Canada Law Journal.

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DIARY FOR FEBRUARY.

15. Thur.. Rehearing in Chancery begins.
17. Sat ... Hilary Sittings end. William Osgoode first C. J. of U. C., died 1824.
18. Sun... *Second Sunday in Lent.* Maritime Court Act came into force, 1878.
20. Tue .. Supreme Court Session begins.
25. Sun... *Third Sunday in Lent.*
27. Tue .. Sir John Colborne, administrator. 1838.
28. Wed .. Indian mutiny began, 1857.

TORONTO, FEB. 15, 1883.

WE recommence in our present number our current review of the cases reported in the *Law Reports*. As before, all decisions except those relating to the provisions of special English Acts, to which our statute books contain no similar enactment, will be noticed as soon as possible after they are issued, and the salient points and dicta of the judgments will be called attention to. Our object in this feature of our Journal, which so far as we know, is to be found in no other English or Canadian publication, is to enable our readers to keep track of the current English decisions in an easier and more effectual manner than can be done by attempting to assimilate a number of indigestible digests and headnotes. It is our intention, also, to resume and continue regularly our short reports of current English Practice Cases, illustrative of our Judicature Act and orders.

THE point which came before our Court of Appeal in *Allan* v. *McTavish*, 2 App. R. 278, was recently before the English Court of Appeal in *Sutton* v. *Sutton*, W. N. 1882, 172; and the latter Court, we see, has come to the opposite conclusion to that arrived at by our Court of Appeal. The English Court holding that an action on a covenant contained in a mortgage of lands is barred, as well as the remedy against the lands, after the lapse of twelve years, by the Impl. Statute 37-38 Vict. c. 57, s. 8, which, except as to the period of limitation, is similar to R. S. O. c. 108, s. 23. In Ontario the Judge of first instance, (Morrison, J.) was of the same opinion as the English Court of Appeal, and was reversed. In England, the Judge of first instance (Chitty, J.), appears to have been of the same opinion as our Court of Appeal, and he was reversed.

WE publish elsewhere an able and important judgment by Judge Clark, holding that a judge has power in a Division Court suit to make an order to strike out a defence and enter judgment for plaintiff without a formal trial of the action. The learned judge will probably find that his decision will involve him in an unexpected amount of labour, though, as he says, the question of inconvenience is a matter of minor consideration. Other judges may not feel called upon, by reason of the great inconvenience that would attend such a practice, if for no other reason, to exercise their discretion under sect. 244 of D. C. Act, to the extent Judge Clark has done; but it is hard to see where his reasoning is at fault. A case is noted in R. & J. Digest, p. 1106, *In re Willing* v. *Elliott*, where Chief Justice Wilson is said to have held that the sections of the Administration of Justice Act, 1873, authorizing the examination of parties, does not apply to Division Courts; we can find no report of the case however. We are under the impression that it came up as an appeal from a judgment of Judge Toms. Perhaps some of our readers could furnish a report of the case.

Editorial Items.

The case of *McDougall* v. *Campbell*, 6 U. C. R. 502, has settled an important principle of law; and we think the decision in every way satisfactory. The short point in the case was this: the plaintiff being about to advance a sum of money on the mortgage of an estate, upon which the defendant had a prior mortgage, the defendant agreed to postpone his mortgage to the plaintiff's. The agreement was in writing, but the plaintiff omitted to register it. The defendant afterwards assigned his mortgage for value to an assignee, without notice of the agreement with the plaintiff, and consequently the plaintiff lost his priority. The question to be determined was whether the defendant, under those circumstances, was bound to indemnify the plaintiff or not. The Supreme Court, affirming the Court of Appeal for Ontario, held that he was. Strong, J., dissented, on the ground that the defendant was not bound to disclose to his assignee the agreement to postpone, and that the plaintiff had lost his priority through his own fault and by the operation of the Registry Law, for which the defendant was not responsible. It is, however, satisfactory in the interest of fair and honest dealing, that the majority of the Court felt able to discard this line of reasoning, and conform to the principle that a man cannot derogate from his own contract to the prejudice of another, even by keeping silence, when in common justice he ought to speak.

The recent Masonic Lottery, in which, according to the manager thereof, as reported in the daily papers, was "consummated the grand act of the Masonic Temple's history," makes us feel a lively hope that the proper authorities will take measures to prevent the consummation of similar "grand acts" for the future. The recent lottery was a comparatively small affair, but it is the thin edge of the wedge, and the taste for such easy roads to wealth, like more legitimate forms of ambition, "grows by what it feeds on." Nothing can be more demoralizing to the people than such public lotteries and the long list of lucky numbers, which appeared a few days ago in our daily papers, reminds one unpleasantly of what may be seen almost any day in the week in the morning papers in Spanish countries. The demoralization of the Spanish people may be attributed, to a great degree, at all events, to their passion for lotteries and other kinds of gambling; and if the recent Masonic Lottery was not illegal under Imp. 12 Geo. II. c. 28, which our Courts have held to be in force in this country (*Cronyn* v. *Widder*, 16 U. C. R. 356), or under our C. S. C., c. 95, it would be well to remove such a defect in our criminal law.

