The Canada Law Journal.

VOL. XXIV. MAY 16, 1888. No. 9.

IN our notes of cases in this number, we give two decisions, the one by the Court of Appeal for Ontario, the other by the Supreme Court of Canada, on the vexed question of the commencement of controverted election trials more than six months after the presentation of the petition. The case decided by the Supreme Court is the now well-known Glengarry controverted election petition. It will be seen that the five judges of the Supreme Court were not unanimous in their findings. GWYNNE, J., dissents from every position taken by his learned colleagues in the decisions arrived at by them; and RITCHIE, C.J., joins with him in dissenting from the conclusion that an order for the extension of the time for trial, granted after the expiration of the six months, is invalid, and can give no jurisdiction to try the merits of the petition, it being then out of court. The judgment pronounced was, then, that of a divided court, three of the judges sustaining the appeal, and two of them being adverse to it. It will be interesting to see the reasons given by these learned and able judges in support of their dissenting judgments. Without giving any opinion ourselves, it may be said that there are several in the profession in Ontario whose views seem to coincide with those of the learned judge who hails from this province.

AN examination of the report relating to the registration of births, marriages and deaths in Ontario for 1886, the last report issued, reveals some interesting, though by no means encouraging facts, in regard to the duration of life among lawyers, as compared with men engaged in other callings. Cultivators of the soil, as might be expected from their independent open air life, are longest lived, attaining an average age of almost 63 years. Professional men come next with an average of 58 years, labourers have an average life of 53 years, while mechanics as a class reach an average of almost 52½ years. Under the general head of professional men, those classed as "gentlemen," live to the age of 69. What professional gentleman would not prefer to be a gentleman by profession? Lawyers pass away at 45, physicians live nine years longer. But we commend dentistry to those who long to reach a ripe old age, the death of but one dentist is recorded, and "he filled his last cavity" at the age of 77. The good often die young, but if they escape the perils that beset youthful goodness, their chances of life are excellent. The average life of clergymen is 18½ years more than that of their professional brethren of the courts. The arduous labours of public officials in holding their situations, drawing their salaries and determining knotty points of precedence, hurry them to an untimely tomb at 50.

We regret to have to record the death of Mr. Justice Henry, of the Supreme Court of Canada, at Ottawa, on the third instant. He had been suffering from an attack of paralysis for some weeks, and, notwithstanding occasional signs of improvement, continued to grow worse until death came. The life of the deceased judge was a long and eventful one. He was born at Halifax, N.S., in 1816, so that he was in his 72nd year. He was called to the bar of his native province in 1840, and, from that time until his death, he has almost constantly served his country in some public capacity. Shortly after his call to the bar he served in the Legislative Assembly as member for Sydney, which he continued to represent until 1867, when his support of the proposed confederation scheme cost him his seat. For several years he also held the office of Mayor of Halifax. During these years, notwithstanding his arduous public services, he rapidly gained distinction in his profession. He became a member of the Legislative Council, and was the active promoter of several legal reforms. His measure for chancery reform was the first step in that direction in any English-speaking community. He was for some time Solicitor-General of Nova Scotia, but finally separated from his old colleagues of the Liberal party, with which party he had always identified himself, on the question of the Catholic disabilities. The Opposition gained office, and Mr. Henry became Solicitor-General in the new Government. He acted for Nova Scotia as a delegate on several important missions, amongst others at Washington, whither he went to secure a renewal of the Reciprocity Treaty of 1854; at London, to urge on the Imperial Government the necessity of constructing the Intercolonial Railway; and also as a member of the convention which laid the foundation of confederation. He was appointed to the Supreme Court of the Dominion thirteen years ago. His long, active, and eventful life was devoted to the service of his country. His death leaves a vacant place in the ranks of the many gifted men who have come from our Maritime Provinces to take part in working out to a successful issue the destinies of this Dominion.

We are pleased to learn that McGill University has conferred the degree of D.C.L. on Mr. J. J. Maclaren, of this city. We congratulate Dr. Maclaren on the richly merited honour of which he has been the recipient. The degree was obtained in course, the learned doctor having been for some years a B.C.L., of McGill University. The thesis which Mr. Maclaren wrote preparatory to the degree treats of Roman Law in English Jurisprudence. It goes back to the days of the Roman occupation of Britain, and the time of Saxon and Danish rule. In these times the traces of Roman law are found chiefly in the manorial system, in municipal institutions, and in the law of wills and donations. The period of the Norman Conquest is more fully dealt with, and the names of Glanville, Bracton, Fleta, and Britton, occupy a prominent place in this portion of the narrative. The influence of the civil law on the common law is, of necessity, treated only in brief outline, as also the Court of Chancery, which has often been described as "Roman to the backbone." We give the conclusions at which Dr. Maclaren has arrived, in his own words:—

1. That a large portion of the English common law, generally supposed to be indigenous, is of Roman origin, having either survived from the Roman occupation, or having been subsequently introduced through the influence of the Church, or under the early Norman kings.

2. That further additions were made to these Roman law elements in consequence of the revival of the study of civil law under Vacarius and his successors, and the incorporation by Bracton into his work of a considerable part of the *Corpus Juris*, either previously embodied in the common law or inserted by him as not being inconsistent with its provisions.

3. That many of the principles of the civil law were adopted through the medium of the Court of Chancery, the ecclesiastical courts, and the Court of Admiralty, where the civil law rules were either adopted or generally recognized as authorities.

4. That even in the common law courts, the extension of the law to meet the requirements of advancing civilization, and particularly the development of modern mercantile law, were largely on civil law lines, through the adoption of the *lex mercatoria*, and the favour with which eminent judges, such as Lord Holt and Lord Mansfield, regarded the Roman law.

5. That recent legislation, as, for instance, the extension of the rules of equity by the Judicature Act, has infused the equitable principles of the civil law into the law of England.

THE LAW OF DOWER.

SOME time ago we took occasion to express some doubt as to the correctness of the construction placed on the 42 Vict. c. 22 (O.), (now embodied in R. S. O. c. 133, s. 5, *et. seq.*) by the cases of *Smart* v. *Sorrenson*, 9 O. R. 640, and *Calvert* v. *Black*, 8 P. R. 255. These observations, which are to be found *ante* vol. 21, p. 405, have recently received additional force from the fact that in a recent case before the Chancellor, of *Re Croskery*, that learned judge has expressed a very strong opinion adverse to those cases. *Re Croskery* was an appeal from the Master in Chambers refusing an application by mortgagees to pay the surplus moneys into Court which remained in their hands, after satisfying their mortgage; the money in question having been derived from a sale of mortgaged property under a power of sale. Claims were made to the fund on the part both of the wife of the mortgagor, and his assignee for the benefit of creditors. If *Smart* v. *Sorrenson* were correct, the wife of the mortgagor could, of course, have no claim to the funds, her husband being still alive, and his equity of redemption having been extinguished, and the Master in Chambers so held, and therefore refused the application. But the Chancellor was of the opinion, after a careful examination of the authorities, without expressly overruling *Smart* v. *Sorrenson* and *Calvert* v. *Black* (which sitting in Chambers it was not competent for him to do), that the claim of the wife was of such a character that the mortgagees

ought not to be put to the risk of determining whether it was, or was not, well founded, and were, therefore, entitled to pay the money into court, and he, therefore, allowed the appeal.

The Act seems to us clearly to recognize the fact that, in circumstances such as existed in *Re Croskery*, the mortgagor's wife's inchoate right of dower is to be protected, and this can only be done effectually either by setting apart a sum to be invested, the income of which during the husband's life would be payable to him or exigible by his creditors, and the capital of which would have to be preserved, until it was seen whether or not the wife survived her husband. If she did, it would be payable to her, and if she did not, it would be payable to the mortgagor, and be exigible by his creditors. Or, on the other hand, the wife's interest may be ascertained, on the principle on which deferred annuities are valued, and her claim satisfied by a present cash payment in accordance with such valuation.

DIVORCE.

WHILST we are thankful that in this country we have not the facility for dissolving the marriage tie, which is, unfortunately, only too easy in the country to the south of us, and now not much better in England, we are glad to know that the procedure in our Divorce Court has been at length placed upon an intelligent, and as far as possible, on a satisfactory footing. The rules, orders and forms of proceeding of the Senate of Canada have, as we have already announced, been definitely settled and adopted by the Senate. They may well be published (which is done in another place) for the benefit of all parties who may have occasion to refer to them.

In the exhaustive and interesting speech made by the Hon. Mr. Gowan, in moving for a special committee to frame these rules and forms, and for regulating the procedure upon applications for divorce before the Senate, the whole subject was fully laid before the House, and an historical review given of the origin and position of the divorce law in this Dominion, and its various Provinces. Ample reasons were also given for the suggested changes in the then procedure. Were it possible, we should like to quote very largely from it, but must content ourselves with the following extract which shows the careful thought bestowed on the subject:—

"It has been urged that the establishment of a divorce court similar to that of England is desirable in order to secure cheap, speedy, sound and uniform administration, and that the machinery for divorce should be purely judicial, rather than quasi judicial and legislative, and arguments, of more or less cogency, have been used in favour of a special court.

"I am free to admit that a proceeding of a judicial character by a legislative process is not without inconvenience; but upon public grounds I should not desire to see Parliament divest itself of control in a matter which lies at the very foundation of morality, and the purity of domestic life, and consequently the well-being of society.

"It is well there should be room for elastic action—the refusal to pass a law in favour of one who has outraged decency and morality—the power to exercise penal legislation, if I may so put it, in gross cases. This power, in the public interests, should I think, remain with Parliament. When involved in the exercise of its high functions to make a special law in a particular case, perfect freedom of action should be preserved.

"A court of divorce could merely declare the law and pronounce fixed judgment, having relation to the individual contest alone.

"There may be inconvenience, as I have said, in the legislative process, but I do not think the inconvenience is insurmountable. I believe it may be minimized or overcome by appropriate rules regulating divorce proceedings.

"But in any case, the argument in favour of the establishment of a court seems open to objection, and as at present advised I do not think it would be in the public interests.

"The number of cases coming before Parliament is increasing, but with only thirty cases since Confederation, the probable number would not warrant the large additional burden, the establishment and maintenance of such a tribunal would involve.

"'Tis true in Parliament these cases are disposed of but once a year, while a Divorce Court would be always open; but I am disposed to think *it would be anything but a blessing* to offer the temptation of a court sitting always, for hasty appeals to dissolve the marriage tie. Moreover, there would be more technicality, of necessity, in the proceedings of a court, as may be seen in looking over the proceedings of the English Divorce Court cases, and many vexatious impediments not likely to occur in Parliament. Then, as to delay: in most cases I think the time in obtaining a final decree from a court would not be less, in the majority of cases, than in obtaining an Act for divorce.

"The costs of obtaining a private Act are said to be high, and some regard this as an evil; but I venture to say they would be little less in a Divorce Court contest; and so, neither on the ground of simplicity and speed, nor economy in procedure, can the arguments in favour of a Divorce Court, in my opinion, be sustained.

"Something has been urged with more force, on the ground of uncertainty in procedure. I must admit the existing procedure is incompetent and unsatisfactory. I believe, however, this may be cured by a revision of the Rules for Divorce, and that a simple and intelligible practice can be devised, under which parties interested, or their legal advisers, could be able to clearly know the method and conditions upon which relief would, if granted at all, be obtained, and which would prevent improper appeals to Parliament—and guard against fraud and abuses."

