Canada Law Journal.

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DIARY FOR SEPTEMBER.

17. Wed .....First U. C. Parliament met at Niagara, 1792.
19. Fri.....President Garfield died, 1881.
20. Sat.....Lord Sydenham, Governor-General, died, 1841.
21. Sun.....*15th Sunday after Trinity.*
24. Wed .....Guy Carleton, Lieut-Governor, 1766.
28. Sun.....*16th Sunday after Trinity.*
30. Tues.....Sir Isaac Brock, President, 1811.

TORONTO, SEPTEMBER 16, 1884.

THE *Canada Gazette* of the 13th inst. announces that Hon. John O'Connor, Q.C., has been appointed a Judge of the Supreme Court of Judicature for Ontario, a Justice of the High Court of Justice for Ontario, and a member of the Queen's Bench Division, *vice* Hon. M. C. Cameron, appointed Chief Justice of the Common Pleas Division.

THE opinon expressed in our issue of 1st July last as to the proper construction of 41 Vict. chap. 17, sec. 2, appears to coincide with the recent decision of the Court of Appeal in *Goddard* v. *Coulson* noted *ante* p. 263. The latter decision is opposed to that of the Chancery Division in *Re Cornish* noted *ante* p. 266.

THERE have been singularly few cases of general interest argued before the Chancery Divisional Court at the present session. The motion to strike out *Langtry* v. *Dumoulin* is almost the only matter that has brought up an interesting legal argument. The other cases for the most part have involved mainly findings of fact on the evidence.

WE have been requested to publish the judgments in *Badenach* v. *Slater*, on the subject of fraudulent preferences, a note of which will be found on a previous page of this journal (p. 259 *ante*). The judgment of the Chief Justice we have been unable to procure as yet, but we are informed that in all material points it is the same as the views expressed by Strong and Gwynne, J.J., in their judgments which will be found in another column.

The following is a summary of the cases in appeal which stood for hearing at the sitting of the Court of Appeal, commencing 2nd September, 1884:—

Queen's Bench Division	21	
Cameron, J.	1	
		— 22
Common Pleas Division	15	
Galt, J.	1	
Osler, J.	1	
		— 17
Chancery Divison	2	
Boyd, C.	6	
Proudfoot, J	6	
Ferguson, J.	6	
		— 20
Election Cases	3	
Patterson, J. A.	1	
County Court	25	
		— 88

WE have received and have before us an annotated edition of the Naturalization Act, Canada, 1881, with a preface, by Mr. Howell the well-known author of the Surrogate Courts Practice. This Act only came into force on July 4th, 1883, so that the work is very opportune. A hasty glance over it is all that we have at present been able to give, but we shall probably again refer to it. The typographical part of the book is excellent, and the notes appear to shew careful research. We will not, however, at present say more than that these annotated editions of particular

Acts appear to us to be a very useful form of legal literature, and each one that is produced should be cordially welcomed.

IT has always been a surprise to us that the provisions for summary inquiries into fraudulent conveyances, in R. S. O. cap. 49, secs. 10, *et seq.*, should be confined, as they are, to conveyances of land. The class of persons who make conveyances with a view to defrauding and delaying their creditors do not always possess lands, but most of them possess chattels of greater or less value. At all events nothing is commoner than for impecunious people with fraudulent tendencies to execute chattel mortgages to their sisters, their cousins, or their aunts, and leave their creditors out in the cold. At present we take it, these chattel mortgages, however insupportable, can only be upset by means of a Superior Court action, or an interpleader issue. It would certainly be very convenient if in such cases summary applications could be made to the Master in Chambers, or the County Court Judge, as in the case of conveyance of land. We present this suggestion to the Attorney-General as a slight recognition on our part of his recent public services.

IT is a somewhat remarkable fact that a *cause célèbre* on the subject of maintenance and champerty should have come up in our courts, so soon after one on the same subject in the English courts. The case of *Bradlaugh* v. *Newdigate* was much referred to on the argument in the motion to strike out the now famous Rectory case from the list of cases standing for rehearing before the Chancery Divisional Court, which is now awaiting decision. The whole question in dispute is whether the vestry and churchwardens of St. James' Cathedral have such an interest in the subject of the action of *Langtry* v. *Dumoulin* as justifies them from a legal point of view in intervening, and carrying the case to rehearing in Canon Dumoulin's name. It appeared abundantly clear in the evidence that Canon Dumoulin, if left to himself, would not proceed further with the litigation, but that, subordinating his judgment to the wishes of the congregation he unwillingly acquiesced in the latter assuming control over the case and continuing the fight, at their own expense. Counsel for the plaintiffs, indeed, in somewhat forcible language, talked of "ecclesiastical parasites" who sought to derive sustenance by fattening on the rector. Counsel for the defendants on the other hand contended that the congregation had such an interest as prevented their intervention in the suit being classed as maintenance or champerty, because a wealthy rector would be a relief to the pockets of the congregation, and because the church debenture holders would be more secure in their investment. They also contended that Canon Dumoulin, if he succeeded in establishing his right to the fund in dispute, would hold it as a trustee for the congregation. This the plaintiffs strenuously denied, quoting words of Canon Dumoulin to show that such was not a position he himself recognised, inasmuch as he claims the money would be at his own disposal, although he would consider himself morally bound to consult the congregation in the disposal of it. They, also, lay stress on the fact that no such relationship of trustee and *cestui que trust* is set up in the pleading. Counsel for the defendant urged that as a master may maintain a servant's suit, and a rich man a poor man's, so *a fortiori* the vestry and churchwardens may maintain their rector's. On this the Chancellor observed that in the ordinary case of the rich man and the poor man, the poor man was desirous of having his suit maintained, whereas here the poor man appeared to wish nothing of the kind. Perhaps the decision will ulti-

mately turn upon the question of whether a *bona fide* belief that one has an interest in the subject of an action, justifies one in intervening therein.

CANADIAN QUEEN'S COUNSEL BEFORE THE PRIVY COUNCIL.