The first number of the *Law Reports* issued this year contains a full report of the address by the Lord Chancellor, on behalf of himself and the Judges of England, made to Her Majesty on receiving form her hands the key of the building containing the new Law Courts. The peroration of this address is so fine that we make no excuse for reproducing it here for the benefit of those of our readers who do not subscribe to the *Law Reports*, or whose notice it may have escaped. It was not included in the account of the Opening reproduced in our number for February 1st.

The Lord Chancellor concluded thus:—

"It was, indeed, fitting and worthy of your Majesty, that these Royal Courts should be dedicated to their future use by the Sovereign of these realms, whose noblest prerogatives are justice and mercy, and from whom all jurisdiction within the British dominions is derived. Your Majesty's Judges are deeply sensible of their own many shortcomings, and of their need of that assistance which they have constantly received from the Bar of England, and from the other members of the legal profession; but, encouraged by your Majesty's gracious approval, and having before them the examples of a long line of illustrious predecessors, they have endeavoured, and will always endeavour, to fulfil the great duties entrusted to them with fidelity to your Majesty, with zeal for the public service, with firmness, impartiality, in the fear of God,

and without fear of man. That they and their successors may be enabled truly to do justice within these walls, so long so the British name shall endure; that the blessing of the Almighty may rest upon their labours; that the law which they administer may ever be a terror to evil-doers, and a strength and support to those who have right on their side; and that your Majesty may be preserved for many future years, still to shed fresh lustre upon a throne founded on law, sustained by justice, and established in the hearts of your Majesty's people, is the fervent prayer of all the Judges of your Majesty's Supreme Court of Judicature, for whom on this august occasion it has been my privilege to address your Majesty."

RULES OF COURT.

A valued correspondent draws our attention to the provisions of O. J. A. sec. 54, ss. 3, which appears to get over some of the difficulties suggested in our last number. It is possible, also, that the Interpretation Act, s. 8, ss. 33, to which our correspondent also refers, removes the doubt raised by us as to the necessity of all the Judges of the High Court concurring in the making of Rules for the High Court. If this be so, any doubt as to the validity of the Rules already passed would seem to be set at rest. The main objections to the present system, discussed in our previous remarks, can, however, hardly, we think, be disputed—namely: that the present Rule-making body, even though the minimum number be seven, as our correspondent avers, is too large: that there is a discordance of aim among its members, and a corresponding want of harmony of action in the body, as well as a difficulty in getting the necessary number of Judges together for a sufficient time, and a danger that crude suggestions may be formulated into Rules without sufficient consideration. Moreover, that when Rules are passed, it seems to be nobody's business to see that they are published speedily in an authentic form for the information of those for whose guidance they are framed. We believe Rules passed in the beginning of January have not yet been published officially.

These objections and difficulties, we are sure, no one can be more anxious to see removed than the learned Judges themselves.

RESCISSION OF CONTRACT.

Two cases in which the same principle of law was involved appear to have been recently decided; the one by the English Court of Appeal, *Mersey Steel and Iron Co.* v. *Naylor*, 47 L. T. 369, and the other by the Q. B. Division of Ontario, *Midland Ry. Co.* v. *Ontario Rolling Mills Co.*, 19 C. L. J. 31. In both cases the question at issue was whether a wrongful refusal to pay, pursuant to a contract, for part of the goods delivered thereunder, amounted to a rescission or renunciation of the contract, or whether the party refusing to pay, could nevertheless recover damages for breach of contract for the non-delivery of the remainder of the goods. In the English case the Master of the Rolls declared that there is no absolute rule which can be laid down in express terms as to whether a breach of contract on the one side, has exonerated the other from performance of his part of the contract. It is stated in *Freeth* v. *Burr*, L. R. 9 C. P. 208, 29 L. T. N. S. 773, that the question in such cases must turn on "whether the acts and conduct of the party evince an intention no longer to be bound by the contract," and this statement of the law was cited with approbation by the Master of the Rolls. In the English case the refusal to pay was based on a mistake in law as to the legal right of the plaintiff company to receive the money—a petition for its winding up having been presented. In the Ontario case the refusal to pay was caused by a mistake of fact, as to the delivery of part of the goods for which payment was claimed. And in both cases, it was held that the refusal to pay under the circumstances was no abandonment of the contract; and in both these cases which were brought to recover the price of the goods actually delivered,

a counter claim for damages for non-delivery of the remainder of the goods was sustained.

In *Honck* v. *Muller*, 7 Q. B. D. 92, 45 L. T. 202, Lord Bramwell appears to have considered that in no case where the contract had been partly performed, could one party rely on the refusal of the other to go on, as amounting to a renunciation of the contract. But the Court of Appeal, we see, repudiated the idea that any different rule is applicable whether the contract be performed in part or not performed at all.

