wife they should find for the plaintiff.

Held. (HENRY, J. dissenting), that the defendant was entitled to the oath of the party that he objected to answer because he believed his answering would tend to criminate him.

2, Per GWYNNE, J., that there was misdirection in this case.

Barker, Q. C., for appellant.

Weldon, Q. C., for respondent.

QUEEN'S BENCH.

IN BANCO—MARCH 11.

MONDS v. MARTIN

Replevin—Illegal distress—Evidence of lease—New trial.

In an action of replevin the jury found for the defendant, who disagreed with the plaintiff as to the terms of the alleged lease. The defendant was supported by one W., who took down the instructions for a lease which he produced. The lease was not drawn, because the defendant, the landlord, being defendant in ejectment upon a mortgage in default was arranging through W. for a loan to pay off the mortgage. After the trial a letter of W.'s was discovered, which had been written to a Loaning Company, and referred to the plaintiff's being tenant, and supported to a certain extent the plaintiff's story. A new trial was granted, as it was uncertain whether there was a lease or an agreement for one only.

McCarthy, Q. C., for plaintiff.

Mulock, for defendant.

PECK v. PHŒNIX INSURANCE COMPANY.

Fire insurance—Material alteration in premises—Notice of.

The plaintiff's premises being insured as "occupied by a tenant as a grocery store and dwelling," were re-let to his son-in-law, who used them for dealing in furniture, and had a small room behind the shop in which he had a carpenter's bench and tools, and did repairing and rough work. D., the defendants' local agent, was notified of this change, and went on to the premises and saw the tenant at work making a secretary. He wrote to the Head Office at plaintiff's request, notifying them of this, and they answered that if the policy were sent they would consent in writing to it. The policy contained a condition that "any change material to the risk and within the control or knowledge of the assured shall void the policy as regards the part affected thereby, unless the change be promptly notified in writing to the company or its local agent, and the company so notified may * * cancel the policy. * * *

The jury found for the plaintiff.

Held, that the verdict should not be disturbed, as the jury had fairly found the notification of the change sufficient.

Semble, that the transmission of the policy for endorsement was not essential if the communications were reasonably sufficient.

Meredith, Q. C., for plaintiff.

Bethune, Q. C., for defendant.

ST. JOHN v. BULLIVANT.

Trover

The plaintiff was mortgagee of sixty-four shares in defendant's propeller, and on defendant's insolvency was allowed by the creditors and assignee to take the vessel as she stood at a valuation. Before this time the defendant had removed from the vessel a piano and several other articles, and had substitured stoves for steam heaters.

Held, that the plaintiff was concluded by the settlement with the assignee, by which he took the vessel as she then stood, in the absence of fraud, and could not recover these articles. The mortgagor being in possession had a right to manage the vessel according to his good discretion by removing articles on board or substituting others for them.

Semble, that a piano on board a vessel would not pass to the mortgagee under such general words as "with her boat, guns, ammunition, small arms and appointments."

McClive, for plaintiff.

Bethune, Q. C., for defendant.

LUMSDEN v. DAVIES.

Sale of goods upon conditions as to re-purchase—Statute of Frauds.

The defendant sold to the plaintiffs a quantity of tea, and agreed that if the plaintiffs, after trying to dispose of the same, had any left upon their hands at a certain date that he, the defendant, would re-purchase it at an advance of ten cents per pound. The tea was delivered, and upon the defendant's refusal to buy back what was left on the plaintiff's hands at the date named, this action was brought for the breach.

Held, that the whole agreement consisted of one conditional contract of sale and not of two contracts; and that the delivery of the tea by the defendant therefore satisfied the Statute of Frauds.

Osler, Q. C., for plaintiffs.

Ferguson, Q. C., for defendant.

LAPOINTE v. LAFLEUR.

Ejectment—Reservation of certain quantity of land from conveyance—Time of selection.

Defendant conveyed to his son, J. L., jun., the E. ½ of a lot, "reserving from the operation of these presents unto the said parties of the first and second parts (the latter being defendant's wife), during their joint lives, and during the life of the survivor, one acre of the said lot hereby conveyed, the same acre to be taken in any part of the said hereby conveyed, land when the parties of the first and second parts see fit." Defendant continued to live on the lands with his son till the latter's death, in 1876. Several years before his death J. L., jun., built a small house on the land, which was occupied by his men till his death. After his son's death, the defendant went off the land, but returned in about a year, and lived in the small house built by his son, and improved the same. The mortgagees of the son sold to the plaintiff under the power in their mortgage, and the defendant, at the sale to the plaintiff, on being asked, said he had not selected his acre, was then asked to do so, and then selected the part where he was living. The plaintiff was present and heard this, and his conveyance was "subject to the reservations contained in tbe deed from J. L. sen., to J. L. jun."

Held, that the reservation in the deed from defendant to his son was more properly an exception than a reservation, and that an estate for the joint lives of defendant and his wife and for the life of the survivor, remained in the defendant, and he therefore was entitled to select the acre at any time, and was not bound to do so in the life-time of his son.

Burnham v. *Ramsay*, 32 U. C. R. 491, distinguished.

Bethune, Q. C., for plaintiff.

A. Cassels and *W. N. Ponton*, for defendant.

PATTERSON v. THOMPSON.

Illegal distress—Replevin—Exemption from distress of goods brought to be manufactured.

The exemption from distress of goods entrusted to persons carrying on certain public trades to exercise their trades upon them is a privilege founded on public policy for the benefit of trade.

In this case saw-logs were taken to a saw-mill by the plaintiff, to be converted into lumber in the due course of business of the mill.