IT has been the practice of English Queen's Counsel to lead Colonial Queen's Counsel in appeals before the Judicial Committee of the Privy Council, no matter what was the official status or seniority of the Colonial Q.C. We are glad to learn that when Mr. Thomas Hodgins, Q.C., was in England last May investigating Imperial State Papers relating to the boundaries of the Province of Ontario, he enquired of Mr. Henry Reeve, C.B., the Registrar of the Imperial Privy Council, whether there was any rule of the Judicial Committee giving precedence to English Queen's Counsel over Canadian Queen's Counsel in all cases, even where the latter was Attorney-General of Canada. Mr. Reeve replied that there was no rule, but that the practice was for English Queen's Counsel to lead in all cases, and that no exception was made even where the Canadian Queen's Counsel was a Canadian Attorney-General. The same question was submitted to Mr. Andrew R. Scoble, Q.C., a Bencher of Lincoln's Inn, who had been for many years Advocate-General of Bombay. His reply was that he could not, nor did he know of any member of the English Bar, who could, authoritatively answer the question as to the etiquette which governed precedence in the Judicial Committee of the Privy Council. But he added that "theoretically, as members of the Colonial Bars have right of audience in the Judicial Committee, their precedence is regulated by seniority, and a Canadian Q.C. of 1860 would rank before an English Q.C. of a later year. But the precedence of Colonial Law officers does not seem settled; and besides there is no *obligation* on the part of an English Q.C. to take a junior brief with a Colonial Q.C. as leader. Of course the English Attorney and Solicitor-General lead everybody."

The question remained unsettled until Mr. Attorney-General Mowat arrived in England to argue the question of the boundaries of Ontario and Manitoba before the Judicial Committee, when he offered the junior brief in the case to Mr. Scoble, Q.C. Before accepting the brief, Mr. Scoble enquired through Sir Arthur Hobhouse, one of the judges of the Judicial Committee, whether there was any precedents on the point in the records of the Privy Council. No precedent having been found, the matter was referred to the Attorney-General of England, Sir Henry James, M.P., whose opinion appears to concede the right of Canadian Queen's Counsel to equal privileges with their English brethren before the Judicial Committee, and is as follows:—

"It appears to me that the Privy Council is common ground to the Bars of this country and all our colonies and dependencies. I see no reason why we should not accord equal rank to Her Majesty's counsel in the Colonies when pleading in colonial causes. As the Canadian Queen's Counsel is the Attorney-General of Ontario, I think there is an additional reason why, in this particular case, you should not object to allow him to act as your leader."

In communicating this opinion the writer adds: "This is common sense, and I think commends itself to the Bar generally."

Of course there may be cases before the Privy Council, as before the courts in Canada, where it may be proper to have a junior Queen's Counsel of eminence as leader to a senior Queen's Counsel. Such an arrangement is always possible where it is considered advantageous to the management of the case. But it is satisfactory

to know that hereafter English and Colonial Queen's Counsel will take rank in Colonial appeals before the Privy Council according to seniority, and that the claim of an English Queen's Counsel to lead his senior from one of the Colonies can no longer be maintained in practice but may be conceded for the benefit of the client. One of our city contemporaries referring to this matter says:

"This action upon the part of the legal lights of the Mother Country will, perhaps, be none the less grateful to their brethren here, from the fact that it has not been taken without due deliberation and considerable warm discussion. And yet it will doubtless be a surprise to a good many people that what is so manifestly in accordance with the fitness of things should have occasioned any controversy, and especially that it should have been carried on with keenness and warmth. It is satisfactory, however, to know that, though it was not "until after a somewhat warm discussion," it was decided, "by a considerable majority, that barristers from the Colonies, when engaged professionally in the Mother Country, should henceforth be accorded a cordial and unreserved welcome." The question of the standing of Colonial counsel engaged before the Judical Committee was left to the decision of the Attorney-General, Sir Henry James, who has ruled that they are entitled to the same recognition as English barristers of equal rank and standing."

RECENT ENGLISH DECISIONS.

The *Law Reports* for July comprise 13 Q. B. D. p. 1-198; 9 P. D. p. 101-121; and 26 Ch. D. p. 237-433.

COVENANT TO PAY "ALL RATES, TAXES AND ASSESSMENTS."

In the first of these the decision in *Wilkinson* v. *Collyer*, p. 1, may be briefly noticed. A tenant on taking a lease of a house covenanted "to pay all rates, taxes and assessments payable in respect of the premises during the tenancy, except the land tax and the landlord's property tax." The Divisional Court held in this case that a sum assessed upon the owners as their proportion of the expense of paving the street upon which the premises abutted, was not a rate, tax or assessment within the meaning of the covenant, but a charge imposed upon the owner for the permanent improvement of his property. The principle of the decision appears to be, in the words of Manisty, J., that the words above used "apply to rates and assessments of a temporary or recurring nature, and not to a sum which is a charge upon the property giving it an increased permanent value." "No case," he adds, "has gone the length of holding that a sum assessed upon the owner as his proportion of the expense of paving a new street, is a rate, tax or assessment within such a covenant as this."

JOINT AND SEVERAL LIABILITY—JOINT JUDGMENT AGAINST FIRM—MERGER.

In the next case, *In re J. & H. Davison, ex parte Chandler*, p. 50, the point decided was, that where a firm is adjudicated bankrupt on a judgment debt recovered against the firm jointly, if the partners are also severally liable in respect of the same matter by reason, for instance, of its arising out of breach of trust, the judgment creditor is not, by reason of his having sued for and obtained a joint judgment, thereby precluded from proving against the respective separate estates of the creditors. If he is so precluded, says Cave, J., at p. 53, "It can only be either because the separate cause of action is merged in the joint judgment, or because by suing on the joint cause of action they (the judgment creditors) have elected to rely on that only, and have thus waived the separate cause of action." But as to the first, he says, that it seems clear both on principle and authority that a joint judgment is no bar to a separate cause of action. "On principle, why should it be?" he asks. "The object of taking a joint and several note is to have the separate liability of each promissor as well as the joint liability of all, and why should the fact that the separate liability of one promissor as merged in a separate

judgment against him prove a bar to an action on the joint note?" As to the second ground, he says: "The doctrine of election or waiver applies only where the person having the cause of action is put to elect between two inconsistent remedies, as in the case of the right to sue either the agent or the principal when disclosed; . . or in the case of the right to sue for a tort or to waive the tort and sue for the proceeds in the hands of the wrongdoer. In these cases the plaintiff may elect which remedy he will have, but when he has elected one remedy he has thereby waived his right to the other. In this case, on the contrary, it is admitted that if the respondents could have proved a fraudulent misappropriation by the partners, they might have had both a joint and separate judgment, and consequently there was no election and no waiver."

COMPANY—FORGERY OF SHARE CERTIFICATE OF OFFICER—ESTOPPEL.