As will be seen by a perusal of the rules, a committee of nine senators is appointed, called the Select Committee on Divorce, to whom are to be referred all petitions and bills for divorce and all matters arising thereout. This Committee practically constitutes the Divorce Court of the Dominion. The original proposition was to make the Committee consist of seven members of the Senate, and we confess to the thought that the smaller number would have been preferable to the larger one which was afterwards agreed to.

It is not necessary to enlarge upon the danger and impropriety of the old procedure, which practically left to the member having charge of the bill to select the judges who were to pass upon the case. It was at least in bad taste, and contrary to first principles underlying judicial determinations. Again, a relic of

antiquity has been disposed of by getting rid of the absurd practice of taking the evidence of witnesses to prove service at the bar of the house on written questions. The same Committee will now be the tribunal for dealing at once with all questions of a preliminary and formal character, as well as the facts and circumstances upon which the bill of divorce is founded. The orderly conduct of the proceedings has been provided for, and the same rule of evidence which governs in indictable offences is laid down in this matter, with certain necessary exceptions. The applicant for divorce, as well as the party from whom the divorce is sought, may be examined upon oath. In all cases not otherwise provided for, the procedure is to follow the rules and usages of the House of Lords in respect to bills for divorce. As, however, we give the rules in *extenso*, it will not be necessary to refer to them at greater length.

In reading the debates which took place in the Senate in reference to this subject, one can not but remark upon the difficulty of making any satisfactory progress, owing to the views of a number of the senators whose religious opinions are entirely opposed to divorce under any circumstances whatever. This is to be deplored, for it may as well be accepted that marital difficulties will occur as long as the world lasts, and there must be a divorce law of some sort, and it is only wisdom to make it as perfect as possible. But whatever may be the result in administration of the reforms in the procedure now inaugurated, there can be no doubt that sound views respecting the purity of the home and the family, and its importance as a factor in the prosperity of any people, have been enunciated, and attention has been drawn to a subject of very great importance, both from a religious, moral and social standpoint.

COMMENTS ON CURRENT ENGLISH DECISIONS.

The *Law Reports* for April comprise 20 Q. B. D. pp. 441-596; 13 P. D. pp. 41-75; and 37 Chy. D. pp. 327-540.

BREACH OF PROMISE OF MARRIAGE—ACTION AGAINST REPRESENTATIVES OF DECEASED PROMISOR—ACTIO PERSONALIS MORITUR CUM PERSONA.

The first case in the Queen's Bench Division to be noted is *Finlay* v. *Chirney*, 20 Q. B. D. 494, to which we made some reference, *ante* p. 161. This was an action for breach of promise of marriage brought against the personal representatives of the promisor. The pleadings contained no allegation of any special damage, but, by special leave of the Court of Appeal, particulars of alleged special damage were delivered pending the appeal from an order of Field and Wills, JJ., granting a new trial. These particulars were, (1) Amount expended in the purchase of a trousseau; (2) Maintenance of plaintiff from date of promise to the death of the testator; (3) Costs occasioned by the birth of a child, the result of the seduction of the plaintiff by the testator under the promise of marriage in

question, including cost of maintenance until test.tc.'s death; (4) Loss of parish allowance for each of her three legitimate sons, withdrawn in consequence of the birth of the illegitimate child; (5) Loss, owing to the birth of the illegitimate child, of a legacy of £100, which would otherwise have been left to plaintiff by her mother, in common with her brothers and sisters. The Court of Appeal (Lord Esher, M.R., and Bowen, L.J.) were of opinion that, (1) a breach of promise of marriage, without any allegation of special damage, is a mere personal injury, to which the maxim *actio personalis moritur cum persona* applies, and, therefore, no action therefor will lie against the representatives of a deceased promisor; (2) that none of the particulars alleged constituted such special damage as entitled the plaintiff to recover; and (3) that the only special damage which would be recoverable in such an action would be something affecting the money value of the contract to the plaintiff, and part of the consideration for the promise, and brought to the knowledge of the other party at the time of the contract, in order to bring it within the principle of *Hadley* v. *Baxendale*, 9 Ex. 341. In the judgment of Bowen, L.J., is to be found an instruction disquisition on the maxim *actio personalis*.

ORDER FOR ALIMONY PENDENTE LITE—FINAL JUDGMENT.

In re Henderson, 20 Q. B. D. 509, a question was raised whether an order for the payment of alimony *pendente lite* was a "final judgment," entiding the wife to issue a bankruptcy notice against her husband for non-payment of arrears, and the Court of Appeal (Lord Esher, M.R., and Fry and Lopes, L.JJ.) held that it was not.

ORDER DISMISSING ACTION FOR WANT OF PROSECUTION—FINAL JUDGMENT.

A similar question arose *in re Riddell*, 20 Q. B. D. 512, but in this case the point raised was whether an order dismissing an action with costs for want of prosecution was a "final judgment," and the Court of Appeal (Lord Esher, M.R., Fry and Lopes, L.JJ.) came to the conclusion that it was not; a similar decision we may remark to that of the Supreme Court in *Cauchon* v. *Langelier* (see *ante* pp. 184-5). Lord Esher, M.R., defines a "final judgment" to be "a judgment obtained in an action by which the question whether there was a pre-existing right of the plaintiff against the defendant, is finally determined in favour of either the plaintiff or defendant." Fry, L.J., without giving any definition of a "final judgment," says, that "nothing can be a final judgment by which there is not a final and conclusive adjudication between the parties of the matters in controversy in the action;" and Lopes, L.J., defines a "final judgment" to be "a final adjudication of the matters in contest in the action between the parties to the action."

VENDOR AND PURCHASER—AGREEMENT FOR PUCHASE OF LEASE—CONSTRUCTIVE NOTICE OF COVENANTS IN LEASE.

In *Reeve* v. *Burridge*, 20 Q. B. D. 523, the plaintiff sought to recover from the defendant £100, liquidated damages for breach of a contract of purchase of

a leasehold, and the question turned on whether, by entering into the contract without any opportunity of inspecting the lease, the defendant was to be deemed to have had constructive notice of the existence of certain onerous covenants in the lease, the existence of which was the ground on which he refused to carry out the contract. Stephen, J., before whom the case was tried, held that the defendant had such notice; but the Court of Appeal (Lord Esher, M.R., Fry and Lopes, L.JJ.) overruled him on this point. Fry, L.J., who delivered the judgment of the Court, considers the case was governed by *Hyde* v. *Warden*, 3 Ex. D. 72, although, in that case, the purchase of a sub-lease was in question; and, on page 528, he says, "that there is great practical convenience in requiring the vendor, who knows his own title, to disclose all that is necessary to protect himself, rather than in requiring the purchaser to demand an inspection of the vendor's title deeds before entering into a contract, a demand which the owners of property would in some cases be unwilling to concede, and which is not, in our opinion, in accordance with the usual course of business in sales by private contract."

HUSBAND AND WIFE—SEPARATION—ACTION BY WIFE TO RECOVER MAINTENANCE—STATUTE OF FRAUDS.

McGregor v. *McGregor*, 20 Q. B. D. 529, is a case which marks the crumbling away of old ideas regarding the relationship of husband and wife. The action was brought by the wife against her husband to recover six weeks' arrears of maintenance, agreed to be paid to her by the defendant as one of the terms of an agreement for separation. It was objected that the parties could not contract with each other without the intervention of a trustee; and also that the agreement was not to be performed within a year, and was, therefore, void under the Statute of Frauds, because it was not in writing. But the Divisional Court (Stephen and A. L. Smith, JJ.) overruled both objections, holding that the agreement for separation was valid, that it was competent for the parties to enter into such a contract without the intervention of a trustee, and that it was one that could be enforced by the one against the other. As to the point raised as to the Statute of Frauds, the court held that, as the action was merely to recover six weeks' arrears—even if the agreement were one within the Statute—the plaintiff was entitled to recover as for money paid at the defendant's request, the consideration being executed, following *Knowlman* v. *Bluett*, 9 Ex. 307.

WINDING-UP ACT—ACTION AGAINST LIQUIDATORS—STAYING ACTION—COMPANIES ACT, 1862, S. 87—(R. S. C. C. 129, S. 16.)

Graham v. *Edge*, 20 Q. B. D. 538, was an action brought against the official liquidators of a company after a winding-up order had been made, to recover rent charged on property which had vested in the defendants as liquidators. The leave of the court had not been obtained to the bringing of the action, and the defendants applied to stay the proceedings. Huddleston, B., and Manisty, J., stayed the proceedings, holding that the action was in effect one against the company, though Manisty, J., expressed some doubt on the point.

FALSE IMPRISONMENT—REASONABLE AND PROBABLE CAUSE.

Howard v. *Clarke*, 20 Q. B. D. 558, was an action for false imprisonment, in which a verdict having been rendered for the plaintiff for £25, the defendant moved to set aside the verdict and enter judgment for the defendant. The case arose as follows:—By the Pawnbrokers' Act, 1872 (35 & 36 Vict. c. 93, s. 34), in any case where, on an article being offered in pawn to a pawnbroker, he reasonably suspects that it has been stolen, or otherwise illegally or clandestinely obtained, he may seize and detain the person and the article and deliver them to the custody of a constable. The plaintiff offered to pawn with the defendant—a pawnbroker—a gold horseshoe pin set with seven diamonds, and a ring. The defendant had previously received notice from the police of articles recently stolen, among which was "a gold horseshoe pin set with seven diamonds," and a ring; and he asked the plaintiff if he was a dealer. He replied he was not. The defendant also asked where plaintiff had obtained the articles, and the plaintiff stated he had got them from a publican, whose name and address he gave. The plaintiff gave the defendant into custody. It was subsequently proved that the plaintiff had not stolen the articles, and that his statements were true. At the trial the judge left it to the jury whether the defendant had a reasonable suspicion; but the court (Mathew and A. L. Smith, JJ.) held that this was misdirection, and that it was for the judge to say whether the defendant reasonably suspected that the pin had been stolen or otherwise illegally or clandestinely obtained, and that, no matter whether the question was for judge or jury, on the facts there was no evidence of absence of such reasonable suspicion, and therefore judgment was given in favour of the defendant.

COMPANY—SALE OF SHARES—REFUSAL OF COMPANY TO REGISTER TRANSFER.

The only other case in the Queen's Bench Division to be noticed is *London Founders' Association* v. *Clarke*, 20 Q. B. D. 576. In this case a sale of shares had been made through brokers in the Stock Exchange, and the purchaser, according to the practice of the Stock Exchange, had paid for the shares on receiving a duly executed transfer of the shares. On applying to the company to register the transfer, the directors, who were empowered by the articles of the association in their discretion to decline to register a person claiming by transfer of shares, refused to register the transfer; whereupon the transferee brought the action to recover back the price of the shares from the vendor as money had and received to his use. The Court of Appeal (Lord Esher, M.R., and Fry and Lopes, L.JJ.), however, held that the contract did not import an undertaking by the vendor that the company would register the transfer, and, therefore, the action failed; and Lord Esher expressed the opinion that the same result would follow, even though the directors had had no option, and had wrongfully refused to register the transfer.

SHIP—COLLISION—RELATION OF TOW AND TUG—LIABILITY OF VESSEL IN TOW.

One or two of the cases in the Probate Division call for a brief notice. In *The Niobe*, 13 P. D. 55, the question of the relationship between a tow and a tug

is discussed, with regard to the liability of the former for collision by the latter. In this case, a tug having a vessel in tow came into collision with another vessel. The collision might have been avoided had a proper look-out been kept on board the vessel in tow, and had she warned the tug that she was in danger of collision by continuing on her course. Under these circumstances, Sir James Hannen held that the owners of the tow were liable, and that, under the ordinary contract of towage, the vessel in tow has control over the tug, and is therefore liable for the wrongful acts of the latter, unless they are done so suddenly as to prevent the vessel in tow from controlling them.