We may add that the Court of Appeal, in arriving at the decision they did, were compelled to admit that it was impossible to reconcile the earlier cases on the point, referring more particularly to *Hoare* v. *Rennie*, 5 H. & N. 19; *Simpson* v. *Crippin*, L. R. 8 Q. B. 13; 37 L. T. N. S. 546; and *Honck* v. *Muller*, 7 Q. B. D. 91; 45 L. J. 202.

PROFESSIONAL INVADERS.

WE refer again to this subject, which is indeed a burning question amongst country practitioners, for the purpose of urging upon the Judges not to appoint commissioners for taking affidavits so freely as is done.

We believe that one remedy for the profession will be found there. The practice for some time has been that every one of these unlicensed practitioners who competes with the lawyer in his own town or village, obtains a commission just upon asking the County Judge to give a certificate that the public needs require it. It is said that these certificates are often given thoughtlessly.

But the discretion in granting the commissions is that of the Superior Court Judges, and they have no right to delegate it to others. If they wish to be informed on the subject, let them enquire as well of the Bar in the County as of the County Judges, and let those whose duty as well as right it is, take some pains to be fully informed. It is hard that they should be called upon to spend their time in this. But they can depute the officers of the Courts to make enquiries, and then act on the information. The profession have rights and they should be protected, and they naturally call upon the Judges to do their part. The number of lawyers in the country is now so great that there is no practical inconvenience in limiting commissions to them and to Clerks of Division Courts. The Benchers have discussed the matter again and again, and we have dozens of times exposed the iniquity of the present system. As for legislation in this matter, of course it is hopeless to get any Local Legislature to see that there is a grievance when so many of our legislators earn an honest (or the reverse) penny by conveyancing. Of course these hedge conveyancers put a good deal of work in our way by their ignorance, but that, certainly, is not the reason why the Judges in effect, but, of course, most unintentionally, play into their hands. Refuse commissions except to officers of the Court, save for very special reasons, and the grievance will be to some considerable extent remedied.

HUMOROUS PHASES OF THE LAW.

WE are told on good authority that the Reports of the American Courts are being issued at the rate of about two volumes a week. With this one appalling fact in our minds, we are not surprised that a person, of Mr. Browne's keen observation of anything and everything containing ought of humor in its composition, has been able, since the appearance of the first edition of his "Humorous Phases of the Law,"* in 1876, to glean enough amid the decisions of the Courts to add very materially to most of the topics of which he so pleasantly treated. Besides, he has not been content with the vast field that lies before him shadowed by the patriotic wings of

* Humourous Phases of the Law. By Irving Browne, editor of the *Albany Law Journal*, author of "Short Studies of Great Lawyers," new edition, revised and enlarged. Sumner Whitney & Co., 1882.

the great American Eagle, but has prowled around with editorial scissors and an expansive note-book into the Courts of our Dominion, both East and West, into the sacred precincts of Westminster Hall, the Four Courts of Dublin, the Parliament House of Edinbureh, among the judges and advocates of old Europe, and even leaps half way across the Pacific and quotes the learned deliverances of the Supreme Court of the Hawaiian Islands.

We greet the arrival of this new edition, "revised and enlarged," with even greater pleasure than we did the first. The bulk of the book is more than doubled, while the gravity is not increased one whit; although it deals extensively with such serious subjects as "Sunday," and "the Clergy." "Law," through a very proper maid, is by no means always dull; though never naughty, she is often nice. She is, in fact, chameleon-like, and depends much upon what she is near. Mr. Browne often finds her with a smile on her face, a humorous twinkle in her eye, a witticism upon her lips; when he does, he seizes the bright look or word with pen or pencil; thus he finds waiting upon her a pleasure and a profit, but no penance. He knows full well how to write a law book that will both instruct and entertain. He is able to make "the dry bones of our science sparkle with phosphorescent light at night."

This new volume forms another of the "Legal Recreations" published by Sumner Whitney and Company, of San Francisco, This series has been coming out far too slowly for the last half dozen years.

The new chapters treat of such interesting subjects as "Newspaper Law," "Practical Tests in Evidence," "De Minimis,' and "Limitations of the Privileges of the Clergy;" while much has been added to such topics as "Negligence," "Nuisance," "Animals," "Sundays," "Wagers," and "Trade-marks." Let us first steal some of the honey which the busy B. has gathered through the days that have passed since 1876, and stored in this book, and then dive into his other treasuries that he now first opens up to the general reader. We say general reader, for here we find much that has already interested, amused or instructed the professional in the pages of the *Albany Law Journal* (of which since September, 1879, our author has been the able and indefatigable editor); and this is a book in which any reader of intelligence, be his profession or calling what it may, will find much to interest and profit.