Held, that the business of sawing lumber for

hire is a trade in which is exempted from distress from rent, the property of a stranger brought in to be converted into lumber, and that the plaintiff was entitled to recover; and this, notwithstanding that one of the tenants of the saw-mill appeared to have an interest in the saw-logs, jointly with the plaintiff.

Lount, Q. C., for plaintiff,

McCarthy, Q. C., for defendant.

INGRAM v. TAYLOR.

Interpleader—Liability to seizure of crops in hands of guardian.

A testator in 1873 devised the west half of his farm to the plaintiff in interpleader, his son's wife, and the heirs of her body during the life of her husband, and the east half to the son of the plaintiff; it appearing on the evidence that the object of the testator in so disposing of his property was to prevent it from becoming liable under a judgment previously obtained against his son, the husband of the plaintiff. The plaintiff attended to the management of both her own portion and that of her son, her husband working under her directions. The defendants seized the crops in execution under the judgment against the husband of the plaintiff above referred to, part of which said crops had been grown on the plaintiff's portion, and part on that of her son.

Held, on the evidence, with regard to that portion which had been raised on the plaintiff's land, that a verdict was properly entered for the plaintiff in interpleader.

Lett v. *Commercial Bank* distinguished; and law as to married women commented on.

Held also, with regard to the portion grown on the land of the plaintiff's son, that although, had the husband of the plaintiff worked and used the land himself, the property in the crop would, at common law, have been in him, as guardian of his son, subject to the right of his son to an account; yet, inasmuch as the plaintiff had worked the whole farm, supplied the necessary seed, and expended all that had been spent in raising the crops seized, the facts did not warrant the application of the common law rule, and a rule to set aside the verdict for the plaintiff on that point was consequently discharged.

Bethune, Q. C., and *J. W. Kerr*, for plaintiff.

McCarthy, Q. C., for defendants.

FLEURY v. COPELAND.

Sale of goods "to arrive"—Construction of.

A contract for the sale of goods "to arrive" does not constitute a conditional contract rendering the vendor liable only on the condition of the arrival of the goods. The term is properly applied where goods are either in transit in a named vessel or about to be shipped at a named port in some particular manner.

G. H. Watson, for plaintiff.

J. E. Rose, for defendant.

COMMON PLEAS.

IN BANCO—MARCH 11.

GREENE v. HAMILTON PROVIDENT SOCIETY.

Mortgage—Building Societies—Non-members subject to rules—Default in mortgage—Amount recoverable—Purely money demand—Release—C. S.U.C. ch. 53, 37 Vict. ch. 50, sec. 3 D.

By sec. 3, of 37 Vict. ch. 50 D., borrowers from Building Societies incorporated under C. S. U. C., ch. 53, though not members of the societies, or signing the rules, are made subject to all such rules in force at the time of becoming borrowers.

In an action against defendants, such a Building Society by the plaintiff, a second mortgagee, on the common counts to recover certain moneys, claimed to be due after the payment of the defendant's claim—

Held, under such rules, that the society, on a sale of the land, under a mortgage given by such borrower to the society, on default before the expiration of the time fixed by the mortgage, were not restricted to the amount originally advanced, with the then accrued interest, but were entitled, in addition to the original principal, to discount the future repayments at such rate of interest and on such terms as the directors might determine; and that only the surplus after the deduction of this sum, together with all payments, moneys, and expenses due

to the society, was to be paid to the mortgagor.

The costs of sale and commission thereon were ruled to be properly chargeable, but not a charge for insurance and survey, or the costs of an action on the covenant, as not coming within the rules.

It was objected on the argument that the plaintiff could not maintain the action, as a subsequent incumbrancer, on a purely money demand, under sec. 4 of the A. J. Act, R. S. O., ch. 49, and that it was necessary that the original mortgagor should have been a party to the suit; but the plaintiff having put in a release from the mortgagor, which, it was said, was used at the trial, though not filed, of all moneys which he might be entitled to receive from the Company as proceeds of the sale or otherwise, the objection was not entertained.

Creelman, for the plaintiff.

Bethune, Q. C., and *Crerar*, for defendants.

PROVINCIAL INS. CO. v. CAMERON, *Executrix.*

Insurance company—Stock—Power of attorney—Calls—Advertisement.

There was also an action against the defendant Cameron in her own right, and actions against five other defendants.

The actions were for unpaid calls on stock.

The stock held by the defendant Cameron in both above capacities was transferred under power of attorney.

Held, that there was sufficient evidence given of the existence of such powers of attorney, and excusing their non-production, to let in secondary evidence thereof; and also that the evidence showed that such shares had not been forfeited.

Under the statutes relating to the Company, it appeared that the name of the Company had been changed; but *held* under the circumstances that it did not affect the plaintiff's rights.

It was objected that the shares of certain of the shareholders had been illegally forfeited, but *held* that even if illegally forfeited, no harm was done as they were still liable thereon; but that under the said Acts the directors had power to forfeit.

Held, that under the said Acts the directors could make more than one call at the same time, so long as they allowed thirty days after the publication of the notice for the payment of such call.

Held, also, that under the said Acts it was not obligatory on the Company to give notice of such call made in one or more of the several newspapers published in every district where stock was held, before suing any of the shareholders who had received such public notice of the call in a newspaper published in his or their district or districts.

Held, also, that a variation in the days of payment in the resolution making the call and its public notice in the newspaper would render such calls invalid.

Objections were also taken to certain resolutions passed subsequently to the resolutions making the call, which, it was contended, had the effect of severally extinguishing the calls, and giving preference to certain shareholders, but such objections were held untenable.

Robinson, Q.C., and *Huson Murray* for the plaintiffs.

Bethune, Q.C., *Snelling*, *Tilt*, *Biggar*, and *Worrell*, for the defendants, except *Jones*, who appeared in person.