CODICIL—EXECUTION—ACKNOWLEDGMENT.

In *Danitree* v. *Fasulo*, 13 P. D. 67, a codicil was propounded for probate, the execution of which was disputed. The testatrix, it appeared, had produced a paper to the witnesses to attest; but one of the witnesses saying she did not wish to know what it was, she refrained from making any explanation about it, and the witnesses signed the paper which they identified as the codicil. One of the witnesses was sure that the name of the testatrix was on the paper when she signed it; but she could not recollect that the testatrix had signed it in her presence. She did not read the paper, and was not aware that it was a testamentary paper. The other witness was unable to say whether she signed at the request of the testatrix or of the other witness; but when she went into the room the testatrix had the paper in her hand. This witness, also, had no idea of the nature of the paper, and did not recollect seeing the testatrix sign it; but she thought her signature was there when she put her own name to the paper. On this evidence, Butt, J., was of opinion that the codicil had been duly acknowledged by the testatrix, and it was admitted to probate.

ADMINISTRATION WITH WILL ANNEXED—GRANT TO STRANGER IN BLOOD—MINOR.

In the goods of Webb, 13 P. D. 71, administration with the will annexed was granted to a stranger in blood who had been elected by the testator's children as their testamentary guardian, without notice to the next of kin entitled to the grant, it being shown that one had renounced, and that the remainder were at a distance, or their place of residence unknown.

ADVERTISEMENT OFFERING REWARD FOR EVIDENCE—CONTEMPT OF COURT.

The only other case in the Probate Division is *Butler* v. *Butler*, 13 P. D. 73, a suit for divorce on the ground of the husband's adultery and cruelty. The defendant had issued and published about the district in which the wife and her family lived, a notice purporting to be signed by him offering £25 reward for evidence of the confinement of a young married woman of a female child, "probably not registered." The plaintiff moved for an attachment, and it was held by Butt, J., notwithstanding it was sworn that evidence had been procured in answer to the notice, that the publication of the notice was a contempt of court, as tending to prejudice the petitioner and discredit her in the assertion of her rights;

and a writ of attachment was ordered to issue, but the writ to lie in the office for three days, and during that time the defendant to be at liberty to apply to the court an affidavit that he had removed the objectionable placards.

TRUSTEE—BREACH OF TRUST—INDEMNITY—CONCURRENCE IN BREACH OF TRUST.

Proceeding now to the cases in the Chancery Division, *Evans* v. *Benyon*, 37 Chy. D. 329, first claims our attention. In this case a trustee had distributed a trust fund in breach of trust, at the request of one of the beneficiaries, from whom he took a bond of indemnity, the beneficiary undertaking to indemnify the trustee against "all consequences." The fund was distributed in favour of the daughters of one Edward Charles Evans, who concurred. In the events which happened the trustee himself and Edward Charles Evans became solely entitled to the fund as next of kin of the tenant for life, who had power to appoint the fund by will, but died without doing so. The trustee having died, the action was brought by his representatives against the beneficiary who had given the bond of indemnity, to compel him to replace the fund. Kay, J., held that he was bound to replace it; but the Court of Appeal (Cotton, L.J., Hannen, P.P.D., and Lopes, L.J.) held that the bond of indemnity should not be so construed as to compel the obligor to make good any loss which the trustee as a beneficiary might sustain, and that, since the trustee himself could not have made a claim against himself for the breach of trust, there was no claim against his estate in respect of which his representative could claim indemnity against the obligor or his estate. And it was further held that E. C. Evans, having actively concurred in the distribution, knowing it to be a breach of trust, could not have made any claim against the trustee or his estate, even if he had not known that he had a possible interest in the trust fund, which, however, the court was satisfied he did know; and therefore, that as regarded his interest, there was no claim against the obligor under the indemnity. The action was therefore dismissed.

ACCORD AND SATISFACTION—CHEQUE BY THIRD PARTY FOR SMALLER SUM.

The case of *Bidder* v. *Bridges*, 37 Chy. D. 406, is one that is no longer of much importance in this Province, since R. S. O. c. 44, s. 53, ss. 7, has legalized the acceptance of payment of part of a debt as satisfaction for the whole; as to past transactions, however, it may be of some use. The short point involved was simply this: A plaintiff was liable for certain costs to the defendant, which were taxed, and the plaintiff's solicitor then gave his cheque for the amount taxed to the defendant's solicitor, who accepted it. After the cheque had been paid, the defendant's solicitor claimed that his client was entitled to interest on the costs, and the question was whether the acceptance of the cheque of the plaintiff's solicitor was a satisfaction of the whole claim. Both Stirling, J., and the Court of Appeal (Cotton, Lindley and Lopes, L.JJ.) held that it was, because the solicitor, by giving his cheque, became personally liable on it, and that was an additional consideration, so as to take the case out of the rule laid down in *Foakes* v. *Beer*, 9 App. Cas. 605.

PRACTICE—PARTIES—PARTITION—PLAINTIFF OF UNSOUND MIND.

In *Porter* v. *Porter*, 37 Chy. D. 420, it was held that a partition action may be brought by a person of unsound mind by his next friend; but that the court at the trial ought not to act upon the request for sale made by such a plaintiff, without being first satisfied that the sale would be for his benefit. The case of *Halfhide* v. *Robinson*, 9 Chy. 373, in which James, L.J., said: "I wish it to be understood that a bill cannot be filed by a next friend on behalf of a person of unsound mind not so found by inquisition, for dealing with his real estate," was considered by Cotton, L.J., only to mean that the course taken in that particular case was not proper, and that there should have been an application in lunacy.

SOLICITOR AND AGENT—COSTS—TAXATION OF PART OF BILL.

In re Johnson & Weatherall, 37 Chy. D. 433. London agents delivered to their country principal, a bill of agency charges which included a number of distinct actions and matters, in which they had acted as agents. The charges relating to each distinct action or matter, were made out separately under the head of that action or matter, though the whole of the charges were included in one bill. On an application by the principal to tax the charges relating to one of the actions only, North, J., held that the bill was one bill, and that the principal was not entitled to have part of it taxed; but the Court of Appeal (Cotton, Lindley and Bowen, L.JJ.), were of a different opinion, and held that though the taxation of a part of a bill could not be ordered under the Solicitors' Act, 1843, yet that the court, under its general jurisdiction, had power to order taxation of part of a bill, and that in this case it was right that such jurisdiction should be exercised, and taxation of the charges relating to the one action was therefore ordered on the principal undertaking to pay the balance claimed by the agents within a short time (subject to an undertaking to refund), and as the appellant had not previously offered this undertaking, he was ordered to pay the costs of the appeal, and the rule as to the result of one-sixth being taxed off was not to be followed.

MARRIED WOMAN—RESTRAINT ON ANTICIPATION, DURATION OF—VENDORS' AND PURCHASERS' ACT—(R. S. O. c. 112, s. 3).

Perhaps the only points for which it is necessary to notice *In re Tippetts and Newbould*, 37 Chy. D. 444, are these, viz.: That it was held by the Court of Appeal that when on a sale of a married woman's interest in a leasehold vested in trustees, a question arose as to whether the property was subject to a restraint on anticipation, such a question could not be determined upon an application under the *Vendors' and Purchasers'* Act (R. S. O. c. 112, s. 3), because that was a question in which the purchaser was not interested; but the Court of Appeal (Lord Coleridge, C.J., and Cotton and Bowen, L.JJ.), permitted the application to be turned into an application for the construction of the will; and upon such application it determined (affirming Kay, J.), that when a fund subject to a particular estate is given to a married woman absolutely, but subject to a restraint on anticipation, such restraint is not, in the absence of any other ground, confined to the duration of the particular estate.

TRADE NAME—NEWSPAPER—INJUNCTION—EVIDENCE OF DAMAGE.

In *Borthwick* v. *Evening Post*, 37 Chy. D. 449, the plaintiff, the proprietor of the well-known London newspaper called *The Morning Post*, brought the action to restrain the defendants from calling a new paper established by them *The Evening Post*. Kay, J., granted the injunction; but the Court of Appeal (Lord Coleridge, C.J., and Cotton and Bowen, L.JJ.), being of opinion on the evidence, that though the conduct of the defendants in taking the name *Evening Post*, might be calculated to deceive the public into supposing that there was a connection between the two papers, yet that there was no probability that the plaintiff would be injured by such supposition, and therefore dismissed the action, but without costs, as the court considered the defendants guilty of dishonest conduct.

MORTGAGOR AND MORTGAGEE—RE-TRANSFER OF SECURITY ON REDEMPTION—BREACH OF TRUST.

In *Magnus* v. *Queensland National Bank*, 37 Chy. D. 466, the Court of Appeal (Lord Halsbury, L.C., and Cotton, and Bowen, L.JJ.), affirmed the decision of Kay, J., 36 Chy. D. 25, noted *ante* vol. 23, p. 364. It may be remembered that the action was brought by certain trustees against the defendants who had been mortgagees, to make them account for not having, on payment of their mortgage, re-transferred the securities held by them, so as to revest them in the parties from whom they had received them. By the defendant's action, the proceeds of the securities in question had got into the sole control of one of three trustees, who had misappropriated them, and the mortgagees were held bound to make good the loss thus sustained. It was attempted to be argued by the appellants, that if they had re-transferred the securities to the three trustees, the defaulting trustee would still have succeeded in defrauding the trust out of the money; but Bowen, L.J., said that that argument, reduced to its "bare bones," was like saying, "a man knocks one down in Pall Mall, and when I complain that my purse has been taken, the man says: "Oh, but if I had handed it back again, you would have been robbed over again by somebody else in the adjoining street."

EASEMENT CONVEYANCE—GENERAL WORDS—IMPLIED GRANT OF APPARENT EASEMENT.

Brown v. *Alabaster*, 37 Chy. D. 490, is a case of some importance on the law of easements. A parcel of land situate at the intersection of two streets called Park Road and Augusta Road, was owned by the same person, and he built three houses, A, B and C on it, fronting on Park Road; and in rear of the lot he made a lane, by which access would be had to Augusta Road from the gardens in rear of houses B and C. While the property was in this condition, he sold the houses B. and C. to the defendants, with their "rights, easements and appurtenances," but without expressly granting a right of way over that part of the lane in rear of house A, which was the corner house, and abutted on Augusta Road. He subsequently sold house A to the plaintiff, who claimed the right to stop up the lane in rear of his parcel. There was a means of access to the

gardens in rear of houses B and C from Park Road by a tiled passage, which, however, was only suitable for a foot way and not for vehicles. As Kay, J., points out, at the time of the grant to the defendants, owing to the unity of possession in their grantor, the way in question was not an easement, and the question between the parties was whether this way passed to the defendants as a way of necessity? and if it was not a way of necessity, could it be held to pass to the defendants by implied grant? On the first point, the learned judge was clear, that the right to the lane could not be maintained on the ground of its being a way of necessity, because of the existence of the tiled passage; but on the other point he was of opinion that the lane came under the head of an apparent and continuous easement, and passed by implied grant to the defendants. We may remark that in Gale on Easements, it is laid down that a right of way is not a continuous and apparent easement.

WILL—CONSTRUCTION—"PROPERTY AT MY BANK."

In re Prater Desinge v. *Beare*, 37 Chy. D. 481, the Court of Appeal (Lord Halsbury, L.C., and Cotton and Bowen, L.JJ.), reviewed the decision of Chitty, J., 36 Chy. D. 473, noted *ante* p. 70. The question at issue was the meaning of a bequest of "half my property at R.'s bank," there being at the time of the will, and of the death of the testator, a cash balance and also certificates of shares, some inscribed and some transferable by delivery at the bank named. Chitty, J., decided that only half the cash balance passed, but the Court of Appeal hold that half of the shares of which the bank held the certificates also passed.