Christianity is part of the law of our land, so we will glance first at the new things he gives upon "The Law of Sunday." Visitors to the New England States will find it well to remember that down East one must not travel on the Sabbath to pay a visit of pleasure to a friend, nor to sell pigs, nor to swap jewelry; nor can one call on a friend in coming back from a funeral in order to be cheered up. If one does any of these things, and meets with an accident, he is remediless: (*Cratty* v. *Bangor*, 57 Me. 423; *Bradley* v. *Rea*, 103 Mass. 188; *Myers* v. *Meinrath*, 101 Mass. 366; *Davis* v. *Somerville*, 128 Mass. 594). On the other hand, if you hire a horse on the Lord's-day and injure him, you will not have to pay the owner, provided you were driving for pleasure; it will be far otherwise if the horse was hired for any work of necessity or charity: (*Parkers* v. *Latner*, 60 Me. 528; *Doyle* v. *Lynn, &c., Ry.*, 118 Mass. 195). If one is hurt solely by a defect in the streets while walking in the City of Portland, after drinking a glass of beer in a beer shop, he may recover damages from the city: (*O'Connell* v. *Lewiston*, 16 Me. 34). We thought there was no beer to be had in beer-shops in the home of the Maine Liquor Law! Although the moral and divine song says, "Let dogs delight to bark and bite," they must not do the latter to human bipeds on the Sabbath; it is neither a work of necessity nor charity. And in Iowa they must not bark and frighten the horses of one who is breaking the law by driving on business on that day: (*White* v. *Lang*, 120 Mass. 598;

Schmid v. *Humphrey*, 48 Ia. 652). The case of the Scotch doctor's boy and his master's gig, to which we referred at p. 192 of our last volume, is given at considerable length. We learn that in Indiana it is wicked to take up a subscription for a religious purpose on Sunday, yet it is no harm to feed pigs, to cut ripe grain, to market ripe melons, to sell cigars at a hotel: (*Catlett* v. *Trustees*, 62 Ind. 365; *Edgerton* v. *State*, 67 Ind. 588; *Wilkins* v. *State*, 59 Ind. 416; *Carver* v. *State*, 69 Ind. 61). We think that the Court must have been particularly impecunious when it decided the first of these cases, and we find that in Michigan and Pennsylvania the judges were not quite so strict as to money transactions of that kind on Sunday: (*Allen* v. *Duffie*, 43 Mich. 1; *Dale* v. *Knapp*, 24 Alb. L. J. 432) Sunday shaving is dealt with at length, and our own case of *Reg.* v. *Taylor* referred to, but only in a foot note, such unimportant personages are we poor Canadians. While we are on religious topics, let us see what our author has to say on the privileges of the clergy. We will assume, and, of course, rightly, that our readers know all the English cases; such as the case of the parish schoolmaster, who, like daddy long-legs, would not say his prayers, (no, we mean would not teach in Sunday-school), and was, consequently, thrown, not down stairs, but out of employment; and the case of Wesleyan architect, who was accused of having no religious acquaintance with the work of restoring churches: (*Gilpin* v. *Fowler*, 9 Exch. 615; *Botherhill* v. *Whytehead*, 41 L.T. (N.S.) 588); where both master and architect taught their clerical opponents, by actions of damages, to be somewhat more *suaviter in modo*. Mr. Browne gives us a case where the Rev. Mr. Bennett wrote to a lady who had belonged to his choir, making uncomplimentary remarks about Count Joannes (born simple George Jones), who wished to marry the fair singer. The Count sued the parson, the jury mulcted him in damages, and the Court said the marriage was none of his business. Mrs. Farnsworth was not so successful against the minister who "read her out of church," according to custom: (*Joannes* v. *Bennett*, 5 Alb. L. J, 169; *Farnsworth* v. *Storrs*, 5 Cush. 412). A priest has a right to keep order in his church, even though the disorder has arisen from the personal nature of some of the remarks in his sermon, but he has no right to forcibly eject a person lawfully in a sick room in which he is about to administer the sacrament of extreme unction to a dying man: (*Wall* v. *Lee*, 34 N Y. 141; *Cooper* v. *McKenna*, 124 Mass. 284). We find the rule laid down that a clergyman cannot receive a pecuniary benefit from a parishioner, unless he shows the utmost good faith on his part, and freedom of action on the part of the donor. And this, although the Court said in one case, truly enough, "in this country the danger is that clergymen will receive too little rather than too much." A priest cannot safely advise his hearers "to tie a kettle to the tail" of an obnoxious parishioner; and, as we know in this Dominion, if he warmly espouses the cause of a parliamentary candidate, and refuses the sacrament to those who propose to vote for his opponent, the election will be set aside on the ground of undue influence and intimidation: (*McGrath* v. *Finn*, Irish C. P. 1877; *Maise* v. *Robillard*, 4 Can. Leg. News, 10). Mr. Browne does not think that a priest may properly tell his people from the pulpit how they should vote.

Under the law of "Necessaries" we find that in Montreal an £80 ball dress is not a necessary for a poor wife; an infant's board is a necessity, but not so with timber to repair his house: (*Sharply* v. *Doutre*, 4 Can. Leg. News, 185; *Bradley* v. *Pratt*, 23 Vt, 378; *Freeman* v. *Bridger*, 4 Jones, L. 1). Dentistry is necessary for an infant, and so are spurs, and sleeve-links, and a horse, and a pony: (*Strong* v. *Foote*, 42 Conn. 61; *Hill* v. *Arpon*, 34 L. T. (N.S.) 125; *Ryder* v. *Wombwell*, L. R. 3 Exch. 90; *Hart* v. *Brater*, 1 Jur. 623; *Miller* v. *Smith*, 20 Minn. 248).