REGINA v. BROWN.

Extradition—Foreign indictment—Sufficiency—Statutes in force.

Held, that the 40 Vict. ch. 25 D., relative to extradition of fugitive criminals, is not in force, but that the law and practice relating thereto is to be found in the Ashburton Treaty, Art. X. and the Statutes 31 Vict. ch. 94 D.; 33 Vict. ch. 25 D.; and the Imp. Act 33 & 34 Vict. ch. 52.

On an application for the extradition to the United States of a person charged with murder therein:

Held, *per* WILSON C. J., that under the above Acts a certified copy of an indictment for murder found by the grand jury of the said foreign country, to wit, Erie County, New York State, was sufficient evidence by itself of such charge to warrant the extradition, but that the other evidence set out in the case, documentary and *viva voce*, was insufficient.

Per OSLER J., that neither the indictment nor the other evidence was sufficient.

Per GALT J., that such other evidence was sufficient, and without it he would hesitate as to accepting the indictment as sufficient by itself.

The order for extradition was therefore allowed.

J. K. Kerr, Q. C., for the Crown.

McMichael, Q. C., for the prisoner.

ROBBINS v. VICTORIA MUTUAL INS. CO.

Mutual Ins. Co.—Failure to deliver proof within thirty days.—Mistake—Recovery.

Upon a policy issued by a Mutual Company, the statutory conditions were endorsed with variations, one of which was, (being the same as sec. 56 of the Mutual Act, R. S. O., ch. 161,) that the proofs, declarations, &c., called for by the statutory conditions should be furnished to the company within thirty days after loss, &c. The loss occurred on the 2nd October, 1878, and on the 5th the plaintiff notified defendants by letter. A few days after, the plaintiff saw one S., an agent of the defendants for obtaining applications, but not for settling claims, but who had acted for plaintiff in settling a previous loss with defendants, and asked him to act for him on this occasion, and do whatever was proper, which S. promised to do. On 17th October the defendant's president came up and saw plaintiff, who informed him of the loss, and all the circumstances relating thereto, and plaintiff was told by him, in answer to his enquiry thereto, that nothing further need be done. The plaintiff, in consequence, did nothing; but subsequently, on hearing that the defendants disputed the claim, some correspondence took place, which resulted in plaintiff employing a solicitor, and proofs were thereupon put in, but after the lapse of the thirty days.

Held, that sec. 2 of the R. S. O., ch. 162, applies to Mutual Companies, and that as the evidence shewed that the non-compliance with the condition as to putting in proof within thirty days was by mistake, &c., the plaintiff was protected, and was therefore entitled to recover.

Lennox (of Barrie), for the plaintiff.

McCarthy, Q. C., for the defendants.

QUINLAN v. THE UNION FIRE INSURANCE COMPANY.

Insurance — Statutory conditions — Buildings within 100 feet—Failure to give notice of—Diagram by agent after personal inspection—Evidence.

The first statutory condition endorsed on a policy of insurance, provided that if any person insures his building or goods and causes them to be described otherwise than as they really are, to the prejudice of the company, or misrepresents, or omits to communicate any circumstance which is material to be made known to the company, in order to enable them to judge of the risk undertaken, such insurance shall be of of no force in respect to the property regarding which the misrepresentation or omission is made. The second statutory condition so endorsed, provided that after application for insurance, it shall be deemed that any policy sent to the assured is intended to be in accordance with the terms of the application, unless the company point out the difference relied on; with a variation added, that such application, or any survey, plan, or description of the property to be insured, shall be considered a part of the policy, and every part of it, a warranty by the assured, but the company will not dispute the correctness of any diagram or plan prepared by its agent from a personal inspection. The 20th condition as varied, provided that in case any agent takes any part in the preparation of the application for the insurance, he shall, with the exception above provided in case of a diagram or plan, be regarded in that work as the agent of the applicant. By the application, which was signed, not by the applicant, but by the agent, the applicant was required to make known the existence of all buildings within 100 feet of the insured premises, and it appeared that the applicant had omitted to make known the existence of a small building used for storing coal oil within such distance. A diagram was made and filled in by the agent, and signed by him in his own name as well as the insured, which contained no reference to this building. The diagram was not made from a personal inspection at the time, but from a previous inspection, and the knowledge thereby acquired.

Held, that even if by the above conditions the plaintiff would be relieved from the effect of the

omission to make known the existence of such building where the diagram was made by the agent from a personal inspection, there was no such personal inspection here.

Bethune, Q.C., and *Dixon*, for the plaintiff.

McCarthy, Q.C., and *A. C. Galt*, for the defendants.

IN RE NORTH OF SCOTLAND MORTGAGE CO., AND THE CITY OF TORONTO.

Assessment and taxes—British Co.—Personal property—Liability to assessment—43 Vict., ch. 27, sec. 3 (O.)—*Ultra vires.*

The plaintiffs were a company incorporated under the Imperial Company's Acts of 1862 and 1867, for the purpose of lending money on real estate or on public securities, &c., the registered office of which was in the city of Aberdeen, Scotland, but having an agency in the city of Toronto, the only agency in Canada. All the income or profits of the company arising from the business in Ontario, after deducting expenses of management, were remitted by the General Manager at Toronto to the said registered office at Aberdeen, where all dividends were declared and paid, and where they were liable to assessment, and were actually assessed under the laws of Great Britain. The corporation of the city of Toronto, acting under the 43 Vict., ch. 27, sec. 3, O., which provides that all personal property within the Province, the owner of which is not resident therein, shall be assessable like the personal property of residents, assessed the plaintiffs for a large amount of personal property.

Held, that the statute was not *ultra vires* of the Provincial Legislature, and that the plaintiffs came within its provisions.

The assessment was therefore held to be valid.