COMPANY—WINDING UP—CONTRIBUTORY—AGREEMENT TO APPLY DEBT IN PAYMENT OF CALLS.

In re Land Development Association, 37 Chy. D. 508, will be of interest to those engaged in winding up proceedings. Kent was a shareholder of the company in liquidation, whose directors were empowered to receive from shareholders payment in advance for future calls. He had purchased a debt due by the company and applied to the directors to apply a sufficient part of the debt in paying up his shares in full. The directors passed a resolution authorizing this to be done, but no entries were made in the company's books for carrying the proposed transaction into effect. The company was subsequently ordered to be wound up, and it was held by Kay, J., that the resolution of the directors, not being followed up by any entry in the books of the company showing that the shares had been paid up, the transaction did not amount to payment in cash, and that Kent therefore remained liable for calls in respect of the shares, under sec. 25 of *The Companies' Act*, 1867, which provides that every share in any company shall be deemed and taken to have been issued, and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing and filed with the Registrar of Joint Stock Companies, on or before the issue of such shares;" no such contract having been filed.

TRUSTEE ACT—APPOINTMENT OF NEW TRUSTEES—APPOINTMENT OF SEPARATE SET OF TRUSTEES FOR PART OF TRUST PROPERTY.

In re Moss's Trusts, 37 Chy. 513, Kay, J., held that, under the *Trustee Act*, 1850, s. 32, the court had power to appoint a separate set of trustees for part of the trust property held upon distinct trusts. He also ruled that a petition under the *Trustee Act* should state under which particular section of the Act the court is asked to act.

ADMINISTRATION—INTESTACY—PERSONALTY—GRANDCHILDREN—STATUTE OF DISTRIBUTIONS—(22 AND 23 CAR. 2, C. 10) SS. 3, 5, 6, 7.

In re Natt, Walker v. *Gammage*, 37 Chy. D. 517, is a case upon the construction of the *Statute of Distributions* (22 Car. 2, c. 10), and reveals the somewhat curious fact that the statement in *Williams* on Executors, 8th ed., vol. 2, p. 1503, to the effect that where the children of an intestate are all dead, and all of them have left children, all the grandchildren are entitled to an equal share *per capita*, is an incorrect statement of the law. The point, it seems, has been the subject of difference of opinion among the text-writers for some time past. In *Watkins* on Descents the same opinion is expressed as in *Williams*; but in *Burton's* Compendium, 7th ed., p. 438, the contrary view is stated, and this seems borne out by *Hargrave* in his Jurisconsult Exercitations, vol. 1, p. 271, and also by a note of Joshua Williams to *Watkins* on Descents. Considering the length of time the statute has been in force, and the many cases which must have arisen, it is certainly strange that the question of its proper construction on this point should, at this late day, be in doubt. North, J., as we have intimated, was of opinion that *Williams'* view is erroneous, and that where the next of kin are all grandchildren, or great grandchildren, they take *per stirpes* and not *per capita*.

ADEMPTION—BEQUEST OF BUSINESS—DOUBLE PORTIONS.

The only other case to be noted is *In re Vickers, Vickers* v. *Vickers*, 37 Chy. D. 525. In this case a testator had bequeathed his residue (including a business, which he directed to be sold) for the benefit of his children (two sons and three daughters) equally; and subsequently to the date of the will he assigned his business to his eldest son on trusts, which provided for the admission of the younger son as a partner on equal terms with the elder on his attaining full age; the repayment, with interest, to the testator of a sum temporarily loaned by him to the business; and the payment to the testator of a weekly sum for his life: and it was held by North, J., that the shares of the two sons in the residue were adeemed to the extent of the value of the property assigned in trust for them at the time of the assignment, which must be brought into account in the distribution of the residue.

Notes on Exchanges a d Legal Scrap Book.

A NOVEL CASE OF NEGLIGENCE.—A novel case of negligence came before the Supreme Court of Louisiana in *Clairain* v. *Western Union Telegraph Company*. The following are the facts, as we learn from the *Albany Law Journal* "Clairain was employed by the company as a lineman in putting up wires on their telegraph poles. While he was engaged in this work some forty feet from the ground, it became necessary for him to force the steel spur, attached to one of his legs, into the post, throw his other leg around the pole, and lean outward on the cross-arm and wire at the end of it, for the purpose of tying the wire to the outer end of the arm. While he was in this position the wire broke near the cross-arm, the cross-arm itself broke where it was fastened to the telegraph pole and he fell headlong on the stones beneath, and received injuries from which he died in a few days, leaving a widow and three children. It was charged that the wire was of inferior quality, second-hand and full of kinks, that it had been so twisted as to weaken it, and that the cross-arm was of light material, too thin, improperly bored, and so brittle as to be utterly unfit for its purpose. It must be considered that the employment was a dangerous one; not dangerous in merely climbing or ascending the poles, and reaching out to the end of the cross-arms and fastening the wire, but dangerous from the fact that the wire and its wooden support might chance to be defective or unsound. These, necessary for his work, the employee had a right to presume were entirely safe, and he was entitled to rest on this presumption for his security: *Hanson* v. *Railway*, 38 La. Ann. 111. And it further follows that the employment being a dangerous one, as conceded and asserted by the defendant's counsel, the defendant company, the employer, should be legally held to the greatest care and diligence in the selection of the necessary materials, and everything else calculated to insure the safety of the employee in the prosecution of his work: *Black* v. *Railroad Co.*, 10 La. Ann 38; *Railroad Co.* v. *Derby*, 14 How. 486. 'It is indispensable to the employer's exemption from liability to his servants for the consequence of risks thus incurred, that he should be free from negligence. He must furnish the servant with the means and appliances which the service requires for its efficient and safe performance; and if he fail in that respect, and an injury results, he is liable to the servant as he would be to a stranger:'" *Railroad Co.* v. *Ross*, 112 U. S. 377.

Correspondence.

CASE LAW; OR, AUTHORITY v. *PRINCIPLE.*

TO THE EDITOR OF THE CANADA LAW JOURNAL:

The judgment rendered in the Division Court case, *Masson* v. *Wicksteed*, reported in the LAW JOURNAL of 16th March last, presents a humorous aspect, as showing how the whole machinery of the law may be diverted for several days, employing two County Court judges and two barristers; and detaining a whole host of fretting lawyers and witnesses, in order to decide judicially what any business man of fair intelligence and experience would have decided practically in a few minutes. This judgment, really rendered by two County Court judges of Ontario, residing in Ottawa, because their views thereon were known to coincide, furnishes also a melancholy example of the evils resulting from a long familiarity with technicalities rather than principles; evils springing from want of a sound training in the principles of the law, as well as case law; a training which would encourage reflection and give the power, and confer the habit of thinking and judging for one's self, and not relying blindly on the judgment of others; an education which would teach that cases in law when decided only establish principles, and not iron rules. *Revenons à nos moutons* or to the case of *Masson* v. *Wicksteed*, as decided lately by Judge Lyon, in the Division Court of Ottawa.

The defendant, president of an incorporated company, in obedience to a resolution of the Directors, draws a cheque in the form and manner usual to most companies, in favour of McCulloch, a former servant of the company, and post-dates it. Masson discounts the cheque; but when it is presented at the bank, the answer "no funds" is returned. Masson is paid cash by McCulloch, and the cheque is returned to McCulloch. McCulloch by his solicitor, Mr. Code, should then have sued the company on the cheque or for work and labour done, etc., because, irrespective of the manner in which the cheque was drawn out, the cheque had been accepted all through as being that of the company, by McCulloch, Code, Masson, the bank and the directors of the company.

But the company was virtually insolvent, and the president was a better bird to pluck; and so an action was brought against him personally.

The argument advanced in court and in chambers was as follows: "Several cases decide that a post-dated cheque is an inland bill of exchange; several cases declare that bills of exchange drawn by a company should have a particular usual form; this particular post-dated cheque has not that particular usual form; therefore it cannot be the company's cheque, therefore it must be the drawer's personal cheque."

The two Carleton county judges agreed as to the correctness of the above

argument; and one of them rendered judgment in accordance with the conclusions of the foregoing syllogism; whose premises are founded on decisions taken from various cases, without proper regard being paid to the difference existing between the facts disclosed in those cases and those proved in this particular case.

"It sometimes happens that the facts which are presented to the practitioner or court are the same which have occurred, and have been passed upon before. But this can be only when the parties have dropped out something from their recital, because of an instinctive feeling that it was unimportant. In truth, no two sets of facts were ever absolutely identical. Now, for a court to decide a question differing from what has gone before, it must take cognizance of the law engraved, not by man, but by God, on the nature of man. In other words, it must take cognizance of what our predecessors have named the unwritten law or common law. The law has already been discovered by judicial wisdom to consist of a beautiful and harmonious something, not palpable to the physical sight, yet to the understanding obvious and plain, called principle. And the only way in which it is possible for one decision to be a guide to another involving facts in any degree differing, is to trace the decision to its principle, and thence to pass downward to the new facts and inquire whether or not they are within the same principle. This process is termed reasoning."

"The judicial decision . . . is the conclusion of the judicial mind upon particular facts. . . . Even when the words of a judge are in the most general terms, and to the casual reading meant to convey absolute doctrine as viewed separately from the limited facts in contemplation, they are to be interpreted as qualified by those facts. The consequence is that judicial decisions do not and cannot formally settle any abstract doctrine, such as it is the province of jurists to lay down. The words of judges are always to be interpreted as qualified and limited by the facts of the case in hand; and it is thus even when in form general, as laying down doctrines for all classes of facts."

"Our books of reports are the judicial conclusions from just so many sets of narrow facts as there are cases in them, each set of facts differing from every other; and they do not embody the ultimate rules which govern the infinity of facts, past, present and future." (J. P. Bishop in *American Law Review*, Jan.-Feb., 1888.)

Let us consider the reason why cheques or bills of exchange are usually signed in a certain way on behalf of a company. It is this: "Cheques must be properly signed by a firm keeping account at a banker's, as it is part of the implied contract of the banker, that only cheques so signed shall be paid." (Bouvier's Dictionary.) In case of promissory notes or bills they must be signed in such a way as not to deceive the parties negotiating them. These parties must not be led to think they have a rich company as security for the payment, when they have in reality only a poor individual. In the case before us the cheque was the usual and acknowledged cheque of the company; no one was deceived or in ignorance of the facts; but then the individual defendant was comparatively rich, and the company absolutely poor. So that in order to have

the former condemned to pay, judgments which may have been correct when taken in connection with the cases in which they were rendered, were applied to this case, to which they had no relation. In this way a case which ought to have been decided, following the rule of non-appealable courts, according to equity and good conscience, was not so decided.

Had the judge received a good grounding in legal logic he would have said, after hearing the argument of Mr. Code, "There are three maxims of Civil Law which apply here: 1. *Consensus tollit errorem.* 2. *Modus et conventio vincunt legem;* and, 3. *Cessante ratione legis, cessat ipsa lex.* Mr. Wicksteed signed this cheque as an authorized person on behalf of the company, and was such to the knowledge of all parties to the cheque. It is the company's cheque." Action dismissed with costs, and a little advice to the plaintiff's attorney to study *Roman* law—which is written reason.

The letter killeth, the spirit giveth life. English, Roman and Christian interpretations of law agrees in this; the spirit, and not the letter, must be the rule of decision, and the spirit of a contract is the intention and understanding of the parties. Neither plaintiff nor defendant in the case before us intended or understood that the defendant should be personally liable on the note signed by the defendant for the company.