Among "Wagers" we have the case of

John Hampden, who seems to have been as obstinate and opinionated as the celebrated ship-money patriot of the same name, and who deposited £500, and defied all the philosophers, divines and scientific professors in the United Kingdom to prove the rotundity and revolution of the world from Scripture, from reason, or from fact: (*Hampden* v. *Walsh*, L. R. 1 Q. B. D. 189).

Our author is evidently a lover of natural history, and plays his trump cards when he treats of "The Animal Kingdom in Court." In this chapter a whole Noah's ark full of quadrupeds, bipeds, no-legged animals, pass in review, and we are introduced to the views of the Courts on dogs and bulls, cats and cocks, rams and hogs, doves and deer, turkeys and oysters, pigeons and mice, whales and elephants. Dogs have their rights, as we are told by a Vermont judge, and the rights of the one in question, "the most wickedest kind of a dog," was to be hanged on the first notice. The same judge tells us that in estimating the amount of damages accruing from the bite of a dog, the solicitude and fear of hydrophobia is a proper matter for consideration: (*Godeau* v. *Blood*, 52 Vt. 251). Dogs, we are told, have done more mischief than any other domestic animal, and their cases have been oftener before the Court. Dog's bites are sometimes expensive affairs for their owners. The McKessons owned a Siberian blood-hound; a bite or two of his on the person of their watchman cost them $1500, not to speak of costs. Dodge's dog bit a child who was playing with Dodge's whip, and Dodge had to pay $250: (*Muller* v. *McKesson*, 10 Hun. 44; *Meibus* v. *Dodge*, 38 Wis. 200). Where a boy, inspired perchance by the martial lay of Horatius, stood upon a narrow bridge, and barred the way against a dog, and smote the canine upon the back, it was held that the dog's owner was responsible for the bite that followed. A lady with some meat in her satchel, said to a dog, "Doggie, ain't you going to let me out?" The animal bit her and the owners had to pay damages. This seems hard, as perchance it was sausages the lady had, and the law allows an assault by a parent in defence of offspring. And so where another lady offered candy to a vicious dog on the street, and the animal sprang at her, and bit her. What if this was another instance of the Garuda stone, and the dog was Mr. Bultitude, of "*Vice Versa*," and the candy was peppermint: (*Plumley* v. *Birge*, 124 Mass. 57; *Learles* v. *Ladd*, 123 Mass. 380; *Lynch* v. *McNally* 73 N.Y. 347).

Many are the bulls referred to—not Irish bulls, but the bucolic fathers of the herd. *Crawford* v. *Williams*, 48 Iowa, 247, was an action of damages for seduction by a bull, and doubtless its trial drew a crowded audience. In another case, where the killing of a buffalo bull was defended on the ground of its being an animal *ferae naturae*, the Court in giving judgment, spoke of a Mrs. Gibson, who, instead of running away as others had done when the bull came towards her, "just flapped her apron at him, and said shoo;" the bull turned and ran away in great alarm, never stopping, but ran clean away. Of this case our author says: "This circumstance shows that in punishing Eve's transgressions the Lord was not unmindful of the increased danger which the infection of her sin subjected her to from the brute creation; for what would a fig leaf have availed in such an exigency?" If we have any fault to find with our author, it is that his sense of the humorous occasionally induces him to show too great a knowledge of the Holy Scriptures. Perhaps, however, that is the tendency of the age and country.

But to continue our inspection of the animal kingdom. We have the case of an Irish bull rushing into a house, knocking down the mistress, and entering the kitchen; then comes the "Sacred ox," with its nasty smell, frightening horses, etc.: (*Cote* v. *Newburyport*, 129 Mass. 594); and we have two cinnamon coloured bears exhibiting on the street: (*Little* v. *Madison*, 42 Wis. 643). A

cat figures in *Webb* v. *McFeat* (22 Journ. of Jur. 669), for killing a carrier pigeon. The pursuer, (not the cat, but the plaintiff), claimed that the defender was responsible in respect of the natural disposition or propensity of cats to kill birds, and the defender's failure to keep the animal properly enclosed or secured. The Court considered that the owner of the bird should have exercised as much caution to prevent it coming near the cat as the owner of the cat should have done to keep it from the bird; that as the victor and vanquished met on neutral ground, both owners were in equal blame.

George Mathews wrongfully and negligently kept a savage and dangerous cock-fowl, knowing it to be savage and dangerous, and accustomed to injure mankind, whereby one Florence Walford was pecked and injured, and George Mathews was asked to pay £5 damages; but the Court said £1 was sufficient compensation, and 16 shillings to pay the doctor. "A town is liable for the injury that a town ram does by abutting on one of the town folk: (*Moulton* v. *Learborough*, 71 Me. 257). It seems that in England one is not legally liable if his pigeon alight upon a neighbour's roof and pick out the mortar between the slates and tiles, thereby loosening the same, and letting in wet. The owner of the house may kill them, that is all: (*Hannan* v. *Mackett*, 5 B. & C. 939).