Bethune, Q. C., and *Falconbridge*, for the plaintiffs.

Robinson, Q. C., and *McWilliams*, for the defendants.

LEVICK V. CLAFLIN.

Married woman—Separate trading—Evidence.

On an interpleader issued to try the title to certain goods claimed by the plaintiff, a married woman, as acquired by her in carrying on a trade separate from her husband, in the City of Hamilton, within the meaning of the Married Woman's Property Act, R. S. O., ch. 125, or otherwise, as against the defendants, execution creditors of her husband.

Held, upon the evidence set out in the case, that the plaintiff's title had failed; not only did it appear that the goods with which the business was opened up, which were brought from Cincinnati, Ohio, where the plaintiff and her husband formerly resided, were, according to the law thereof, though claimed by the wife as her's, the goods of the husband, but that the business, though carried on in the name of the wife, was in fact the husband's.

Bruce, (of Hamilton) for the plaintiff.

E. Martin, Q. C., for the defendant.

ABELL V. MCLAREN.

Pleading—Embarrassing pleas—C. L. P. Act.

In this case it was urged that the power to strike out a plea as embarrassing under the C. L. P. Act, R. S. O., ch. 50, was merely confined to the case where the pleading is in its terms embarrassing, *e. g.*, where it is confused, unintelligible, complicated, or involved in statement or otherwise, so as to be difficult to understand, but that it does not extend to cases where, though containing an intelligible defence, the same or a similar defence has already been set up by other pleas on the record, or where it contains unnecessary verbiage or statements of fact, or combines several defences.

Held, that this was too restricted a construction to give to the statute.

Riordan, for the plaintiff.

Ferguson, Q. C., for the defendant.

CLARK V. FARRELL.

Stat. Anne, ch. 14, sec. 1—Claimant of goods seized—Non-removal from demised premises.

In this case, on appeal to the full court, the judgment of CAMERON J., note *ante* p. 80, was affirmed with costs.

Crickmore, for the claimant.

McCarthy, Q. C., and *J. B. Clarke*, for landlord.

Bethune, Q. C., for Sheriff.

TURLEY v. BENEDICT.

Lease—Estate for life—Conditions.

Under an indenture made in pursuance of the Act to facilitate the leasing of lands and tenements, between A. B. of the first part, and D. B. and L. B., his wife, of the second part, it was witnessed that the party of the first pa r agrees to lease to the parties of the second part certain land described; "to have and to hold during their natural life all the privileges and appurtenances of the above mentioned land, with the exception of the hop yard, &c." "And the party of the second part is to have, hold, work, and enjoy during his natural life, or hers, while they have their natural reasoning faculties, and in their right minds; and should the party of the second part, either, or both of them, be deprived of reasoning faculties or incapable of manual labor, they are to have their support in a comfortable and respectable manner while they shall live, from the party of the first part. Should the party of the second part be incapable of taking charge of the place in his after years, as it should be done by good husbandry, then the party of the first part govern the above mentioned lands as seems best to him. The party of the second part, should he require it, shall have the first privilege of dressing and packing his hops, should he have any to dry, at a reasonable price, after the expiration of Podsfellow's lease; with this exception of the party of the first part, the party of the second part is to have peaceable and quiet enjoyment." At the trial the jury found that after the lease D. B. did not cease to possess his reasoning faculties, &c., but that he did become incapable of manual labor, and was incapable of taking care of the place as it should be done by good husbandry.

Held, that under the indenture a freehold estate for life was conveyed; and that such estate was never defeated, for that the finding of the jury disposed of the contingency of the habendum, which was strictly a limitation, and as to the other provisions of the lease, they could not be deemed to be conditions on the happening of which the estate became forforfeited.

Clute, for the plaintiff.

G. D. Dickson, for the defendant.

Galt, J.] [March 25.

VACATION COURT.

EQUITABLE LIFE ASSURANCE SOCIETY v. WRIGHT.

Principal and Surety.

Held, by GALT J., that the discharge or release by the creditor of one co-surety operates as a discharge of the other co-surety or co-sureties, even although they may be bound by different instruments.

Clement, for the plaintiff.

Hall, for the defendant.

CHANCERY.

Spragge, C.] [March 12.

OUSTEN v. GRAND TRUNK RAILWAY CO.

Railway Co.—Payment for lands taken for road—Pleading—Parties—Demurrer.

An "action for money had and received will lie wherever a certain amount of money belonging to one person has improperly come into the hands of another." Therefore, where a Railway Company paid to the executors of a tenant for life the sum payable for the fee simple of lands taken by the Company for the purposes of their road, and subsequently the remainderman filed a bill against the Company and the representatives of the tenant for life seeking to obtain payment from the Company of the proportion of purchase money payable to the remainderman.

Held, that the executors were properly made parties with a view to the Company obtaining relief over against them in the event of the Company being compelled to make good the money in the first instance, and a demurrer by the executors for misjoinder of parties was overruled with costs, as the bill alleged all facts necessary to entitle the plaintiff to a direct decree against them, although the bill was not framed with a view to a direct remedy against the executors; for "the payment being made by the Company to the executors of the claims of money, to a proportion of which the plaintiffs were entitled; and the payment being made without the authority of the plaintiffs it became money had and received by the executors to the use of the plaintiffs."

Maclennan, Q.C., for plaintiff.

Moss, for defendants.

Spragge, C.] [March 12.

RE JARVIS, Vendor v. COOK, Purchaser.

Sale under power by mortgagee, trustee or assignee in insolvency—Advertising sale—Notice—Statute of Limitations—Payment of taxes.