The next case requiring notice is *Shaw* v. *The Port Philip etc. Mining Co.*, p. 103, where it was decided that a certain company were estopped by a certificate issued by their secretary, stating that the plaintiff had been registered as the owner of the shares, from disputing the plaintiff's title to the shares, although the signature of the director appended thereto was a forgery, and the seal of the Company had been affixed without the authority of the directors, it being proved that it was the duty of the secretary to procure the execution of and to issue certificates of shares in the company with all requisite and prescribed formalities. Mathew, J., at p. 108, says:—"It is stated to have been the duty of the secretary to procure the execution of the certificate with the prescribed formalities, and to issue it to the person entitled thereto. It is obviously indispensable in the ordinary course of business that the secretary should perform these duties, and it never could have been contemplated that the purchaser of shares should himself ascertain that each of the prescribed formalities had, in fact, been complied with. It seems to me, therefore, that the secretary is held out by the company as their agent to warrant the genuineness of the certificate. It was argued by the counsel for the defendants that the fact that the certificate was a forgery prevented their being liable for the act of their agent, but he failed, as it appeared to me, to establish any difference for this purpose between a fraud carried out by means of forgery and any other fraud."

RIGHT TO PROTECTION AGAINST FLOOD—ADJOINING LAND OWNERS.

In *Whalley* v. *The Lancashire and Yorkshire Railway Co.*, p. 131, we have perhaps one of the most interesting judgments, both from a legal and ethical point of view, which have appeared in the *Law Reports* for some time, in the judgment of Brett, M.R. It may be said to ring the changes on the maxim *sic utere tuo ut non lædas alienum*. The facts of the case were these: the defendants were the owners of a railway standing at the place in question upon a slight embankment, which they were authorized by Act of Parliament to make and to use as a railway embankment with a railway on it. That embankment at that place was upon sloping ground, so that on one side of it the ground was higher than on the other side. An extraordinary storm of rain arose, by which the land on the upper side was flooded; and the water, being stopped by the embankment, rested against it in a body, so that people might reasonably suppose it would endanger the safety of the embankment. Under these circumstances, the defendants cut trenches or openings through the embankment, the necessary effect of doing which was, that the water passed through these openings on to the plaintiff's land in a different way from what it would have done if it had

percolated through the embankment, as it probably would have done, and by reason of its so passing through these openings in such different manner it damaged the plaintiff's land. The question was, whether the defendants were liable to the plaintiff. The jury found that from the way in which the defendants let the water through, it did more damage to the plaintiff's land than if it had been allowed to percolate through without their having done anything; but they also found that if the defendants had only to consider the preservation of their own land, what they did was a reasonable thing to do, and it was not done by them negligently. Under these circumstances, the Court of Appeal now held the defendants liable. The principal judgment was that of the M.R., who formulates the question before the Court into the following proposition: "When the water, by an extraordinary misfortune, had come to rest against the defendant's property, had they a right, in order to save their own property, to do that, the necessary effect of which was to injure their neighbour's property?" It is impossible here to follow out the different distinctions drawn in this philosophical judgment, but the way in which he sums up the result may be given in his own words: "An extraordinary misfortune happened; it fell upon the defendants, and if they had allowed things to remain as they were, they would have been the sufferers; but in order to get rid of the misfortune which had happened to them, and which, *rebus sic stantibus*, would not have injured the plaintiff, they did something which brought an injury upon the plaintiff. Under these circumstances, it seems to me the defendants are liable." "Of course there is a difference," says Lindley, L. J., at p. 140, "between protecting yourself from an injury which is not yet suffered by you, and getting rid of the consequences of an injury which has occurred to you."

HUSBAND AND WIFE—SEPARATE ESTATE—WILL.

In *Dye* v. *Dye*, at p. 147, it was decided that, in order that the fee simple of an intended wife may be affected with a trust for her separate use by an agreement made between the intended husband and wife before marriage, the agreement must be in writing and signed by the wife as well as by the husband; and mere renunciation by an intended husband of his marital rights in his wife's real property is not sufficient to clothe her with a testamentary power, or to constitute a valid declaration of trust of the fee. But by reason of recent legislation in this Province, it does not appear necessary to dwell upon this case here.

MEASURE OF DAMAGES—LOSS OF MARKET.

In 9 P.D., pp. 101-121, there is only one case which calls for mention, viz., *The Notting Hill*, p. 105, wherein it was decided by the Court of Appeal, affirming Sir James Hannen, that loss of market was too remote a consequence to be considered as an element of damage. Here, a ship, having been damaged by a collision with another ship, the owners of the cargo on the former claimed damages from the owners of the latter ship, *inter alia*, in respect of the loss of market in consequence of a portion of the cargo having been delayed in its arrival at the port of destination. Sir James Hannen, indeed, expressed himself as reluctantly forced to come to the above decision by reason of the weight of authority, but the Court of Appeal upheld the decision, Brett, M. R., quoting the words of Mellish, L.J., in *The Parana*, L.R. 2 P.D. 118, that loss of market, in the sense that persons are entitled to the difference between the price when the goods arrived and the price when they ought to have arrived, is on an ordinary voyage so uncertain that it cannot be the natural and reasonable consequence in every case. And therefore it is not the natural and

reasonable result of a collision at sea. He also observes: "I agree that upon the question of remoteness of damages there is no difference between actions upon contract and actions not upon contract."

Proceeding now to the July number of the Chancery Division:—

EXECUTORS AND TRUSTEES—LOSS BY INSOLVENCY OF AGENT.

The first case *In re Brier, Brier* v. *Evison*, p. 238, may be mentioned in connection with *Speight* v. *Grant*, 9 App. Cas. 1, which was noted in this journal *supra* p. 181. In *Speight* v. *Grant*, the point of the decision is, in the words of Lord Fitzgerald, that "Although a trustee cannot delegate to others the confidence reposed in himself, nevertheless he may in the administration of the trust fund avail himself of the agency of third parties, such as bankers, brokers and others, if he does so from a moral necessity, or in the regular course of business. If a loss of the trust fund should be occasioned thereby, the trustee will be exonerated unless some negligence or default of his has led to that result." The present case in like manner decides that when an executor employs an agent to collect money under circumstances which make such employment proper, and the money collected is lost by the agent's insolvency, the burden of proof is not on the executor to show that the loss was not attributable to his own default, but on the persons seeking to charge him to prove that it was. Referring to the facts in this case Lord Selborne, L.C., says:—"There were numerous small book debts to be collected; we do not know much as to the circumstances of the executors, but it would be according to the ordinary course of business that they should not personally collect them, but should employ some proper and respectable person for that purpose. . . Then if a person seeks to charge the executors with a loss arising from the default of an agent whom it is admitted to have been reasonable to employ, does it not lie on him to inform the Court of the circumstances under which the loss arose, the time during which the money was in the agent's hands, the time at which the insolvency took place? This having been done, the executors, on the other hand, would have an opportunity of shewing what efforts they had made and what means they had used for getting in the money, and what, if any, were the difficulties in the way."