Judge Lyon says in effect by his judgment, everybody knows this to be the company's cheque, the company never repudiated it and is willing to pay it when called on; but I won't allow the company to be asked to pay. You are all wrong in thinking that *to be* which you know *is*, for I see that several decisions—in cases, to be sure, very different from this one, but then they are *decisions*—say that the defendant is personally liable; though it may seem contrary to equity and even to good conscience.

"Our judges, of course, are recruited from the bar, and a bad training for lawyers results in correspondingly poor judges. And, in defence of the crimes, or rather errors and mistakes, charged against judges, I must say that I am only surprised that they do not make more. A man cannot help being what he is, when, under the training he received, he could not have been anything else. And a lawyer who is trained, or trains himself, to a subserviency to precedents and authorities, will, if he reaches the bench, be, more or less, a slave to them still. And then when out of the mass of legal literature available, crude, undigested, confusing, contradictory and irreconcilable masses of law—or alleged law—are hurled at him by opposing counsel, is it any wonder that he should often make mistakes?" (George H. Christy, in CANADA LAW JOURNAL, 1 December, 1886.)

Blackstone foresaw the evils which would result from a case of apprenticeship and study in England, similar to what is now adopted in the Province of Ontario. He thus writes, at page 32 of his celebrated commentaries:—

"Making, therefore, due allowance for one or two shining exceptions, experience may teach us to foretell that the lawyer educated for the bar in subservience to attorneys and solicitors will find that he has begun at the wrong end. If practice be the whole he is taught, practice must also be the whole he will ever know; if he be uninstructed in the elements and first principles upon which the

rules of practice should be founded, the least variation from established precedents will totally distract and bewilder him. *Ita lex scripta est* is the utmost his knowledge will arrive at; he must never aspire to form, and seldom expect to comprehend, any arguments drawn, *a priori*, from the spirit of the laws, and the natural foundations of justice."

"The great difficulty as to cases consists in making an accurate application of the general principle contained in them to new cases presenting a change of circumstances. If the analogy be imperfect, the application may be erroneous. The expressions of every judge must also be taken with reference to the case on which he decided; and we must look to the principle of the decision, and not to the manner in which the case is argued upon the bench, otherwise the law will be thrown into extreme confusion. The exercise of sound judgment is as necessary in the use as diligence and learning are requisite in the pursuit of adjudged cases." (Kent's Commentaries.)

The only method of arriving at this happy consummation so devoutly to be wished in Ontario, namely, that all barristers and judges shall be able to form and comprehend arguments drawn from the spirit of the laws and the natural foundations of justice, and for judges to give decisions in cases in conformity with such arguments, is, I think, to insist upon a full course and examination in the principles of law when studying for the profession.

Ontario is, in this respect, far behind England; the utility of a knowledge of Roman law, as law, is undeniable, forming, as it does, the basis of the laws of all Latin nations. Even the Common Law of England is greatly indebted for its vigour and philosophic accuracy to Justinian's Code.

In England, the examination which must be passed before a law student can be "called" is divided into two parts—the first being the Roman law, and the second in English law. He may take both at the same time, or he may take the Roman law first, but he cannot take the English law before the Roman. He may take the Roman law any time after he has kept four terms, but cannot take the English until he has kept at least nine terms. This is the only remedy for the present condition of affairs in the legal profession in Ontario. With the example of such a judgment as the one given by Judge Lyon before them, the Law Society of Upper Canada should take immediate steps to place Roman law in the law student's curriculum.

R. J. WICKSTEED.

DIARY FOR MAY.

1. Tues ...Supreme Court sittings. St. Philip and St. James.
2. Wed....Sup. Ct. of Can. sits. J. A. Boyd, 4th Chan., 1831.
6. Sun.....*5th Sunday after Easter.*
7. Mon....Lord Brougham died, 1868, æt 90.
8. Tues ...Ct. of App. sits. Gen. Ses. and C. C. sit. for trials in York. 1st Inter. Exam.
10. Thur. ..2nd Inter. Exam. Ascension Day.
13. Sun.....*1st Sunday after Ascension.*
15. Tues ...Solicitors' Examination.
16. Wed....Barristers' Examination.
20. Sun.....*Whitsunday.*
21. Mon....L. S. Easter Term begins. H. C. J. sit. begin. Confederation proclaimed, 1867. Lord Lyndhurst born, 1772.
24. Thur. ..Queen Victoria born, 1819.
25. Fri. ....Princess Helena born, 1846.
27. Sun.....*Trinity Sunday.*
28. Mon....Battle of Fort George, 1813.
31. Thur. ..Parliament of U. C. first met at Toronto, 1797.

Early Notes of Canadian Cases.

SUPREME COURT OF CANADA.

ELECTION CASE.

GLENGARRY CONTROVERTED ELECTION CASE.

Election petition—Ruling by judge at trial—Appealable—Dominion Controverted Elections Act—R. S. C. c. 9, ss. 32, 33 and 50—Construction of—Time—Extension of—Jurisdiction.

Present—SIR W. J. RITCHIE, C.J., and FOURNIER, HENRY, TASCHEREAU and GWYNNE, JJ.

Held, 1.—That the decision of a judge at the trial of an election petition overruling an objection taken by respondent, as to the jurisdiction of the judge to go on with the trial, on the ground that more than six months had elapsed since the date of the presentation of the petition, is appealable to the Supreme Court of Canada, under s. 50 (*b*), c. 9, R. S. C. GWYNNE, J. dissenting.

2. In computing the time within which the trial of an election petition shall be commenced, the time of a session of Parliament shall not be excluded, unless the court or judge has ordered that the respondent's presence at the trial is necessary. GWYNNE, J., dissenting.

3. The time within which the trial of an election petition must be commenced, cannot be enlarged beyond the six months from the presentation of the petition, unless an order has been obtained on application made within said six months.

An order granted on an application made after the expiration of the said six months is an invalid order, and can give no jurisdiction to try the merits of the petition, which is then out of court. RITCHIE, C.J., and GWYNNE, J., dissenting.

Appeal allowed with costs.

Blake, Q.C., and *Cassels*, Q.C., for appellant.

Macmaster, Q.C., for respondent.

SUPREME COURT OF JUDICATURE FOR ONTARI

COURT OF APPEAL.

ELECTION CASE.

Court of Appeal.] [Jan. 10.

In re ALGOMA DOMINION ELECTION PETITION.

BURK *v.* DAWSON.

Elections—R.S.C. c. 9, ss. 32, 33, construction of—Time for trial of petition—Extending time.

The petition was presented on the 6th May, 1887, during a session of Parliament which ended on 23rd June, and issue was joined on 3rd June; no application was made or steps taken after that until the 6th December, 1887, when the petitioner applied to have a time and place appointed for trial, and to have the time for the commencement of the trial enlarged.

The last part of s. 32 of the Controverted Elections Act, R. S. C. c. 9, is as follows:—

"The trial of every election petition shall be commenced within six months from the time when such petition has been presented, and shall be proceeded with from day to day until such trial is over; but if at any time it appears to the court or judge that the respondent's presence at the trial is necessary, such trial shall not be commenced during any session of Parliament; and in the computation of any time or delay allowed for any step or proceeding in respect of any such trial, or for the commencement thereof as aforesaid, the time occupied by such session of Parliament shall not be included."

Held, PATTERSON, J.A., dissenting, that the exception in the last clause is confined to a

case in which the court is satisfied that the respondent's presence is necessary; "such trial" refers to a trial at which the respondent's presence has been declared to be necessary; and no such declaration having been made in this case, the time of the session of Parliament was not to be excluded from the six months within which the trial was to be commenced.

It was not incumbent upon the respondent to move to dismiss the petition for default.

The court could not *nunc pro tunc* declare that the respondent's presence at the trial was necessary.

Per curiam, that the time for the commencement of the trial may be enlarged under s. 33, notwithstanding the expiration of the six months; but it had not been established in this case that the requirements of justice rendered such enlargement necessary; and the court refused to appoint a time and place for trial or to enlarge the time.

W. Cassels, Q.C., and *C. J. Holman*, for the petitioner.

McCarthy, Q.C., and *J. R. Roaf*, for the respondent.

JAMES *v.* ONTARIO AND QUEBEC RAILWAY COMPANY.

Expropriation of land—R. S. C. c. 109, s. 8—Increase in value—Right to set off peculiar benefit.

Held, affirming the judgment of FERGUSON, J., 12 O. R. 624, that in ascertaining the compensation to be made to a land-owner for land expropriated under R. S. C. c. 109, s. 8, the value of the part taken (as well as the increased value of the part not taken, which by sub-sec. 21 is to be set off), must be ascertained with reference to the date of the deposit of the map or plan and book of reference under sub-sec. 14 (or, in this case, with reference to the date of the notice or determination to expropriate), and, therefore, such value should include any increase which may have been caused by, or is owing to, the contemplated construction of the railway.

Semble, per BURTON, J.A., that what is intended by sub-sec. 21, is a direct or peculiar benefit accruing to the particular land in question, and not the general benefit to all land-owners resulting from the construction of the railway.

Per OSLER, J.A., the land in question not having been taken for the purposes of the railway strictly, but, after the same had been laid down for the purpose of effecting a deviation in a street in order that the railway might run along the original street, there was no right to set off the increased value of the land not taken, caused by the construction of the railway.

WILLS *v.* CARMAN.

Costs—Payment of to unsuccessful party—O. J. A. rule 428—Nominal damages, power of court to give judgment for—Venire de novo.

In an action for libel the jury found that the defendant was guilty of libelling, but that the plaintiff had sustained no damage thereby. The judge at the trial dismissed the action, but ordered the defendant to pay the plaintiff's costs, and gave the latter judgment therefor. The defendant thereupon moved in the Divisional Court against the judgment for costs, which that court varied by ordering the action to be dismissed with costs, and the plaintiff having appealed to this court from the judgment at the trial, dismissing the action, as also from the judgment of the Divisional Court.

Held, that although rule 428, gives to the judge or court the power of depriving any of the parties to an action, plaintiff or defendant, of their costs, it does not confer the power of compelling a successful party to pay the costs of an unsuccessful party; *Mitchell v. Vandusen*, 14 A. R. 517, considered, approved and followed.

Held, also, allowing the appeal of the plaintiff from the judgment at the trial, that a *venire de novo* should be awarded to the court. (PATTERSON, J.A., dissenting from such direction.)

Per HAGARTY, C.J.O., and GALT, J. No court has or ought to have the right to direct *ex propreo motu* judgment for nominal damages where a jury has refused to award them.

Per OSLER, J.A.—Nominal damages should not be added, unless it clearly appear that such damages are a mere matter of form, or that the omission to find them was accidental or unintentional, or an oversight following a distinct intention to find the plaintiff's cause of action proved.

Per PATTERSON, J.A.—The jury having left no fact undetermined, the plaintiff was entitled to judgment, which might properly be entered for nominal damages with full costs.

ERICKSON *v.* BRAND.

Malicious arrest—Capias ad respondendum—Necessity to set aside before bringing action—Reasonable and probable cause—Duty of judge.

In an action for malicious arrest on the ground of want of reasonable and probable cause, to enable the plaintiff to recover it is not necessary to show that the *ca. re.*, or the judge's order on which the same was obtained, has been set aside.

The defendant in his application for an order for the *ca. re.* by his affidavit made out a *prima facie* case, but certain facts and circumstances, which it was alleged he was aware of, were omitted therefrom, and which it was contended, might, if stated, have satisfied the judge granting the order, that, although the plaintiff was about to depart from the Province, it was not with *intent* to defraud, etc. At the trial the judge decided the question of reasonable and probable cause, without leaving to the jury any question as to whether the statements in the defendant's affidavit fairly stated the case.