One reads *State* v. *Mary Turner*, 66 (N.C. 618) with saddened feelings about Christmas time, because Mary was indicted for stealing one turkey of the value of five cents! The Court held that turkeys were not *ferae naturæ*. But coons are. Freshly imported parrots are not domestic animals: (*Warren* v. *State*, 1 Greene, 106; *Swan* v. *Saunders*, 44 L. T. (N.S.) 424). The Courts know something about oysters. We are told that like domestic animals, they continue perpetually in the owner's occupation, and will not stray from his home or person. Unlike animals *ferae naturæ*, they do not require to be reclaimed or made tame by art, industry, or education. (Fancy an educated oyster.) If at liberty they have neither the inclination nor the power to escape. They are obviously more nearly assimulated to tame animals than to wild ones; and perhaps more nearly to inanimate objects than to animals of either description. This Court takes them merely in the shell, will have nothing to do with soup, stew or patties, it says, "dead oysters are of no value." Another legal sage says, "Oysters have not the power of locomotion any more than inanimate things:" (*State* v. *Taylor*, 3 Dutch, 117; *Fleet* v. *Hagermen*, 14 Wend. 42). Space would fail were we to attempt to follow our author among dogs and carrier pigeons, bees and elephants, parrots and whales. We can only add that when *Thurman* v. *Bertram* was tried by Baron Pollock, an elephant was brought into Court; and ladies may joy in the fact that it is no crime to steal a tame mouse.

(To be continued.)

RECENT ENGLISH DECISIONS.

In recommencing to review the current English decisions contained in the *Law Reports*, it seems best to begin with the January numbers, rather than attempt the task of going through the numbers which have been missed in the course of the recent period, during which our articles on this subject have been unavoidably discontinued.

The January numbers of the *Law Reports* consist of 10 Q. B. D, pp. 1-58; and 22 Ch. D. pp. 1-131.

The former of these commences with a brief memorandum of the opening of the Royal Courts of Justice, and contains the address of the Lord Chancellor and the Judges to the Queen. We re-produce in the orm of an editorial, in our present number, the exceedingly fine peroration with which this address concluded.

Recent English Decisions.

TRESPASS—HIGHWAY—NEGLIGENCE—ONUS.

The first case requiring notice here is *Tillett* v. *Ward*, p. 17. In this case the plaintiff sued the defendant for damages, for that the defendant's ox, which was being driven by the defendant's servants through the streets of a country town, entered the plaintiff's shop which adjoined the street, through an open doorway, and damaged his goods, and the law governing the subject is thus stated by Stephen, J.:—"As I understand the law, when a man has placed his cattle in a field, it is his duty to keep them from trespassing on the land of his neighbours; but while he is driving them upon a highway, he is not responsible, without proof of negligence on his part, for any injury they may do upon the highway, for they cannot then be said to be trespassing. The case of *Goodwyn* v. *Cheveley*, 28 L. J. (Ex.) 298, seems to me to establish a further exception, that the owner of the cattle is not responsible, without negligence, when the injury is done to property adjoining the highway, an exception which is absolutely necessary for the conduct of the common affairs of life. In this case no negligence on the part of the drivers of the ox was shown, and the Divisional Court gave judgment for the defendant.

BILL OF EXCHANGE—MARGINAL FIGURES.

Passing by a bankruptcy case, the next one requiring notice is *Garrard* v. *Lewis*, p. 30, in which the question of the exact import and effect of marginal figures at the head of a bill of exchange, came before Bowen, L.J. The bill of exchange in question had been drawn by one Bees, four months after date, on the defendant; at the time when the defendant appended his signature to the document the sum to be mentioned in the body of the bill was left in blank, but in the margin of the bill were the figures £14 os. 6d., which was the sum for which the defendant desired to accept. Bees subsequently filled in the blank in the body of the bill for £164 os. 6d., and fraudulently altered the figures in the margin to that sum. Having done so, he indorsed the bill to the plaintiffs, who took it as *bona fide* holders for value for the larger amount. The plaintiff now sued the acceptor on the bill for £164 os. 6d. The defendant pleaded that the bill after issue was altered in a material part. Bowen, L.J., in his judgment reviews the history of marginal figures in bills of exchange, and comes to the following conclusion:—"I arrive at the conclusion that a man who gives his acceptance in blank holds out the person to whom it is entrusted as clothed with ostensible authority to fill in the bill as he pleases within the limits of the stamp, and that no alteration, even if it be fraudulent and unauthorized, of the marginal figure, vitiates the bill as a bill for the full amount inserted in the body, when the bill reaches the hands of a holder who is unaware that the marginal index has been improperly altered."

PRACTICE—PRODUCTION OF DOCUMENTS.