PLEDGE OF SHARES—BLANK TRANSFERS.

The next case requiring notice is *France* v. *Clark*, p. 257. There F. deposited the certificates of certain shares in a company with C. and also a transfer with the consideration, date and name of the transferee left in blank, as security for £150. C. then deposited them with Q. as security for £250. Q. filled in his own name as transferee, and sent the transfer for registration, and claimed the position of purchaser for value of the shares as against F. It was held by the Court of Appeal that Q. had no title against F. except to the extent of what was due from F. to C. Lord Selborne lays down the law in general terms as follows:—"The defence of purchaser for valuable consideration without notice by any one who takes from another without inquiry an instrument signed in blank by a third party, and then himself fills up the blanks, appears to us to be altogether untenable. . . The person who has signed a negotiable instrument in blank, or with blank spaces, is (on account of the negotiable character of that instrument) estopped by the law merchant from disputing any alteration made in the document, after it has left his hands, by filling up blanks (or otherwise in a way not *ex facie* fraudulent) as against a *bona fide* holder for value without notice; but it has been repeatedly explained that this estoppel is in favour only of such a

bona fide holder; and a man who, after taking in blank, has himself filled up the blanks in his own favour without the consent or knowledge of the person to be bound, has never been treated in English Courts as entitled to the benefit of that doctrine. He must necessarily have had notice, that the documents required to be other than they were when he received them in order to pass any other or larger right or interest, as against the person whose name was subscribed to them, than the person from whom he received them might then actually and *bona fide* be entitled to transfer or to create; and if he makes no inquiry he must at the most take that right (whatever it may happen to be) and nothing more. He cannot, by his own subsequent act, alter the legal character, or equitable operation of the instrument."

WILL—SPECIAL POWER OF APPOINTMENT—LAPSE.

In the next case, *Holyland* v. *Lewin*, p. 266, the point decided is briefly this, that the 33rd section of the Wills Act (R. S. O. cap. 106, sec. 35), which enacts that a devise or bequest to a child of the testator who dies in the lifetime of the testator leaving issue shall not lapse does not apply to an appointment under a special power. In delivering the judgment of the Court of Appeal, Lord Selborne says: "The words 'devise' and 'bequeath' are terms of known use in our law, the former from Glanville's time and earlier. In their ordinary sense they signify the declaration of a man's will concerning the succession to his own property after his death. Such a devise or bequest operates (on the subjects which either by common or by statute law, or by custom, can so be disposed of) by virtue of the will, and of that alone. On the other hand, an appointment under a limited power operates by virtue of the instrument creating the power, the execution when valid being read into and deriving its force from that instrument. . . It follows, we think, legitimately from these premises that the words 'devise' or 'bequest,' when read in the Wills Act without any indication of an intention that they should apply to appointments under power, ought, *prima facie*, to be understood in their ordinary sense, viz., as referring to a gift by will of the testator's own property, and nothing else."

FRESH EVIDENCE ON APPEAL.

The case of *In re Leonard & Ellis Trade-mark*, p. 289, does not appear to call for notice, except as to the dictum of Cotton, L. J., at p. 302, where, speaking of permitting the adducing of fresh evidence on appeal, he says: "In my opinion, it is most dangerous to allow parties, when they have taken their stand at the trial of a particular question on certain evidence, relying either on the sufficiency of their own or the deficiency of their opponent's evidence, afterwards to come, when they find that they have miscalculated the effect of it, and ask to be allowed to produce evidence which they think will meet the point of the case. . . I have a great dislike to allowing evidence to be adduced after there has been a trial in order to cover a blot which has been pointed out by the result of the trial."

INJUNCTION TO RESTRAIN SLANDER.

The next case, *Hermann Loog* v. *Bean*, p. 306, is an exceedingly interesting one, being apparently the first instance of an injunction being granted to restrain slanderous statements. The plaintiffs sought to restrain the defendant, who had been an agent of theirs, and whom they had dismissed from their employ, from making slanderous statements injurious to their business, to their customers and other persons. The Court of Appeal upheld Pearson, J., in granting the injunction as to statements made to customers, the plaintiffs' counsel not persisting in demanding it as to other persons. Cotton, L.J., says,

p. 313: "Here is a man, who had been in the employ of the plaintiffs, making to their customers slanderous statements with regard to the business of the company, and trying to induce the customers not to pay the sums which they owe to the plaintiffs. The Court has of late granted injunctions in cases of libel, and why should they not also do so in cases of slander? It is clear that slanderous statements, such as were made to old customers in this case, must have a tendency materially to injure the plaintiffs' business; they are slanders, therefore, spoken against their trade. It is not necessary, therefore, in my opinion, to show that loss has actually been incurred in consequence of them. If they are calculated to do injury to the trade, the plaintiffs may clearly come to the Court. There is, no doubt, more difficulty in granting an injunction as regards spoken words than as regards written statements, because it is difficult to ascertain exactly what is said. But when the defendant is proved to have made certain definite statements, such as are mentioned in the order, in my opinion an injunction is properly granted to prevent his repeating them. The defendant, though no doubt the tongue is an unruly member to govern, must take care that he keeps his tongue in order, and does not allow it to repeat those statements which he is by the injunction restricted from uttering." Bowen, L. J., says, at p. 315: "Now, has the Court jurisdiction to grant such an injunction? It seems to me to be clear that it has. There is a wrong done which is actionable if it has been committed, and which naturally would, if repeated or persisted in, affect injuriously the property or trade of the plaintiff company. It has been held since the Judicature Act, that a plaintiff is entitled to the protection of the Court against a wrong of that sort which is contained in a written document; that is to say, the Court will restrain the publication of a libel which is immediately calculated to injure the property and trade of the person against whom it is directed. Then can there be any distinction in principle between a slander which is contained in a written document and a slander which is not? In the case of *Thorley's Cattle Food Company* v. *Massam*, L. R. 14 Ch. D. 763, and *Thomas* v. *Williams*, *ib.* 864, the Court interfered to restrain the slander which was placed upon paper; so that clearly in the case of such written slander *as is naturally attended with injury to property and business*, the Court has jurisdiction to interfere, and it appears to me that the same principle must apply to spoken slander."

MANDATORY INJUNCTION.

In this case, also, a mandatory injunction was also asked for to compel the defendant to withdraw certain notices as to forwarding letters which he had given to the post-office authorities. It was objected that the Court would not grant such an injunction upon interlocutory application, except in special cases. It is worth while, therefore, to call attention to the words of Cotton, L.J., at p. 314:—"This Court, when it sees that a wrong is committed, has a right at once to put an end to it, and has no hesitation in doing so by a mandatory injunction, if it is necessary for the purpose."