Held, that before deciding on the question of reasonable and probable cause, the judge should have seen that the facts on which he ruled, were either proved without contradiction, or admitted or found by the jury.

Burton, J.A., dissentiente.

Patterson, J.A., dubitante.

HIGH COURT OF JUSTICE FOR ONTARIO.

Chancery Division.

Boyd, C.] April 9.

HARRISON *v.* SPENCER.

Will—Period of distribution—Thellusion's Act—39-40 Geo. III. c. 9.

By a will of personal estate, after a life estate had been given to the testator's widow, it was provided by a residuary clause that the property should be equally distributed amongst the testator's nephews and nieces who should be alive at the time of his death. At the time of this action, the widow of the testator was still alive, but some of the nephews and nieces had died.

Held, that the will gave a vested interest to such nephews and nieces as should be alive at the time of the testator's death, but the period of distribution was the death of the widow; and the bequest to the nephews and nieces was subject to be divested as to those of them who died should die before the said period of distribution in favour of their representatives, who were entitled to take in substitution for the original legatees, and for this reason it was be inferred that by heirs at law the testa meant to express that the benefit was to go to the persons who would inherit the personal estate—that is to say, the next of kin.

Held, also, that the Act against accumulations, commonly called the Thellusion Act, 39-40 Geo. III. c. 9, which was passed after the Statute, 32 Geo. III. c. 1, by which English law was introduced into Canada, and which did not extend in terms to the colonies, is not in force in this Province, where the law appears to be as it was in England before that Statute.

Ferguson, J.] [Mar. 15.

BARBEAU *v.* THE ST. CATHARINES AND NIAGARA CENTRAL RAILWAY COMPANY.

Railways and Railway Companies—Expropriation of lands—Dominion Railway Act or Provincial Railway Act—Work for general advantage of Canada—Notice.

In an application for an injunction to restrain the defendants, who were incorporated by Statutes of the Ontario Legislature, from applying to a county judge for a warrant for possession of certain lands required by them, and being expropriated by them under the provisions of the Ontario Railway Act, on the ground that the defendants' railway had been declared a work for the general advantage of Canada, and that no notice of expropriation had been served, as required by the provisions of the Ontario Railway Act.

Held, under the circumstances of this case, and following *Clegg* v. *The Grand Trunk Railway Company*, 10 O. R. 713, and *Darling* v. *The Midland Railway Company*, 11 P. R. 32, that the defendants were no longer within the operation of the Ontario Statutes.

Held, also, that a notice requiring the lands given under the Dominion Railway Act was not a sufficient notice under the Provincial Railway Act.

Robinson, Q.C., and *Collier*, for the plaintiff. *Aylesworth* and *Towers*, for the defendants.

Boyd, C.] [April 9.

ST. THOMAS *v.* CREDIT VALLEY RAILWAY.

Contract—Damages for breach—Railways—Failure to run trains to point contracted for.

An appeal from the report of the Master at London, assessing the damages which the plaintiffs were entitled to for breach by the defendants of their agreement to establish a station at Church Street, in the west end of the city of St. Thomas, and run trains from their station in the east end of the city to the said station at Church Street.

Held, that the matter must be referred back, as the law and evidence did not warrant the conclusion to which the Master had come. The failure to keep up the station at Church Street might have, and might be expected to have, the effect of rendering property in that neighbourhood less desirable than it would otherwise be; and though the actual depreciation is a matter which pertains to the property owners and not to the city as damages, yet the lessened taxation resulting from this depreciation is not too remote a fact for consideration upon the reference.

It is clear that the personal loss or inconvenience suffered by travellers or citizens from the abandonment of the station at Church Street, or the actual depreciation in value of the land individually owned in that neighbourhood, could not be reckoned as constituents *per se* of the damages suffered by the corporation.

Stated broadly, the inquiry was, how much less benefit had been received by the municipality by reason of the railway service at one station being discontinued, and the difficulty of ascertaining the amount was not a reason for withholding relief altogether.

If the Company admitted that the station on Church Street was to be given up for all future time, the damages should be assessed once for all, which might be done either by fixing one solid sum, or by directing a yearly payment. The loss in taxation resulting to the city from the depreciation in taxable property which could be traced to, or reasonably connected with, the Company's default, formed a yearly standard which might be capitalized so as to fairly represent the money compensation to which the plaintiffs are entitled.

Dalton McCarthy, Q.C., and *Ermatinger*, Q.C., for the plaintiffs.

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

Boyd, C.] April 23.

HEFFERMAN *v.* TAYLOR.

Will—Life tenant—Power to rent—Trustees.

A testator gave all his estate, real and personal, to trustees upon trust to allow and give the use thereof to his wife during life for her support.

Held, that the wife had the right to rent the farm and deal herself directly with the tenant during her life. In this case, those entitled in remainder were the adult children of the life tenant, and no active duties were cast by the will upon the trustees during the continuance of the life estate, and such being the case, the court would give effect to the usual incidents of an estate for life by which the tenant can occupy it or let it, or otherwise dispose of it as seems best to that tenant.

Held, therefore, that a lease theretofore made by the trustees without the sanction of the widow, though there was no evidence of *mala fides* on their part, must nevertheless be set aside, and possession of the property given to the widow or her nominee.

Practice.

Mr. Dalton.] [April 17.

MORROW *v.* CHEYNE.

Pleading—Action for malicious prosecution—Observations of judge at trial of criminal charge—Publication of charge.

In an action for malicious prosecution, a part of the statement of claim setting out the observations of the judge before whom the plaintiff was tried upon the criminal charge out of which the action arose, was struck out; but a part stating damage to the plaintiff from the publication of such charge in newspapers and otherwise, was allowed to stand.

C. Millar, for the plaintiff.

Shepley, for the defendant.

Boyd, C.] [April 23.

Re BROOKFIELD AND SCHOOL TRUSTEES OF SECTION 12, TOWNSHIP OF BROOKE.

Mandamus—Motion for in court or chambers—Costs—O. J. Act, s. 17, ss. 8—R. S. O. (1877), c. 52, s. 17.

Sec. 17, sub-sec. 8, of the O. J. Act, applies to motions for *mandamus*, etc., where an action is pending; but R. S. O. (1877), c. 52, s. 17, specially authorizes a summary application for a *mandamus* in chambers.

Kincaid v. *Kincaid, ante* p. 217, distinguished.

And where a summary application for a *mandamus* was made to the court, costs as of a chambers application only were allowed to the applicant, where the circumstances did not justify the imposition of a larger amount of costs than was sufficient to indicate that the respondents were in the wrong.

Snelling, for the applicant.

F. E. Hodgins, for the respondent.

Galt, C. J.] [April 5.

SWAIN *v.* STODDART.

Security for costs—Interpleader issue—Local judge, jurisdiction of.

A local judge, in whose county the proceedings in an action out of which an interpleader arose were carried on, and who himself made the interpleader order, has power to make an interlocutory order in the issue thereby directed.

Coulson v. *Spiers*, 9 P. R. 49, followed.

A party to an interpleader issue may be ordered to give security for costs.

The dictum of the Master in Chambers in *Canadian Bank of Commerce* v. *Middleton*, 12 P. R. 121, not approved.

Williams v. *Crosling*, 3 C. B. 956, followed.

Aylesworth, for the plaintiff.

C. J. Holman, for the defendant.

Boyd, C.] [May 8.

HUFFMAN *v.* DONER.

Judgment—Combined interlocutory and final—Rules 72, 75.

Where a writ of summons is indorsed with the particulars of a liquidated demand, and also with a claim for unliquidated damages, the plaintiff may, without an order, sign a combined final and interlocutory judgment upon default of appearance; rules 72 and 75 may be combined in a proper case, and justify such a judgment.

Bissett v. *Jones*, 32 Chy. D. 635, followed in preference to *Standard Bank* v. *Wills*, 10 P. R. 159.

Middleton, for plaintiff.

W. M. Douglas for defendant.

MARITIME COURT OF ONTARIO.

McDougall, J.]

THE "HECTOR."

THOMAS PRINGLE, *petitioner.*

SCHUMAN & WELLER, *respondents.*

Jurisdiction of the court—Registration—Vessels—Application of the Statutes.

The "Hector" was a common pleasure boat on Lake Ontario, of about three tons burthen, twenty-five feet long, seven feet beam, two and a half feet deep, and unregistered. The defendant, Schuman, was master of the vessel. The plaintiff alleges an agreement between Ezra H. Pringle and the defendants, that the former should have a half interest in the boat and its earnings, and that this half interest was assigned by Ezra H. Pringle to the plaintiff, who now sets up his claim to a half interest in the boat and its earnings, and asks that an account be

taken of money received and expended. He also prays for a sale of the boat and payment of his claim out of the proceeds. The defendants deny all knowledge of the boat as the "Hector," and deny the alleged agreement with Ezra H. Pringle, and allege that the defendant, John L. Weller, is the sole owner. They say the boat is not propel' ! by steam, has not a whole or fixed deck, is not constructed for voyaging on large bodies of water, but only for coasting, is unregistered, and has never been known by any distinctive name. They contend that the *res* is not a "ship" or "vessel" within the meaning of any Act giving jurisdiction to the court, and that, consequently, the court has no jurisdiction as to ownership or earnings: 26 & 27 Vict. c. 24, s. 10, and the Maritime Court Act of Ontario, were cited for the defendants. They also cite the "Australasia" and *Lepraque* v. *Burrows*, 13 Privy Council cases 132, and the Admiralty Court Act, 1861, s. 8. For the plaintiff it was contended that no vessel under fifteen tons need be registered, and that the court has jurisdiction over unregistered vessels so long as the vessels are ships within the meaning of the Maritime Act: *Ex parte Ferguson*, L. R. 6, Q. B. 280; s. 19, of the Act; and the "Oscar Wild" before SENKLER, J., at St. Catharines; also the Vice-Admiralty Act, s. 10, ss. 9, and the Maritime Court Act of Ontario, s. 14, ss. 3, were referred to.

Held, that the *res* mentioned in the petition is not a registered ship within the meaning of the Vice-Admiralty Courts Act, and, therefore, the jurisdiction of the court does not extend to a vessel of her class. There is, therefore, no jurisdiction to entertain the claim.

Tytler, for petitioner.

Ketchum, for defendants.

SUPREME COURT OF PRINCE EDWARD ISLAND.

QUEEN *v.* WOODS.

Application for certiorari—Summary Convictions Act—Form of information—Evidence of the substance of the charge—Issue of warrant.

This was an application on behalf of the defendant for a *certiorari* to remove a conviction of the stipendiary magistrate of the city of Charlottetown, for a violation of the Canada Temperance Act, into the Supreme Court.

The defendant was arrested on a warrant in the first instance upon the information of D. H., the public prosecutor. The information was in the form prescribed by the Summary Convictions Act, and sworn to.

It was contended on behalf of the defendant, that the Summary Convictions Act requires the matter of the information to be substantiated on oath before a warrant to arrest can issue in the first instance, and that the mere swearing to the information which only contains a just cause to suspect and believe, is not sufficient—but that it requires other evidence, such as a witness swearing to the actual commission of the offence charged, in order to substantiate the matter on oath.

Held, that the information as in form prescribed by the Act, and sworn to by the informant, is sufficient for the issue of a warrant in the first instance, and that the rule for *certiorari* be discharged, with costs against the applicant.

Peter, J., dissenting.

Hodgson, Q.C., for rule.