In the next case, *Kearsley* v. *Philips*, p. 36, the action was for the seizure of the goods of the plaintiff on certain premises, and was brought against two defendants P. and D. The defendants were mortgagees, and justified under an alleged right of distress on the premises, and the plaintiff now sought to render them liable for such seizure. It appeared that since the distress, D. ceased to be a trustee, and thereupon B. was appointed a trustee in his place, and the mortgage was transferred from P. and D. to P. and B. In his affidavit of documents, the defendant P. stated that he and B. jointly had in their possession or power certain documents specified in a schedule to such affidavit, and that they were the muniments of title of himself and B. to the premises as mortgagees thereof, and that he, P., objected to produce. On appeal, the Divisional Court, after reviewing numerous cases, now held that such affidavit showed sufficient reason for not making an order for inspection of the documents, citing as decisive, *Murray* v *Walters*, Cr. and Ph. 114. Stephens, J., puts the matter thus:—

"Here the documents, of which production is sought, are in the joint power and possession of two persons, one of whom is not before the Court, and cannot be made a party to the action; they are the title-deeds of a man who is not and cannot be brought before the Court. The application is that one man should be compelled to produce another man's title-deeds, because he has joint possession of them; an application which I should be very reluctant to grant unless bound by authority to do so."

DIVISIBILITY OF COVENANT TO PAY RENT.

The last case to be noticed in this number is *The Mayor of Swansea* v. *Thomas*, p. 48. The head-note states the facts very clearly. The defendant, being tenant of land under lease for years granted by the plaintiffs, and containing the usual's lessee's covenant to pay rent, assigned all her interest in the term. Subsequently the plaintiffs granted their reversion in part of the demised premises. No rent having been paid by the assignees of the defendant, the plaintiffs sued her for arrears of rent accrued due since the grant of their reversion in part of the premises, the sum claimed being a fair apportionment of the rent in respect of the other part, the reversion of which remained in the plaintiffs. Pollock, B., held that the covenant to pay rent was divisible; that the rent could be apportioned, although the action was founded on a privity of contact only; and therefore the plaintiffs were entitled to recover. The following extract from his judgment shows the reasoning by which he arrived at this result: "At common law, before the statute 32 Hen. VIII. c. 34, it is clear that, notwithstanding the assignment of the plaintiffs of their reversion in part of the premises, and notwithstanding any number of assignments by the lessee or his assignee, the plaintiffs might have sued the lessee or his executrix for the breach in question. The effect of that statute is to give to the assignee of the reversion the same right of suing the lessee and his executrix as the original reversioner had. And it has been held that the statute transfers to the assignee the privity of contract, and further, that the covenant is divisible, so that the assignee of the reversion in part may sue upon the covenant in respect of his interest in that part: see *Twynam* v. *Pickard*, 2 B. & Ald. 105. If, therefore, the reversioner can assign the reversion of part of the premises to A., and of the residue to B., and A. and B. can both sue in respect of their respective interests, there seems no good reason why, if the reversioner assigns the reversion of part of the premises to A., and reserves to himself the reversion in the residue, he should not be allowed to sue in respect of his interest in the residue."

MORTGAGE—"ASSIGNS."

In 22 Ch. D. pp. 1-131, the first case is *In re Watts*, *Smith* v. *Watts*. In this case W. the owner and occupier of a public-house, gave to H. and Co., brewers, a mortgage to secure £1,300, and also all sums which should at any time be owing to them from "W., his executors, administrators or assigns on any account whatsoever." W. died, giving by will, all his property to his wife for life. Letters of administration, with the will annexed, were granted to the widow, who carried on the business. H. and Co. having sold under the power of sale in the mortgage, now claimed to retain out of the purchase money, not only the £1,300, still owing and unpaid, but also a sum of £138 for beer supplied to the widow, after the death of W., claiming that they were entitled so to do under the mortgage. Counsel for H. & Co. admitted that if "executors or administrators" had been mentioned, they might be taken as referring only to a debt contracted by W., but which, owing to his death, had become due from his executors or administrators; but, they urged, the word "assigns" could not be so explained. The Court of Appeal now, in accordance with this view, held H. & Co. were entitled to retain the

£138 as claimed, Jessel, M. R., says: — "In opposition to this, the respondents urge that the word 'assigns' is a large word in law, and would include a tenant, or, as in this case, a devisee for life, and that it is not improbable that they were intended. The answer is, very likely not. The parties to the deed probably did not think of these exceptional cases, but only of an assign out and out; and taking the word in that sense, the curious clause which I am about to mention is quite rational. The difficulty in the way of the respondents, is to find anything in the deed authorising us to put a restricted meaning on the word 'assigns.' . . What the parties meant was that the owner of the public-house for the time being should not be entitled to redeem the public-house without paying for the beer supplied to the owners for the time being. Unless we read the clause in this way, the word 'assigns' is virtually struck out, and following the rules that we are to give some effect to all the words used, if any reasonable meaning can be attributed to them, and also following the rule that we are to construe them with regard to what is usually expected to happen. I think the right reading is that the property is pledged for the debt of the assign to H. & Co., as well as what was due to them from Watts. If that is so, then as there is no doubt that the widow was the assign in law, the brewer had a right to say, 'By contract this house is pledged to us for the beer supplied to the widow as assign.'"