LECTURE—PUBLICATION OF—INJUNCTION.

In *Nicols* v. *Pitman*, p. 375, Kay, J., granted an injunction to restrain the defendant from publishing a certain lecture which had been delivered by the plaintiff, at a certain workingman's college, and which the defendant had taken down in shorthand, and published. Kay, J., referred at length to Lord Eldon's judgment in *Abernethy* v. *Hutchinson* 3 L. J. (Ch.) 209, and says as to it:—"It is quite true that the learned judge seems at one

moment to refer to the ground of property and at another to that of contract. But I take his meaning to be this: that when a lecture of this kind is delivered to an audience, especially when the audience is a limited one admitted by tickets, the understanding between the lecturer and the audience is that whether the lecture has been committed to writing beforehand or not the audience are quite at liberty to take the fullest notes they like for their own personal purposes, but they are not at liberty, having taken these notes, to use them afterwards for the purpose of publishing the lectures for profit. That is the ground upon which I am going to decide this case."

A. H. F. L.

REPORTS.

Distinguished Jennings v. Moss 10 A.R. 696.

CANADA.

SUPREME COURT OF CANADA.

BADENACH v. SLATER.

Fraudulent preference—Trust for creditors—Power to sell.

A digest of the decision in this case will be found at p. 258, *ante*. See also editorial in another column.

STRONG, J.—At the argument I had some doubt upon the point raised by this appeal, which subsequent consideration has however entirely removed. *Pickstock* v. *Lyster*, 3 M. & S. 371, having shown that an assignment for the benefit of creditors generally was not avoided by the 13 Elizabeth, but was good against a particular execution creditor of the assignor, I think it must necessarily follow that every power or trust conferred upon the trustee for creditors which is for their benefit must also be valid. I cannot agree that a clause which invests such a trustee with a discretionary power which so far from being necessarily prejudicial to the general body of creditors is actually essential to their protection, renders the assignment invalid merely because it "hinders and delays" them. It is to be presumed that the trustee will do his duty, in other words that he will execute the trust in the interest of the creditors exclusively, and that he will not sell on credit unless it is for their benefit that he should do so. If he fails in his duty, or proposes to act in contravention his conduct can be controlled by a Court of Equity, who can also supersede him in the office of trustee. Supposing there are but a small body of creditors, and that the assignment is made to them directly without the intervention of any trustee, the property being admittedly less in value than the debts there should be no reservation of an ulterior trust for the assignor, could it be said that such a clause as this conferring on them a power to do what they like with their own was void? Then what difference does it make that a trustee is interposed, and a resulting trust declared for the debtor? To the amount of the debts the goods are still the property of the creditors, who through their trustees have the control and management of them for their own behoof. Then to say that the trustee may or may not in his discretion sell on credit is but to say that he shall dispose of the property in the way most advantageous for the whole body of creditors.

The truth is that every argument adduced in support of the contention that such a clause as this necessarily makes an assignment fraudulent strikes at the doctrine of *Pickstock* v. *Lyster*, for so soon as it is once admitted that a particular creditor may lawfully be hindered or delayed by an assignment for the whole body of creditors it necessarily follows that every reasonable and useful power for the protection of the whole body of creditors must also be valid. Whilst I thus hold as to the effect of such a clause as this in the abstract, I do not of course mean to say that a clause authorizing a sale on credit may not, coupled with other circumstances, lead to an inference of fraud which would invalidate the deed of assignment; all I mean to determine is, that by itself such a provision is not illegal. I am of opinion that this is the law under 13 Elizabeth, and that we need not seek the aid of the Provincial statute to enable us to reach such a decision.

I am of opinion that the appeal must be dismissed with costs.

FOURNIER, J., concurred.

HENRY, J., stated that as no case of fraud or collusion had been made out, he was of opinion that the appeal should be dismissed with costs.

GWYNNE, J.—I concur in the opinion that this appeal should be dismissed.

The clause at the end of the second sec. of chap. 118 of the Revised Statutes of Ontario appears to me to have the effect of giving statutory recognition to a doctrine already well established by the decisions of the courts, viz.: that a deed of assignment made by a debtor for the purpose of paying and satisfying rateably and proportionably, and without prefer-

ence or priority, all the creditors of such debtor their just debts, shall not be construed to be a deed made either to defeat or delay the creditors of such debtor, or to give one of such creditors a preference over another, unless then there be something on the face of the deed which is assailed here as being void against creditors which *ex necessitate rei*, has the effect of raising a presumption *juris et de jure* that the intention of the debtors in executing the deed was to defeat or delay their creditors in the sense in which such an act is prohibited by the statute, for there is no suggestion that the deed gives to any creditor a preference over another. The question of intent was one of pure fact to be passed upon by the jury who tried the issue, and the proper way of submitting that question to them would be to say, that if they should find the intent of the debtors in executing the deed was for the purpose of paying and satisfying rateably and proportionably and without preference or priority all the creditors of the defendants their just debts, they should find that it was not made with the fraudulent intent which is prohibited, and that they should render their verdict for the plaintiff.

The words of the deed as affects the selling on credit, in short substance are, that the trustee shall as soon as conveniently may be collect and get in all sums of money due to the debtors and sell the real and personal property assigned by auction or private contract as a whole or in portions for cash or on credit and generally on such terms and in such manner as he shall deem best or suitable having regard to the object of these presents; such object as expressed in another part of the deed being to pay and divide the proceeds among all the creditors of the grantors rateably and proportionably according to the amount of their respective claims.

This language as it appears to me, merely expresses an intention that the trustee may at his discretion sell for cash or on credit accordingly as he shall deem best calculated in the interest of the creditors to realize the largest amount for general distribution among them rateably and proportionably according to the amount of their respective claims.

To hold that this clause in the deed operates so as to compel the court to hold as an incontrovertible conclusion of law that the deed was not made and executed as in its terms it professed to be for the purpose of paying and satisfying rateably and proportionably all the creditors of the debtors their just debts, but was made and executed with intent to defeat and delay such creditors appears to me to involve a manifest perversion of the plain language of the deed, and such a construction of the clause in question is not warranted by any decision in the English Courts or in those of the Province of Ontario from which this appeal comes, and there is in my judgment nothing in it which so recommends it as to justify us in making a precedent by its adoption. If it be said that the clause in question, although not operating as such a conclusion of law, at least affords evidence of the deed having been executed with an intent to defeat and delay creditors, and not for the purpose of paying and satisfying the creditors their just debts rateably and proportionably, and for that reason was proper to have been submitted to the jury to be taken into consideration by them, the answer is, that such a point should have been made at the trial, and not for the first time, as it was here, in the Court of Appeal for Ontario in the argument of the counsel for the appellant in his reply. And as the jury have rendered a verdict for the plaintiff, they must on this appeal be taken to have found as matter of fact that the deed was not executed with intent to defeat and delay creditors, but was executed for the purpose of paying and satisfying them their just debts rateably and proportionably.