The rule of law which requires a mortgagee selling under a power of sale in his mortgage to observe the terms of the power of sale, is also applicable to sales by a trustee or *quasi* trustee acting under a power:—the power must be followed; and the rule applies with equal force to sales by an assignee of an insolvent estate, who in such cases acts under a statutory power.

An assignee proceeded to sell the lands of the insolvent without giving notice of such intended sale "for a period of two months" as prescribed by the Act, without obtaining the sanction of the creditors thereto.

Held, a good objection to the title by a purchaser from the vendee of the assignee in insolvency.

Where a vendor was not in possession of lands, the fact that for upwards of ten years he has paid the taxes on the property is not such a possession as is requisite to bar the right of the owner under the Statute of Limitations.

Maclennan, Q.C., for vendor.

Rose, for purchaser.

Spragge, C.] [March 19.

GILLAM v. GILLAM.

Dower—Election—Ignorantia juris, &c

The testator made a provision in favor of his widow, much more advantageous to her than her interest as dowress, and which was expressly given in lieu of dower, and given during widowhood. The will was acted upon for two years, when the widow married a brother of her deceased husband, and thereupon filed a bill alleging that she had accepted the provisions and bequests made for and given to her by the will in ignorance of her right to dower, had she elected to take dower; and in her evidence she swore that she had been ignorant of such right until advised in respect thereof in 1880, shortly before her second marriage, and now sought to have dower assigned to her.

Held, that the rule "*Ignorantia juris neminem excusat*" applied, and the bill was dismissed with costs.

Boyd, Q. C., for plaintiff.

Moss, for defendant.

Spragge, C.] [March 19.

REID v. REID.

Dower—Tenant for life—Interest—Principal.

The general rule is that as between a tenant for life and the remainderman in respect of a charge upon an estate, that the tenant for life is bound to keep down the interest on such charge, and the duty of the remainderman is to pay the principal. This rule was applied where a widow claimed to have dower out of her husband's estate, which at the time of her marriage was subject to certain legacies and a mortgage, in preference to an annuity given her by his will; she being held bound to pay one-third of the interest on these claims until they became payable, after which the remainderman must pay all the interest as well as the principal thereof.

Boyd, Q.C., and *Totten* for plaintiff.

Ball, Q.C., for defendant.

CHANCERY CHAMBERS.

Blake, V. C.] [Sept. 3, 1875.

RE MORSE.

Quieting Titles' Act—Vesting order—Entireties—Husband and wife.

Where a petition, under the Quieting Titles Act, derived title through a vesting order made upon a sale under a decree in an administration suit,

Held, under *Gnnn* v. *Doble*, 15 Gr. 655, that in the absence of proof to the contrary, the order should be assumed to be regular.

Where a deed in a chain of title had been made to a husband and wife as joint tenants.

Held, following *Shaver* v. *Hart*, 31 U. C. R.,

603, that notwithstanding the terms of the deed, the husband and wife took by entireties, and where the husband made a conveyance of the land in the life-time of his wife, she merely joining to bar her dower, and predeceasing her husband—

Held, that the husband's deed conveyed the fee.

Where, pending the investigation of the title, the petitioner laid out the land in village lots, and registered a plan—

Held, that the petition must be amended in accordance with the plan.

RE CALLAGHAN.

Quieting Titles' Act—Misdescription.

Where a petitioner under the Q. T. A. claimed title as devisee of certain land, but the description of the land in the will was different to that of the land when reclaimed—

Held, that he might establish a title on shewing a misdescription in the will.

But where a misdescription occurred in a deed—

Held, that the petitioners had merely established an equity to have the deed reformed, and that under the Act the Court could not declare the title as though the deed had in fact been reformed.

Mr. Holmested.

RE RAYNERD.

Quieting Titles' Act—Outstanding undivided interest.

Where the title of a petitioner under the Quieting Titles Act is complete, subject to an undivided interest outstanding in trustees for the benefit of an infant, such interest must be got in by the petitioner, or be declared in the certificate of title to be outstanding.

Blake, V. C.]

RE MORSE.

Quieting Titles' Act—Abstract.

Where, in a petition under the Quieting Titles' Act, it was shewn that the registrations on the whole lot of which the land in question formed a part, number over 560, and that it would take six months and cost $100 to prepare an abstract,

Held, that the abstract might be dispensed with if the affidavit of a P. L. S. were filed, proving that he had examined all the registrations on the lot, and that only certain specified numbers affected the land in question.

Blake, V. C.] [Feb. 25, 1876.

RE FRANKLIN.

Quieting Titles Act—Division Court Bonds—Release of by 36 Vict. chap. 6, sec. 5, O.

All Division Court Bonds made before 1st July, 1869, are effectually released by 36 Vict., ch. 6, sec. 5, O.. as to liabilities incurred thereunder, both before and since that date.

Blake, V. C.] [Sept 7, 1876.

RE PETTEN.

Quieting Titles Act—Tenant for life—Consent.

Where the petitioner under the Quieting Titles Act, has only an estate in fee in remainder, the consent of the tenant for life must be obtained before the petition can be filed.

Proudfoot, V. C.] [June 15th, 1878.

RE MOORE.

Quieting Titles Act—Certificate of discharge—Disclaimer.

A certificate of discharge is of no effect to revert the legal estate until registered. Where a certificate of discharge was lost before registration, *held*, that the disclaimer of the mortgagees, who were trustees, and the consent of their solicitors is not sufficient to enable the Court to declare the petitioner entitled to the legal estate in fee simple.

Blake, V. C.] [Feb. 2, 1879.

RE GILCHRIST.

Quieting Titles Act—Foreclosure—Infants.

Where there was no evidence to show that the infants had been served with a decree of foreclosure reserving to them a day to show cause on attaining their majority, but it was

shown that they had been served with notice of proceedings under the Quieting Titles Act, proof of service of the decree was dispensed with.