Davis, Q.C., contra.

Law Students' Department.

The following questions were asked at the English examination for call to the bar preceding Hilary Term, 1888. The answers are taken from the *Bar Examination Journal*. They will give students a good general idea of the kind of examination set for call to the English bar, and also of the style of answers which should be given.

COMMON LAW.

Pass Paper.

Q. 1. Enumerate the principal preliminary matters with regard to which a person conceiving himself to be aggrieved should satisfy himself before safely resorting to the remedy of an action at law.

A.—The principal preliminary matters with regard to which he should satisfy himself before commencing an action relate to—(*a*) the

cause of action; (*b*) notice of action; (*c*) the nature of the relief to be claimed; (*d*) in which Division of the High Court to sue; (*e*) the parties to the action; and (*f*) the defendant's place of residence.

(*a*) The cause of action—whether there will be a legal ground of claim at the time of commencing the action; *e.g.*, in the case of a claim under a contract, whether the time at which the promise was to be performed has arrived; or, in the case of a sale of goods for the price of ten pounds or upwards, whether the requirements of sec. 17 of the Statute of Frauds have been complied with prior to the commencement of the action—also whether the cause of action, supposing it to have once existed, has not been extinguished, as by an accord and satisfaction, or merger, or release, or barred by the Statute of Limitations.

(*b*) As to giving notice of intention to sue—whether the case is one in which notice is requisite, as if it be an action against a justice of the peace for something done by him in the execution of his office.

(*c*) As to the nature of the relief to be sought—as whether damages shall be claimed, or an injunction, or relief of both these kinds.

(*d*) As to the Division of the High Court in which the action shall be brought—whether it is one of those that, under the Judicature Act, 1873 (s. 34), must be brought in a particular Division.

(*e*) The parties to the action—as whether the right to sue is vested in himself solely, or in himself and others jointly, and whether the action should be brought against all of several persons, or against some or one of them only.

(*f*) The place of residence of the party intended to be sued—whether he is residing beyond the jurisdiction, and, if so, whether the claim is one in respect of which leave to issue a writ for service out of the jurisdiction can be given.

Q.—2. By whom are jurors summoned? Distinguish between the functions and qualifications of jurors in early days of English history and at the present time. Can either party to an action take any objection, and how, to the jurors?

A.—Jurors are summoned by the sheriff. In early times jurors were merely witnesses who spoke from knowledge with reference to the facts in issue. They were accordingly selected for the very reasons which would now argue their unfitness, viz., their personal acquaintance with the parties and the merits of the cause. Either party may take objection to the jurors or any of them, by challenge to the array or to the poll. (Broom, C. L., bk. 1, c. 4.)

Q.—3. What are the principal rules as to payment of money into court by a defendant in an action?

A.—Money can be paid into court in any action to recover a debt or damages. It may be paid in before, or at the time of, delivering the statement of defence, or at any later time by leave of the court or a judge. It operates as an admission of liability, unless the liability be denied in the defence. But in actions for libel or slander payment into court cannot be accompanied by such denial. Whether the liability be admitted or denied, the plaintiff may accept in satisfaction of his claim the sum paid in; and even though he do not accept it in satisfaction, he may have the money paid to him at once, unless the liability has been denied in the defence, in which case the money remains in court till the court orders it to be paid out. (Ord. XXII., rr. 1-6.)

Q.—4. What are the principal characteristics of a contract under seal as distinguished from one that is not? and is there any qualification of the doctrine of estoppel by deed? What is the principal authority on the subject of such qualification?

A.—The following are the principal characteristics of the contract under seal, as distinguished from a contract not under seal:—(1) A consideration for the promise is not essential to the validity of the contract. (2) The parties to the contract, and those claiming under them, are estopped from denying the truth of the statements contained in the contract. (3) The contract operates as a merger of any simple contract in respect of the same matter. (4) The right of action on the contract is not barred by the Statute of Limitations until the expiration of twenty years from the time such right accrued. (5) The heir or devisee of the promisor may be sued at law on the contract, and is liable thereon to the extent of the value of the real estate descended or devised to him; the promisee being entitled to this remedy independently of that given by the statute 3 & 4 Will. IV., c. 104, which makes the lands of a deceased debtor liable to be admin-

istered in equity for payment of his debts generally. (6) A contract under seal can be altered or discharged only by another deed or by some act of as high a nature, so far as regards its effects at law, though in equity it may be discharged by parole agreement. Formerly, on the death of a person, his debts due by contract under seal were payable in priority to his simple contract debts; but this priority was abolished by statute (32 & 33 Vict. c. 46) in the year 1869.

The doctrine of estoppel by deed is subject to this qualification—that it does not preclude a party to the deed from showing that it is void or voidable on the ground of illegality, fraud, mistake, duress, or disability of the contracting party. In the case of *Collins v. Blantern* (1 Smith's Leading Cases, 369) is a leading authority on this subject.

Q.—5. What are the contracts respectively of the drawer, the acceptor, and the indorser of a bill of exchange? What is notice of dishonour of a bill, and under what circumstances may it be dispensed with? What is an acceptor precluded from denying to the holder in due course of a bill?

A.—The drawer of a bill of exchange, by drawing it, engages that on due presentment it shall be accepted and paid, and that if it be dishonoured he will compensate the holder, or any endorser who is compelled to pay it, provided the necessary proceedings on dishonour be taken. The acceptor, by accepting, engages that he will pay the bill, according to the tenor of his acceptance. The indorser, by indorsing the bill, engages that on due presentment it shall be accepted and paid according to its tenor, and if it be dishonoured he will compensate the holder or a subsequent indorser who is compelled to pay it, provided the requisite proceedings on dishonour are taken. (Bills of Exchange Act, 1882, ss. 54, 55.)

Where a bill of exchange has been duly presented for payment, and the acceptor has failed to pay it, the holder of the bill, if he wish to make the drawer or endorsers, or any of them, liable for the amount of the bill, must give prompt notice of its non-payment to such of them as he intends to make liable; or, at least, must give notice to the party whose name was last placed on the bill, in order that the latter may advise the party next before him, and so in succession. This is called *notice of dishonour;* and, as a general rule, the holder cannot sue any party to the bill (other than the acceptor) who has not received such notice either from the holder or from one of the other parties to the bill. Notice of dishonour to a drawer or indorser may be dispensed with, however, where the acceptor, as between himself and such drawer or indorser, is under no obligation to pay the bill, as where it has been accepted for the accommodation of the drawer or indorser; and in some other cases. (See Bills of Exchange Act, 1882, s. 50.)

The acceptor is precluded from denying to the holder in due course of a bill the existence of the drawer, the genuineness of his signature, his capacity and authority to draw the bill, and (if the bill is payable to his order) his capacity to indorse it; and, if the bill is payable to order of a third person, the existence of the payee and his capacity to indorse. (Bills of Exchange Act, 1882, s. 54.)

Q.—6. Have the public the right to assume an authority to any and what extent in a partner to bind his partners upon contracts? What are the principal provisions of the Act, 28 & 29 Vict. c. 86, to amend the Law of Partnership?

A.—The public have the right to assume an authority in each partner in a firm to bind the partners jointly upon contracts within the ordinary limits of the partnership business.

The following are the principal provisions of the Act referred to in the question: A loan of money to a trader, upon a contract in writing that the lender shall receive a rate of interest varying with the profits, or a share of the profits, of the borrower's trade, shall not *per se* constitute the lender a partner with the borrower, or render him liable as such. A contract for the remuneration of a trader's agent or servant by a share of the profits of the trade, shall not *per se* render the servant or agent responsible as, or give him the rights of, a partner. The payment of a portion of the profits of a business to the widow or child of a deceased partner therein, by way of annuity, shall not render such widow or child a partner in the business, or liable as such. The receipt by a person of a portion of the profits of a business, in consideration of the sale by him of the goodwill of the business, shall not *per se* render him a partner in the business, or liable as such. But if the borrower in the first

of such cases, or the purchaser of the goodwill in the last, becomes bankrupt, or compounds with his creditors, or dies insolvent, the lender in the first case, and the vendor in the last, is not to receive any part of the amount due to him till the other creditors have been paid in full.

(To be continued.)

Miscellaneous.

RULES OF THE SENATE TOUCHING DIVORCE.

Rules, Orders and Forms of Proceedings of the Senate of Canada touching Bills of Divorce and Procedure thereon, adopted by the Senate, on Wednesday, 11th April, 1888.

A

At every Session of Parliament a Committee of nine Senators shall be appointed by the Senate, to be called "The Select Committee on Divorce," to whom shall be referred all Petitions and Bills for Divorce, and all matters arising out of such Petitions and Bills, and no reference to any Committee other than the said Committee shall be necessary with respect to such Petitions, Bills and matters.

The Committee, unless it be otherwise ordered by the Senate, shall meet on the next sitting day after their appointment and choose their chairman, and five of the Senators on such Committee shall constitute a quorum.

All questions before the Committee shall be decided by the majority of voices, including the voice of the Chairman, who shall have no casting vote.

B

Notice of the day, hour and place of every sitting of the said Committee shall be given by affixing the same in the lobby of the Senate not later than the afternoon of the day before the time appointed for such sitting.

One of the Official Reporters of the Senate, when notified by the Chairman, shall be in attendance at the sittings of the said Committee, and shall take down in shorthand and afterwards extend the evidence of witnesses examined before the Committee, and cause the same to be printed.

C

Evidence taken before the said Committee shall be printed apart from the Minutes of Proceedings of the Senate, and only in sufficient numbers for the use of Senators and Members of the House of Commons, that is to say, one copy for distribution to each Senator and Member, and twenty-five copies to be kept by the Clerk of the Senate for purposes of record and reference.

D

Every applicant for a Bill of Divorce shall give notice of his or her intended application, and shall specify therein from whom and for what cause such divorce is sought, and shall cause such notice to be published during six months before the presentation of his or her petition for the said Bill, in the *Canada Gazette* and in two newspapers published in the District in Quebec, Manitoba, British Columbia or the North-West Territories, or in the County or Union of Counties in other Provinces, wherein such applicant usually resided at the time of the separation of the parties; but if the requisite number of papers cannot be found therein, then in an adjoining District or County or Union of Counties. Notices given in the Provinces of Quebec and Manitoba are to be published in one English and one French newspaper, if there be such newspaper published in the District, but otherwise shall be published in each newspaper in both languages. The notice may be in the subjoined form. If a notice given by any Session of Parliament is not completed in time to allow the petition to be dealt with during that Session, the petition may be presented and dealt with during the next ensuing Session, without any further publication of such notice.

E

A copy of the said notice shall, not less than one month before the date of the presentation of the Petition, at the instance of the applicant, be served personally on the person from whom the divorce is sought, when that can be done. If the residence of such person is not known or personal service cannot be effected, then, if, on report of the Committee as hereinafter provided for, it be shown to the satisfaction of the Senate that all reasonable efforts have been made to effect personal service and, if unsuccessful, to bring such notice to the knowledge of the person from whom the divorce is sought, what has been done may be deemed and taken as sufficient service.

F

No petition for divorce shall be received after the first thirty days of each session.

G

The petition of an applicant for divorce must be fairly written and must be signed by the Petitioner, and should briefly set forth the marriage, when, where and by whom the cerèmony was performed, the grounds on which relief is asked and the nature of the relief prayed, and should also negative condonation, collusion and connivance. The allegations of the petition must be verified by declaration of the Petitioner, under the Act Respecting Extra-Judicial Oaths.