Unless there be something on the face of the deed which in law nullifies and avoids it, the verdict of the jury in maintaining its validity must be upheld. Upon this appeal nothing as it appears to me is open to the appellant to contend but the points contained in his motion in the Common Pleas Division of the High Court of Justice for Ontario for a rule for a non-suit or judgment to be entered for the defendant. The judgment of this Court refusing such rule, sustained by the Court of Appeal for Ontario, is what is before us, and I am of opinion that the verdict of the jury should be upheld, and that the rule moved for was properly refused.

I have, however, carefully perused the judgments in the case of *Nicholson* v. *Leavitt*, so much relied upon by the counsel for the appellant, as it was decided by the Court of Appeals for the State of New York, as reported in 6 N. Y. R. 10, and also the same case as decided in the Superior Court of the State and reported in 4 Sandf. 254. The Court of Appeals when reversing the judgment of the Superior Court seem to me to rest their judgment in a great degree upon a proposition which they lay down, to the effect that a debtor might with equal justice prescribe any period of credit which to him should seem fit, as that which the trustee should give upon sales of property assigned to him as assumed to vest in him a discretion to sell upon credit, if such a mode of selling should seem reasonable and proper and in the best interests of the creditors.

With the utmost respect for the high authority of the Court of Appeals for the State of New York, this seems to me to be equivalent to saying, that to express an intent of vesting in the trustee authority and permission to exercise his best judgment by selling on credit, if such mode of disposing of the property should seem to be in the interest of the credi-

tors whose trustee he is made, and to express an intent of divesting such trustee of all such authority and to prescribe to him a rigid unalterable course, which, in the discharge of his trust, he must pursue against the dictates of his own judgment, and against the will of the creditors whose trustee he is made, are one and the same thing. There are other parts of the reasoning upon which this judgment is rested which seem to me to lead to the conclusion that delaying a creditor in obtaining satisfaction of his debt by the particular process of execution in a suit at law is equally a defeating and delaying of him within the prohibition of the statute as the vesting the trustee with authority in his discretion to sell upon credit, if such would be a reasonable and proper course to pursue in the interest of the creditors, and that the former is not within the prohibition of the statute is established in our courts beyond all controversy.

Upon the whole, therefore, after a careful perusal of both judgments, I must say that that of the Superior Court is, in my opinion, based upon much sounder reasoning, and is more reconcilable with the English authorities than is that of the Court of Appeals, and I think it to be a sound rule to lay down as governing all cases like the present, that an assignment of property by an insolvent debtor can never be declared void under the statute in question here, if in the opinion of the tribunal for determining matters of fact in each case, the actual intent of the debtor, as a matter of fact, in executing the deed was, as the jury must be taken to have found that fact in this case, to provide for the payment and satisfaction of the creditors of the debtor rateably and proportionably without preference or priority according to the amount of their respective claims; and, in my opinion, the mere fact that the deed contains a clause authorizing the trustee in his discretion to sell the property assigned, or any part of it, on credit, if such a mode of selling it should seem reasonable and proper and in the interest of the creditors, does not justify as a conclusion of law an adjudication that the grantor's intent in executing the deed was not to provide for such payment, but on the contrary, in violation of the provisions of the statute in that behalf, was to defeat and delay his creditors.

COUNTY COURT OF THE COUNTY OF YORK.

COLLINS V. BALLARD.

Poundkeepers' Act—R. S. O. Cap. 195—Construction of—Replevin.

Where A. impounded B.'s horse under section 8, R. S. O. cap. 195, and gave usual statutory notices, but notice under section 8 was given a few hours late. *Held*, that the section was directory only, and a substantial compliance was sufficient.

Semble, Replevin will only lie (1) for improper or unlawful impounding; (2) where extortionate claim made and no tender of reasonable or proper amount, or (3) where there has been some improper dealing wtih animal distrained.

[Toronto, June 24.—Co. Ct. Term.

The facts sufficiently appear in judgment of

McDOUGALL, J. J.—This is an action of replevin brought to recover a horse belonging to the plaintiff, alleged to be wrongfully detained by the defendant.

The horse, it appears, got astray and came into the defendant's premises on the 23rd September, 1883. The defendant lives in the Township of Whitchurch, and a by-law of the township was proved by which it was declared illegal for animals to run at large upon the highways in the township. The defendant, instead of sending the animal to the pound, gave a notice under R. S. O. cap. 195, sec. 8, and also advertised the animal for over three weeks in the Newmarket *Era*, a paper published in the municipality (sec. 10). Before the expiration of two months (sec. 12), the owner (the plaintiff), discovered the whereabouts of his horse, and came to the defendant's place and demanded the possession of his animal. The defendant expressed his willingness to give up the horse upon being paid his charges for its keep, which he claimed at the rate of 40 cents a day. This amount it was proved was the per diem allowance that poundkeepers in the municipality were by by-law permitted to charge. The plaintiff thought the charge excessive or improper, and declined to pay it. He did not offer to pay any sum whatever, and left the defendant's place without getting his horse. Shortly afterwards—the two months having expired (sec. 12), the defendant caused to be posted up the sale notices under sec. 13, and mailed a copy of such notice to the plaintiff. Before the day named for the sale the plaintiff replevied the animal, and this action is trying his right to recover possession of his horse. At the trial, with the consent of the parties, I struck out the jury notice and tried the case myself, and at the conclusion of the evidence reserved my judgment.

The defendant for his defence, besides the general issues, sets up a lien and claims the right to

detain the animal for the expenses incurred by him in its keep, alleging the request of the plaintiff to provide food and care, etc. He also sets up his right to detain the animal under the provisions of the Poundkeepers' Act (R. S. O. cap. 195), he having asserted his privilege under that statute of retaining the stray animal himself (it having come upon his premises), instead of sending it to the township pound, averring the performance of all the duties cast upon him by the statute in such a case, viz., the giving of all the statutory notices, etc.

It was objected for the plaintiff that the notice given to the clerk of the municipality was not given within forty-eight hours after the horse came upon the defendant's premises, and that the advertisement in the *Era* was not a copy of the notice served upon or left with the Township Clerk, and the plaintiff's counsel argues that by reason of these alleged informalities the defendant is precluded from setting up his right to detain the horse under the statute.