Blake, V. C.] [Jan. 1881.

RE DUNHAM.

Quieting Titles Act—Contestant.

A contestant under the Quieting Titles Act must file a petition in his own mame before a certificate can issue in his favor, but he may use in such petition the evidence adduced on the petition in which he was contestant.

Proudfoot V. C.] [Jan. 20, 1881.

GOUGH V. PARK.

Costs—Solicitor and client—Travelling expenses.

Where costs as between solicitor and client were to be paid by the plaintiff to the defendant, and where it appeared that the defendant's solicitor had at the request of his client travelled from Sarnia to Toronto to attend on the examination of the plaintiff,

Held, on appeal from the Master, that the defendant can tax against the plaintiff a sum of $60 paid defendant's solicitor for two days' services and travelling expenses.

Proudfoot, V. C.] [Feb. 12.

RE CUMMINGS.

Quieting Titles' Act—Conveyance after proceedings taken.

Parties to whom land has been conveyed after the registration of the certificate of the filing of the petition and pending the investigation of the title must be substituted as petitioners.

Registrars' abstracts must be continued to the date of the certificate of title.

Blake V. C.] [March 7.

WADSWORTH V. BELL.

Sheriff—Poundage.

The poundage of a sheriff cannot be taken to cover more than the risk and responsibility cast upon him when he seizes, retains, and sells goods, and from this levy returns the money. If the sheriff's action be intercepted it is for the court to say what allowance shall be made him in lieu of poundage.

Hoyles, for plaintiff.

H. Cassels, for sheriff.

Spragge C.] [March 12.

ALLAN V. MCTAVISH.

Fraudulent conveyance—Evidence—Res judicata—Ancient document.

D., the purchaser of land, gave a mortgage thereon to secure part of the purchase money, and subsequently allowed taxes to accumulate on the land, which was sold in order to realize such taxes, when D. bought it and obtained the usual deed to himself. D. having made default in payment of the mortgage, proceedings were instituted thereon, pending which D. conveyed this and other property to his two sons, who gave a mortgage back securing the support and maintenance of D. and his wife, when the plaintiff filed a bill impeaching the transaction for fraud.

Held, (1) that upon the evidence the transaction was fraudulent and void as against creditors; (2) that the judgment at law recovered by the plaintiff against D. was not evidence against the sons being *res inter alios judicata;* but (3) that the production of the original mortgage signed by D. which was more than twenty years old, proved itself under R. S. O. ch. 109, sec. 1., sub-sec. 1, which makes such a document evidence of the truth of the recitals contained therein until shown to be untrue; and therefore it was evidence of the debt due thereunder and could be used as such against the sons.

Proudfoot, V. C.] [March 19.

JONES V. DAWSON.

Tenancy by curtesy—Remainder—Devise—Seisin in law.

Where a testator gave to his children all his real and personal property, to be divided equally when the youngest came to the age of twenty-one, subject to a provision that the wife should have all the rents, profits, and interest to maintain herself and educate and maintain the testator's children as long as she remained his

widow, but if she married again, the greater part of the rents, &c., were to be applied to the benefit of his children, and one of the children, Elizabeth, married and died before her younger brother or sister had attained to 21; but after the second marriage of the widow, and leaving surviving her husband and two sons, on a question as to whether the husband was entitled to money by the curtesy in her share,

Held, (1) that as the widow of the testator married before the death of her daughter Elizabeth, the estate of the latter, when she died, was not a remainder expectant on an estate of freehold; (2) that as Elizabeth took by devise and not by descent, she was technically a purchaser, and her issue could inherit as her heirs without actual seizin in her; (3) that a devise passes an estate as effectually as a feoffment and livery of seizin; (4) that seizin in law will suffice if actual seizin is unattainable; (5) that, therefore, the Master was right in finding the husband entitled as tenant by the curtesy.

Plumb, for the infants.

Watson, for the husband.

Blake V. C.] [March 21.

HAYES v. HAYES.

Appeal—Filing report—Practice.

This was an appeal from the Master's report.

It appeared that the report had not been filed until after notice of appeal had been given.

The appeal was therefore dismissed.

Donovan, for appellant.

Armour, contra.

Blake V.C.] [March 21.

MCCOLL v. MCCOLL.

Administration suit.

A mortgagee of the property in question refused to take his money, his mortgage having some time to run.

The property was sold by direction of the Court for $3,000, subject to the mortgage. The purchaser assumed the mortgage and paid the balance, amounting to $1,700 into Court.

The Master held that the $1,700 was the amount upon which the commission under G. O. 643 was to be calculated.

BLAKE, V. C. held the Master's ruling correct. If the mortgagee had consented to a sale free from his mortgage, commission would have been allowed on the whole $3,000.

H. Symons, for plaintiff.

Plumb, for infants.

COMMON LAW CHAMBERS.

Osler, J.] [March 18.

TATE v. HUBBARD—UNION MUTUAL INS. CO., Garnishees.

Attachment—Attorney—Affidavit—Garnishee disputing liability.

The affidavit to obtain an attaching order may be made by the attorney of the judgment creditor or by a partner of the attorney.

A debt is garnishable where it consists of money due under an award and decree of the Court of Chancery, although the full amount is not ascertained by reason of the costs not having been taxed. When the amount in such a case is finally ascertained, execution may be issued against the garnishee, although he still disputes the liability.

Tilt, for judgment creditor.

Alan Cassels, for judgment debtor.

A. C. Galt, for garnishees.

Osler, J.] [March 18.

CANADIAN BANK OF COMMERCE v. CROUCH, TRUSTEES OF SPADINA AVENUE METHODIST CHURCH, Garnishees.

Attachment—Attorney's lien—Costs.