H

The applicant shall deposit with the Clerk of the Senate, eight days before the opening of Parliament, a copy, in the English or French language, of the proposed Bill of Divorce, and therewith a sum sufficient to pay for translating and printing 600 copies thereof in English and 200 copies in French. The translation shall be made by the translators of the Senate, and the printing shall be done by the contractor.

No petition for a Bill of Divorce shall be presented unless the applicant has paid into the hands of the Clerk of the Senate the sum of two hundred dollars ($200), towards expenses which may be incurred during the progress of the Bill, and the said sum shall be subject to the order of the Senate.

I

The petition when presented shall be accompanied by the evidence of the publication of the notice as required by Rule D, and by declaration in evidence of the service of a copy thereof as provided by Rule E, and by a copy of the proposed Bill. The petition, notice, and evidence of publication and service, the proposed Bill, and all papers connected therewith shall thereupon stand as referred, without special order to that effect, to "The Select Committee on Divorce."

J

It shall be the duty of the Committee to examine the notice of application to Parliament, the Petition, the proposed Bill, the evidence of publication and of the service of a copy of said notice, and all other papers referred therewith, and if the said notice, petition and proposed Bill are found regular and sufficient, and due proof has been made of the publication and service of the said notice, the Committee shall report the same to the Senate.

If any proof is found by the Committee to be defective, the Petitioner may supplement the same by statutory declaration to be laid before the Committee.

The Committee may, if the circumstances of the case seem to require it, recommend a particular mode for service of a copy of the Bill upon the party from whom the divorce is sought, before the second reading of the Bill.

K

Upon the adoption of the Report of the Committee, the Bill may be introduced and read a first time.

L

The second reading of a Bill of Divorce shall not take place till after fourteen days from the adoption of the Report of the Committee, and a notice of the second reading shall be affixed to the door of the Senate during that period.

A copy of such notice and of the Bill shall, at the instance of the Petitioner, be served personally, if practicable, on the party from whom the divorce is sought, or served in such other manner as may have been prescribed on Report of the Committee, and proof of such service shall be adduced before the Committee, who shall report thereon to the Senate.

Upon the adoption of the Report of the Committee as to the sufficiency of such service the Bill may be read a second time.

M

When the Bill is read a second time it shall be referred to the Select Committee on Divorce, who shall proceed with all reasonable despatch to hear and enquire into the allegations set forth in the preamble of the Bill, and take evidence touching the same, and the right of the Petitioner to the relief prayed.

The Committee, after such hearing and enquiry, shall report thereon to the Senate, and such Report shall be accompanied by the testimony of the witnesses examined, and by all papers and instruments put in evidence before the Committee. The minority may bring in a report stating the grounds upon which they dissent from the Report of the Committee.

When any alteration in the preamble or otherwise in the Bill is recommended, such alterations and the reasons for the same shall be stated in the Report.

When the Committee report that the preamble of the Bill has not been proved to their satisfaction, the Report shall state the grounds on which they have arrived at such a decision, and no Divorce Bill so reported upon shall be placed on the Orders of the Day, unless by special order of the Senate.

N

The Chairman of the Committee shall sign, with his name at length, a printed copy of the Bill, on which the amendments recommended shall be fairly written, and shall also sign, with the initials of his name, the several amendments made and clauses added in Committee; and another copy of the Bill with the amendments written thereon shall be prepared by the Clerk of the Committee and filed, or attached to the Report.

O

If adultery be proved, the party from whom the divorce is sought may nevertheless be admitted to prove condonation, collusion, connivance, or adultery on the part of the Petitioner.

Condonation, collusion or connivance between the parties is always a sufficient ground for rejecting a Bill of Divorce, and shall be enquired into by the Committee. And should the Committee have reason to suspect collusion or connivance, and deem it advisable that fuller enquiry should be made, the same shall be communicated to the Minister of Justice, that he may intervene and oppose the Bill should the interest of public justice, in his opinion, call for such intervention.

P

The applicant for divorce, as well as the party from whom the divorce is sought, may be heard before the Committee by counsel learned in the law of the Bar of any Province in Canada.

Q

The applicant for divorce, as well as the party from whom the divorce is sought, and all other witnesses produced before the Committee shall be examined upon oath, or upon affirmation in cases where witnesses are allowed by the law of Canada to affirm; and the Rules of evidence in force in Canada in respect of indictable offences shall, subject to the provisions in these Rules, apply to proceedings before the said Committee, and shall be observed in all questions of fact.

R

Summonses for the attendance of witnesses and for the production of papers and documents before the Senate or the Select Committee on Divorce shall be under the hand and seal of the Speaker of the Senate, and may be issued at any time to the party applying for the same by the Clerk of the Senate. Such summonses shall be served, at the expense of the party applying therefor, by the Gentleman Usher of the Black Rod or by anyone authorized by him to make such service. The reasonable expenses of making such service, and the reasonable expenses of every witness for attending in obedience to such summons shall be taxed by the Chairman of the Committee.

S

In case any witness upon whom such summons has been served refuses to obey the same, such witness may, by order of the Senate, be taken into custody of the Gentleman Usher of the Black Rod, and shall not be liberated from such custody except by order of the Senate and after payment of the expenses incurred.

T

In cases not provided for by these Rules, the general principles upon which the Imperial Parliament proceeds in dissolving marriage and the general principles of the rules, usages and forms of the House of Lords in respect of Bills for Divorce may be applied to Divorce Bills before the Senate and before the Select Committee on Divorce.

U

Declarations allowed or required in proof may be made under the Act of the Parliament of Canada entitled "An Act Respecting Extra-Judicial Oaths," before any judge, justice of the peace, public notary, or other functionary authorized by law to administer an oath.

V

Rules 72 to 84, both inclusive, are hereby rescinded; but all other rules of the Senate which, by reasonable intendment, are applicable to proceedings in divorce, shall, except in so far as altered or modified by these Rules, or inconsistent therewith, continue to be applicable to such proceedings.

W

The subjoined forms, varied to suit the circumstances of the case, or forms to the like effect, may be used in proceedings for divorce.

FORMS.

"A"

NOTICE OF APPLICATION FOR DIVORCE.

Notice is hereby given that (*name of applicant in full*) of the of , in the county (*or district*) of , in the Province of , (*here state the addition or occupation, if any, of applicant*), will apply to the Parliament of Canada, at the next session thereof, for a Bill of Divorce from his wife (*or her husband*), (*here state names in full, residence or addition or occupation, if any, of the person from whom the divorce is sought*), on the ground of (*adultery, adultery and desertion, or as the case may be*).

Dated at . } *Signature of applicant or of solicitor for applicant.*
Province of
day of 188 . }

(*When any particular relief is to be applied for, the nature thereof shall be briefly indicated in the notice*).

"B"

DECLARATION AS TO SERVICE OF NOTICE WHEN MADE PERSONALLY.

Province of } I, A.B., of the of
County (*or district*) } in the county (*or district*)
of } of , in the Province
To Wit: } of (*occupation*) do

solemnly declare:—

1. That on the day of , A.D. 188 , I personally served C. D. (*names of persons served*) with a true copy of the notice hereto attached and marked "A," by giving the said copy to and leaving it with the said C. D. at (*state place of service.*)

2. That I know the said C. D., and that I believe him to be the person described in the said notice as the husband of E. F. therein named.

(*Add any statements made by C. D. to the person effecting the service showing identity.*)

And I make this solemn declaration conscientiously believing the same to be true, and by virtue of the Act Respecting Extra-Judicial Oaths.

Declared before me, at the } *Signature of declarant.*
of in the county of
, in the Province of
this day of A.D. 188 .

NOTE.—*Exhibits attached to the declaration should be verified under the hand of the public functionary before whom the declaration is made.*

"C"

GENERAL FORM OF PETITION.

To the Honourable the Senate of Canada in Parliament assembled,

The petition of A. B., of the of , in the County of , in the Province of , the lawful wife of, C. D. of, etc. (*State names in full, residence and occupation.*)

HUMBLY SHEWETH:

1. That on or about the day of , A.D. 18 , your petitioner, then A. X. (*spinster, or as the case may be*) was lawfully married to the said C. D. at .

2. That the said marriage was by license duly obtained (*or as the case may be*) and was celebrated by

3. That at the time of the said marriage your petitioner and the said C. D. were domiciled in Canada, and have ever since continued to be and are now domiciled in Canada.

(*All facts as to the residence and domicile of the parties at and since their marriage should be stated with particularity.*)

4. That after her said marriage your petitioner lived and cohabited with her said husband, at , and that there are now living issue of the said marriage children, viz.: Mary D., born the day of , 18 , and Elizabeth D., born the day of , 18 .

5. That on or about the day of , A.D. 18 , at the in the , the said C. D. committed adultery with one G. H. of , spinster, and since then on divers occasions has committed adultery with the said G. H.

6. That your petitioner ever since she discovered her said husband had committed the said adultery has lived separate and apart from him, and the said C. D. has not since cohabited with your petitioner.

7. That your petitioner has not in any way condoned the adultery committed by the said C. D., and that no collusion or connivance exists between myself and the said C. D. to obtain a dissolution of our said marriage.

Your petitioner therefore humbly prays:

That your Honourable House will be pleased to pass an Act dissolving the said marriage between your petitioner and the said C. D., and enabling your petitioner to marry again, and giving to your petitioner the custody of the said Mary D. and Elizabeth D. and granting your petitioner such further and other relief in the premises, as to your Honourable House may seem meet.

And as in duty bound your petitioner will ever pray.

Signature of Petitioner.

"D"

DECLARATION VERIFYING PETITION.

Province of } I, A. B., of the
County (*or District*) of } of , in
To wit: } the County of ,
in the Province of (*occupation, if any. In the case of the wife being the applicant, say "wife of C. D." and gives names, residence and occupation or addition of the husband*), the petitioner in the foregoing petition named, do solemnly declare:—

1. That, to the best of my knowledge and belief the allegations contained in the paragraphs of the foregoing petition, numbered respectively are, and each of them, is true.

2. (*If any matter is alleged, of which the petitioner has not personal knowledge, add:*) "*That with respect to the matter alleged in the paragraphs of the foregoing petition, numbered respectively , I am credibly informed and believe them, and each of them, to be true.*")

And I make this solemn declaration conscientiously believing the same to be true, and by virtue of the "*Act respecting Extra-Judicial Oaths.*"

(*Sig. of Declarant.*)

Declared before me, at the of , in the County of , in the Province of , day of A.D. 188 .

True copy of the foregoing Rules as adopted by the Senate of Canada, Wednesday, the eleventh of April, A.D. 1888.

EDOUARD J. LANGEVIN,
Clerk of Senate.

Appointments to Office.

SHERIFF.

District of Muskoka.

James W. Bettes, Huntsville.

LOCAL REGISTRAR, CLERK OF DISTRICT COURT, ETC.

Muskoka and Parry Sound.

Richard H. Stewart, Parry Sound, Local Registrar, H.C.J., at Parry Sound, Clerk of the District Court, and Deputy Registrar of the Surrogate Court for the United District.

DEPUTY CLERK AND DEPUTY REGISTRAR.

Muskoka.

Isaac Huber, Bracebridge, Deputy Clerk of the District Court, and Deputy Registrar of the Surrogate Court.

CORONER.

Simcoe.

Wm. L. Allen, M.D., Phelpston.

DIVISION COURT CLERKS.

Simcoe.

David Lloyd, Newmarket, Second Division Court, *pro tempore*, *vice* H. W. Manning, deceased.

Nipissing.

Thomas J. Ryan, McKim. Fourth Division Court, *vice* Wm. B. Aird, left the jurisdiction.

BAILIFF.

Frontenac.

William J. McGrath, First Division Court, *vice* Michael Furlong, deceased.