As to the first objection, the notice to the clerk was given on the Tuesday afternoon, 25th September, about 3 o'clock, p.m. The horse came into the defendant's premises about 8 o'clock on the preceding Sunday morning, the 23rd September. The notice was, therefore, not actually given within forty-eight hours.

I think section eight of the statute may be treated as being *directory* only. Not that an entire omission to give the notice might not be fatal, but the giving of it in fifty-five hours instead of within forty-eight hours, where there is yet two months to elapse before a sale of the impounded animal could be legally had, is, I think, a sufficient compliance with the spirit and intention of the statute. It is an Act intended to be administered in country districts, and by local municipal authorities, and not by lawyers; and in some parts of the country where the inhabitants are sparsely settled, and the roads are bad, the distance from and the accessibility of the clerk's office in cases that can readily be imagined, would render a strict compliance with the statute on the mere question of time—as to a few hours—impossible.

Here the notice was given and intended to be a compliance with the statute, and no ill consequence has affected the plaintiff by the few hours' delay. As is said by Chief Justice Wilson in *Cotter* v. *Sutherland*, 18 U. C. C. P. 407, in speaking of the necessity of a strict compliance with the statutory directions to be observed by the treasurer of a municipality in order to effect a valid sale of lands for arrears of taxes. "A total neglect may have a different effect from a partial neglect. The omission to advertise for one day of a certain period would be a different thing from an absolute neglect to advertise at all. Neither of these extreme cases can well be supported when the objection is taken."

Further, at pp. 408, he says: "I do not forget that *shall* is to be construed as *imperative*. I think this is a case in which there is something in the context or other provisions of the Act indicating a different meaning or calling for a different construction."

In construing a statute such as this looking to its object, and the subject matter legislated upon, I think that the rule may perhaps be safely stated in the somewhat broad language of a note to the American edition of Dwarris on Statutes. (Ed. of 1874, pp. 226, note): "That when a statute directs certain proceedings to be done in a certain way or at a certain time, and the form or period does not appear essential to the judicial mind the law will be regarded as directory, and the proceedings under it will be held valid though the command of the statute as to form and time has not been strictly obeyed; the time and manner not being the essence of the thing required to be done."

The second objection taken by the plaintiff was that the advertisement in the *Era* was not a copy of the notice filed with the clerk. As to this objection, I rely upon similar reasoning to that just expressed with reference to the first objection to overrule it also. The advertisement in the newspaper was not an exact or verbatim copy, but it contained all the necessary information that the statute could have intended, viz., the description and marks of the animal; the date of its coming into the defendant's premises, and his address.

Having then disposed of these two objections in favour of the defendant—Had the plaintiff the right to replevy the animal without first paying reasonable charges for his keep from the time it came into the defendant's possession until he (the plaintiff) learned of its whereabouts?

Section 13 of the Act directs that the notices of the sale to be given under the Act "shall specify the time and place at which the animal will be publicly sold if not sooner replevied or redeemed by the owner, or some one on his behalf, paying the penalty imposed by law (if any), the amount of the injury (if any), claimed or decided to have been committed by the animal to the property of the person who distrained it, together with the lawful fees and charges of the poundkeeper, and also the fence-viewers (if any), and the expenses of the animal's keeping."

Section 14 imposes the duty upon the poundkeeper or person impounding to furnish "sufficient food, water and shelter during the whole time that such animal continues impounded or confined.

Section 15 gives the right to the person furnishing the food to recover the value thereof from the owner of the animal.

Section 16 enables him to recover it in a summary manner before a Justice of the Peace, and directs the Justice in estimating the value or amount to adhere as "far as applicable to the tariff of poundkeepers' fees and charges established by the by-laws of the municipality."

Sections 17 and 18 authorize the person entitled to recover these charges instead of proceeding before a justice to bring about a public sale of the animal.

Now, where an animal has been retained by the individual upon whose premises it has trespassed instead of being sent to the public pound, I think it is intended by the statute that if his impounding has been legal, and he has observed otherwise the statutory provisions, that such person should be entitled to detain the animal until his proper charges are paid. Replevin will, in my opinion, only lie:

1st. Where there has been an improper or unlawful impounding, and hence no right created in favour of the person impounding to make a charge.

2nd. Where there has been an extortionate claim made, and there has been a *tender* of a reasonable and proper amount, and

3rd. Where there has been some improper dealing with the animal impounded, by the person impounding, such as using or working the animal, which act or acts would render it inequitable or unjust on his part to make any claim for care or keep.

In any other cases than these I think the intention of the Act is that the person impounding should only be compelled to give up the animal upon receiving payment of his reasonable charges.

In the present case I think the charges made were reasonable. They were estimated upon the basis of the township tariff for poundkeepers. I think it was amply proved that the animal was well cared for.

It is admitted that no tender of any sum whatever was made before action under the writ issued herein.

I think also that the defendant has substantially observed all the provisions of the statute, which were precedent, to his right to claim for the expenses he was put to in maintaining and caring for the animal.

Under these circumstances I shall enter a verdict for the defendant with full costs of suit, but upon payment by the plaintiff to the defendant of the latter's claim, $23, for the keep of the animal, and also upon payment of the defendant's costs of this suit within one month from date, I will allow the plaintiff to enter a judgment in his own favour for twenty cents without costs. I allow this option to prevent further litigation between the parties hereto, upon the replevin bond or otherwise.

RECENT ENGLISH PRACTICE CASES.

IN RE SPEIGHT, EX PARTE BROOKS.

Appeal—Preliminary objection—Costs.

[L. R. 13 Q. B. D. 42.

This was an appeal from an order by a County Court Judge making absolute an order *nisi* for an injunction. The respondent took a preliminary objection, which was sustained.

CAVE, J.—The party intending to take a preliminary objection, which may be fatal, should give notice to the other side of his intention at the earliest possible moment. Then if the party having received such a notice chooses to go on with his appeal, he knows he does so at the peril of having to pay the costs if he fails. But when such an objection is taken at the very last and succeeds, I think the costs ought not to be allowed.

HOWELL V. DAWSON.

Imp. Jud. Act, 1873, *sec.* 25, *sub-sec.* 8—*Ont. Jud. Act, sec.* 17, *sub-sec.* 8—*Interpleader issue—Appointment of Receiver.*

[L. R. 13 Q. B. D. 67.

An interpleader issue being ordered to try the right to goods seized in execution, the court or a judge may order that instead of a sale by the sheriff, a receiver and manager of the property be appointed, as in this case where the goods seized were cabs and horses, used in the business of a cab propriety, which was a going concern.