In garnishee proceedings a court of law will, as against the attaching credior, protect an attorney's lien for costs of the action in which or by means of which the debt attached has been recovered, where the garnishee has notice of the lien.

This rule extends only to the costs incurred in the particular suit or proceeding, and not to the attorney's general costs against the client in other matters.

A court of equity would restrain a creditor who has obtained an attaching order at law from enforcing it against a fund recovered

through a suit in equity to the prejudice of the attorney's lien for costs in that suit.

Mr. Wilson (Morrison, Wells & Gordon), for attaching creditor.

Mr. Morphy, (Morphy, Winchester & Morphy) for the attorney.

COURT OF APPEAL.

March 26.

[To be more fully noted hereafer.]

GAUTHIER v. WATERLOO COUNTY INS. CO.—Appeal by plaintiff from the judgment of Queen's Bench, making absolute a rule *nisi* to set aside plaintiff's verdict, and to enter a verdict for defendants. Dismissed with costs.

HOWARD v. BICKFORD—(Two cases.)—Appeals from the judgments of the Courts of Queen's Bench and Common Pleas, discharging rules *nisi* obtained by defendant in Hilary Term, 1880, to set aside verdicts for plaintiff. Dismissed with costs.

WALTON v. COUNTY OF YORK.—Appeal by plaintiff from judgment of Queen's Bench, ordering non-suit. Allowed with costs.

LIVINGSTON v. WOOD.—Appeal from order of SPRAGGE C. Dismissed with costs.

BLAKE v. KIRKPATRICK.—Aypeal allowed with costs and reference made to Master.

HARRISON v. PINKNEY.—Appeal from the judgment of the Court of Queen's Bench, discharging defendant's rule *nisi* to set aside the verdict obtained by plaintiff, and to enter a non-suit or a verdict for defendant. Dismissed with costs.

MOORE v. JOHNSTONE.—Appeal dismissed with costs.

DUFF v. CANADA MUTUAL INSURANCE CO.—Appeal from the order of PROUDFOOT. V. C. Dismissed with costs.

REPORTS.

ONTARIO.

ELECTION CASES.

MCMONAGLE v. COONS.

Municipal election—Prosecution for voting more than once for mayor—Inspection of ballot papers—Municipal Act ss. 150, 158.

Action to recover two several penalties of $50 each for having, at an election for the Mayoralty of Prescott, after having already voted, twice voted at other polling places.

Upon an application for inspection of ballot papers, &c.,

Held, (1) That this was a prosecution for an offence in relation to ballot papers, and that the order for inspection could be made under sec. 158 of the Municipal Act.

2.—That such inspection was inadmissible to obtain information as to votes given by any person other than defendant, no prosecution having been instituted against such person.

3.—That even if this prosecution did not fall within the terms of sec. 158, inspection of the voters' list and other papers mentioned in subsection (*g*) to sec. 150 of the Municipal Act, could be ordered by the county judge.

[Brockville, January, 1881

The plaintiff obtained a summons calling upon the clerk of the municipality and the defendant to show cause why the clerk should not produce for inspection the several sealed packets o ballot papers, &c., made up under sec. 150 of the Municipal Act, containing the voters' lists used at the several polling places at the election for mayor, &c., and allow the same and the list of voters and the contents thereof to be inspected by the plaintiff, &c. Also ordering the clerk in the meantime not to destroy the ballot papers, &c., and calling upon the clerk to show cause why he should not produce to this court, at the trial of this cause, the said several packets, &c. and all the contents.

The summons was granted upon an affidavit of the plaintiff stating among other things his belief that defendant on 3rd January, 1881 voted for mayor after having already voted for him at some other polling place, and voted a third time after having already done so at two other polling places; that he had caused a suit

to be entered for the recovery of the statutory penalty; that he believed an inspection and production of such ballot papers and particularly of the several packets marked G. containing the voters' lists used at said election was required for the purpose of maintaining the prosecution of this suit, etc.; that he believed there were several other electors other than defendant who voted at more than one polling place for mayor.

M. E. O'Brien, for defendant. This is not a prosecution for an offence in relation to ballot papers or a petition questioning an election or return. All papers mentioned in sub-secs. to sec. 150 are "ballot papers," and can only be inspected for the purposes mentioned in sec. 158, and not for any other purpose.

This application is of a fishing nature.

French, contra. This is a prosecution for an offence in relation to ballot papers. The cause of action is called an "offence" in sec. 136. It is an offence in relation to ballot papers inasmuch as the defendant was guilty of an offence if he took a ballot paper from the deputy-returning officer for the purpose of voting for mayor after having already voted for mayor at another polling place. Even if the plaintiff is not entitled to an order to inspect the ballot papers he is entitled to one to inspect the voters' list and other papers mentioned in subsec. (*g*) to sec. 150 of the Act, and the plaintiff is entitled to an order for inspection under the general jurisdiction of this Court. See sec. 175 C. L. P. Act. and sec. 244 of Div. Court Act.

McDONALD, Co. J.—Upon the argument I was inclined to think that the production and inspection of ballot papers asked for could not be ordered, as I took much the same view of the 158th section as Mr. O'Brien contended for. I differed from him as to all the papers mentioned in the sub-sections to section 150 being "ballot papers." I thought then, and think now, that the voters' list and other papers mentioned in sub-section (*g*) are not referred to in, or covered by, the 157th or 158th sections of the Act, and I agree with Mr. French in his contention that under the 244th section of the Division Courts Act I could make an order for their production and inspection so long as the same was not prohibited in the Municipal Act. But upon a full consideration of the 158th section I have decided that this action is "a prosecution for an offence in relation to ballot papers."

The learned Judge then referred to the following sections of the Municipal Act: Secs. 118, (ss. 3,) 128, 139, 140, 141, 143, 150, 157, 133, 135.

Now, if the defendant did vote more than once for mayor at the election referred to, he has certainly committed an "offence," for so it is characterized in the 136th section. Is such "offence" an "offence in relation to ballot papers?"

If the requirements of the Act were complied with, and the defendant was permitted to vote for mayor three times, he must have received from the deputy returning officer, on each occasion, a ballot paper containing the names of the candidates for mayor, (Prescott has not any Reeve or Deputy), and not containing the names of the candidates for councillors. Pursuant to the 139th section, the deputy returning officer, at each polling sub-division, must have signed his name or initials upon the back of the ballot paper, and have delivered the same to defendant, and have placed in the column of the Voters' list headed "Mayor," or "Mayor and Reeve" a mark opposite defendant's name to denote that he had received a ballot paper for mayor. If the provisions of the 143rd section were complied with, the defendant did not take the ballot paper so received out of the polling place. If he declined to vote, the deputy returning officer would have written "Declined" upon the ballot paper and preserved it. If the defendant deposited the ballot paper in the ballot box, it must at the close of the poll have been allowed or rejected, and in either case must have been sealed up and returned to the clerk of the municipality. In my judgment, the defendant, if he obtained from a deputy returning officer more than one ballot paper for mayor, with the intention of using same to vote, and did vote; or if he obtained from each one of three deputy returning officers such a ballot paper with such intention, and did vote, was guilty of "an offence in relation to ballot papers."

I next come to the question of whether the production and inspection asked for can be ordered and if so, should such order be made. I think under secs. 136 and 158 that the order can be made. Then ought it to be made? I think it ought in so far as concerns this present action. The 158th sec. provides for the order being made upon the court or judge "being satisfied by evidence on oath that the inspection or production

of such ballot papers is required for the purpose of maintaining a prosecution for an offence in relation to ballot papers." The plaintiff's affidavit covers the necessary ground and furnishes the evidence required to satisfy me. And it seems clear that unless such an order is made, this prosecution, supposing the defendant to be guilty, could hardly be successfully maintained, for then the only evidence which the plaintiff could adduce would be such as might be furnished by admissions or statements of the defendant; and provided the same were obtained at the trial they would probably be rendered useless by the defendant claiming the benefit of sec. 211 of this Act. I may, in passing, remark that this fact furnishes another argument in favor of this being a case in which a production and inspection may be ordered, for otherwise the Act would declare a certain action to be an offence and provide a penalty for it, and yet not only not provide a means of proving the commission of the offence, but actually prohibit the obtaining of such proof, (see secs. 158 and 211).

In so far as this application is made for the purpose of ascertaining whether there were others than defendant who voted at more than one polling place for mayor, I unhesitatingly refuse it. I have more than once held on application made to me for the purpose of obtaining a re-count of ballots under the Act, that the same could not be granted unless "a petition questioning an election or return," had actually been filed. One such decision has, I believe, been reported (see 13 C. L. J. 44). And I also hold that where an inspection is granted for the purpose of maintaining a prosecution, it must be a prosecution actually commenced or instituted.

In considering whether the offence charged n this case is "an offence in relation to ballot papers," I have not been unmindful of this being a penal action, and of the enactments of the 160th section, or of the contention that might arise that the offences in that section mentioned are those in a prosecution for which the legislalature intended that a production or inspection should be ordered. But if confined to such a prosecution, the difficulty as to evidence in a prosecution for voting more than once in an election for mayor, to which I have already above referred, would arise.

The summons will therefore be made absolute to this extent: an order will go for the production for inspection, and inspection on a day to be therein named and upon such conditions as shall be therein named, of the ballot papers and other papers returned to the clerk of the municipality, in so far as the same concern or affect any vote or votes for mayor given by defendant, (if so given). In and by the summons the clerk has already been ordered not to destroy the ballot papers, &c., until otherwise ordered, and to retain the same until otherwise ordered. That order to be continued. The order also to provide for the production at the trial of this cause of the said several packets of ballot papers and the voters' lists, and other papers returned by the deputy returning officers to the clerk of the municipality.

THE SUPREME COURT OF CANADA.

GENERAL RULE.

Wednesday, the Sixteenth day of March, A.D. 1881.

It is ordered:

1. That Rule Eleven be and the same is hereby amended by striking out the word "immediately" at the beginning of such Rule.

2. That Rule Fourteen be and the same is hereby amended by striking out the words "one month" therein contained, and by inserting in lieu thereof the words "fifteen days."

3. That Rule Fifteen be and the same is hereby amended by inserting after the words "and mailing," where they occur in such Rule, the words, "on the same day," and by striking out the words "in sufficient time to reach him in due course of mail before the time required for service."

4. That Rule Twenty-three be and the same is hereby amended by striking out the words "one month" at the beginning of said Rule, and by inserting in lieu thereof the words "fifteen days."

5. That Rule Thirty-one be and the same is hereby amended by striking out the words "one month where they occur in said Rule, and by inserting in lieu thereof the words "fourteen days"; and by adding at the end of said Rule the words "but no appeal shall be so inscribed which shall not have been filed twenty clear days before said first day of said Session, without the leave of the Court or a Judge.

6. That Rule Sixty-two be and the same is hereby amended by striking out the words "two weeks," and by inserting in lieu thereof the words "fifteen days."

7. That Rule Sixty-three be and the same is hereby amended by striking out the words "one month's" where they occur in said Rule, and by inserting in lieu thereof the words "one week."

(Signed) W. J. RITCHIE, C. J.
S. H. STRONG, J.
T. FOURNIER, J.
W. A. HENRY, J.
JOHN W. GWYNNE, J.