HARVEY V. CROYDON UNION RURAL SANITARY AUTHORITY.

Consent order—Withdrawal of consent.

Held, by Court of Appeal, when counsel by the authority of their clients consent to an order, the clients cannot arbitrarily withdraw such consent, though they may apply to be relieved from their consent, on the ground of mistake, or surprise or for other sufficient reason.

[L. R. 26 Ch. D. 249.

COTTON, L. J.—If a consent is given through error or mistake, there can be no doubt that the court will allow it to be withdrawn if the order has not been drawn up. But the question is very dif-

ferent whether when counsel, being duly authorized, have given a consent, there being no mistake or surprise in the case, the party can arbitrarily withdraw that consent. . . . There being no authority which is binding on us to the contrary, we must decide according to what we think the right course, and it must be understood henceforth to be the rule that a consent given by the authority of the client cannot be arbitrarily withdrawn.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

QUEEN'S BENCH DIVISION.

RE MUSKOKA AND GRAVENHURST.

Municipal Act—Arbitrators—Award, etc.

An award by arbitrators under Municipal Act, R. S. O. cap. 174, not invalid though made more than a month after appointment of third arbitrator, notwithstanding sec. 377 of Act.

By sec. 378, no member, officer or person in a corporation's employment, interested in any arbitration, nor any person so interested shall act as an arbitrator under Act.

Held, that the disqualification of interested persons is absolute, and waiver of or acquiescence in the appointment of an interested person will not validate it. By sec. 383, arbitrators are to file with the clerk of the Council, the notes of the evidence taken. There being two councils interested in this arbitration, the arbitrators did not know with which clerk to file the evidence and did not file it.

Held, award not thereby invalidated.

The award having been directed to be made within a year by an order of the Chancery Division, where the parties were litigating concerning it, the Court refused to entertain the merits, but held that for that purpose, the motion should be transferred to that Division.

RE ONTARIO AND QUEBEC RAILWAY CO. AND TAYLOR.

Railway Co.—Expropriation—Award—Compensation for possible damage by falling trees, etc.

The right of a railway company to cut down trees for six rods on each side of the railway under Consolidated Railway Act, 1879, sec. 7, sub-sec. 14, is entirely distinct from their right to expropriate land for the road, and has nothing to do with the compensation to the owner for land so expropriated, and forms a distinct subject of arbitration.

Held, therefore, that an award was bad in allowing compensation to the owner of land expropriated by a railway company for the damage that might accrue to the owner by the possible exercise of the right to fell trees adjacent to the expropriated lands.

Quære, whether under above Act more than the value of the land actually taken can be allowed as the Act does not contain a section equivalent to sec. 7 of R. S. O. cap. 165, which includes compensation for damages to lands injuriously affected.

Held, that the possible damage to land from greater exposure to winds and storms, and the greater liability to injury by fire by reason of the working of the railway were contingencies too remote to be considered in estimating the amount of compensation where there were no buildings to be endangered.

The notice by the railway company, included compensation "for such damages as you may sustain by reason or in consequence of the powers above mentioned."

Held, sufficient to allow the arbitrators to award damages resulting to the owner from the expropriation.

CHANCERY DIVISION.

Osler, J.] [March 29.
Full Court.] [Sept. 8.

JOHNSON V. KRÆMER.

Will—Construction—Express trust—Executors and trustees—Statute of limitations—R. S. O. c. 108.

A testator, J., after ordering all his past debts and funeral expenses to be paid out of his estate, devised to his wife, H. J., all his real estate in L., "during her natural life for the use and support of herself and family, and in case my said wife should at any time think proper to sell my said estate, it shall be the duty of my executors to sell the same with her consent to the best advantage, and the proceeds thereof to be distributed as follows: One-third to be given to my said wife for her use and support; one-third to be appropriated

in educating and bringing up my children; and one-third to be laid out in wild lands to be equally divided amongst my children. But if my said wife should not think proper to sell my said estate, then the same shall be divided amongst my children, their heirs or assigns, after the death of my said wife, share and share alike."

He then nominated P. his executor, "with full power and authority to act in the same," who took out Probate of the will.

The testator died Dec. 12th, 1838, leaving H., his wife, and three children surviving him. Afterwards H. executed a power of attorney, appointing W. J. her attorney to make sale of and convey the said lands so devised as above mentioned, and on Febuary 7th, 1846, H., by deed of that date purported to convey, in consideration of $250, the lands in question to P., the executor aforesaid. The words of grant being "remise, release, relinquish and quit claim," *habendum* to P., his heirs and assigns. Under this deed P. obtained and remained in possession of the land until his death, on March 30th, 1882, when he devised it to K. and K. in trust for the purposes of his will of which he appointed K. and K. his executors.

H. died on November 22nd, 1872, and this action was brought on November 6th, 1883.

It was conceded that the title of the children of J. was barred by the Statute of Limitations unless P. could be treated as an express trustee under sec. 30 of R. S. O., c. 108.

Held, affirming the decision of Osler, J. A., that the proper construction to be placed on the will was that a life estate was given to the testator's widow with a power of sale to the executors during her lifetime with her consent, and remainder in fee to the children in the event of the non-execution of the power. Unless and until the consent of the widow was given, the power of sale did not exist and the executor had no duty to perform in relation to the lands, and he did not take, nor was it necessary that he should take, the legal estate. As he never was required to execute the power he never became trustee, and the plaintiff's title was barred by the Statute of Limitations.

Per PROUDFOOT, J.—There was no devise of the estate to the trustee. The implied estate to enable him to fulfil the trust would only arise when the trust did. Meantime the estate descended to the heirs, and as the trust never arose the trustee never had any estate under the will.

B. B. Osler, Q.C., and *T. S. Plumb*, for the plaintiff.

W. Cassels, Q.C., for the defendant executors.

Proudfoot, J.] [September 17.

CASNER v HAIGHT.

Redemption by wife of a mortgagor after she had joined in the mortgage, and after foreclosure against the husband by the mortgagee, but during her husband's lifetime—Demurrer.

Plaintiff being the wife of A. W. C., who mortgaged his lands, she joining therein for the purpose of barring dower (after foreclosure by the mortgagee against the husband, but during the husband's lifetime), brought an action to be allowed in to redeem the mortgaged premises.

A demurrer to the plaintiff's statement of claim on the ground that the plaintiff had no right, title, or interest in the lands, and that her pleadings affirmed that her husband's interest had been foreclosed, was allowed with costs.

Moss, Q. C., for the demurrer.

V. McKenzie, Q. C., contra.