COSTS OF MORTGAGEE.

This case also illustrates the following rule as to the costs of mortgagees, in the language of the M. R., p. 12: "If a mortgagee brings in his account, and under a wrong impression of the law, but *bona fide* and honestly, makes a claim which cannot be supported and is disallowed, he does not pay the costs; and even if the brewers had failed, I should have held them entitled to their costs in the court below. Under the present circumstances, of course they are entitled to their costs both here and below.

The remaining cases in this number will be noticed in the next issue of this journal.

A. H. F. L.

JUDICIAL DIFFUSENESS.

OBITER DICTA.

THE following remarks taken from the *Law Times* (England) of Dec. 16th ult., are not without application nearer home:—

"Public attention cannot be too often or too pointedly drawn to the serious consequences which may, and often do, result from the too diffuse judgments of learned judges. How frequently does one hear, when the words of some learned judge are cited, that it was 'only a dictum,' or was not necessary for the judgment,' and, therefore, is not to be regarded as binding, or to be taken into consideration in deciding the question at issue. A very remarkable instance of this has lately occurred. In the case of *Bradley* v. *Baylis*, 8 Q. B. Div. at p. 236), Lord Justice Brett is reported to have said:— 'But supposing during the qualifying year one of those lodgers leaves, and the owner thereupon (as he assuredly must) resumes the control over that unlet part; according to my view of the statutes, immediately by that act of his those people left in the house, who have been householders, become lodgers again.' The question for decision in that case was whether or not the appellant 'separately occupied a part of a dwelling house' within the meaning of the Parliamentary and Registration Act, 1878, and the Representation of the People Act, 1867, so as to entitle him to a vote. The case did not raise the point referred to by Lord Justice Brett in his judgment. During the recent revisions of the lists of voters, considerable stress has been laid upon the judgment of Lord Justice Brett, and many objections have been made to the claims of occupiers on the grounds that during the qualifying year in consequence of some one room becoming vacant, the landlord has exercised such a control over the house as is referred to by the Lord Justice in his judgment. In one instance, the objectors, not satisfied with the decision of the revising barrister, appealed to the

court above (*Ancketell* v. *Baylis*, Dec. 1), with the result that the objection was overruled, and the Court held that the part of the judgment of Lord Justice Brett, which was relied upon, was not binding upon them, as it was not necessary for the decision of the question before the Court of Appeal. Similar instances might be indefinitely multiplied, all arising from what we venture to think is a great mistake, namely, too great diffuseness on the part of learned judges in delivering their judgments. Whatever appears in a reported judgment of a learned judge is certain to be adopted and acted upon sooner or later, and it is a result which can only be deprecated and deplored when action is taken upon dicta to which sufficient consideration and attention may not have been given, or which, in cases where more than one judge is sitting, would not have been indorsed by the majority of the court had they constituted an opinion on the essence of the case. So long, however, as judgments are delivered which deal with assumptions and facts outside those before the court for decision, so long will general complaint be made, and that not without great and sufficient reason."

REPORTS

ONTARIO.

(Reported for the LAW JOURNAL.)

CHANCERY DIVISION.

DICKSON V. DICKSON.

Will—Construction—Restraint on alienation—Estate tail.

A testator, by his will, dated 25th June, 1866, devised to the plaintiff "and his heirs," a parcel of land, subject to the following proviso: "that he neither mortgage nor sell the place, but that it shall be to his children after his decease." The plaintiff had children living at the date of the will. The testator died in 1867.

Held, that the plaintiff was not entitled to an estate in fee simple, nor to a fee tail in possession, but that upon his death his children who should survive him, would be entitled to an estate, either for life or in fee.

Semble, that the effect of the devise was to give the plaintiff an estate for life, remainder to his surviving children for their lives, remainder to the plaintiff in

[Jan. 24, 27.—BOYD, C.

Motion for judgment. The action was brought to obtain a construction of the will of Joseph Hickson, who died in 1867. By his last will, dated 25th January, 1866, he devised to the plaintiff a parcel of land in the following terms: "I also give and bequeath to my son John Dickson (the plaintiff), to his heirs and executors forever, the following premises, namely: the south half of the farm, with the half of the dwelling house, and all the buildings presently on the farm; that is to say, the south half of the south half of Lot number 25, in the seventh Concession of the Township of York and County of York, and that, too, on the following conditions, namely, that he neither mortgage nor sell the place, but that it shall be to his children after his decease." It was admitted that the plaintiff had children living at the date of the will.

The action came on by way of motion for judgment on the pleadings.

J. Bethune, Q.C., and *J. Crickmore*, for the plaintiff. The effect of the will is to give the plaintiff an estate tail general, according to the rule in Shelley's case. The word children must be read as "issue of the body." The restraint on alienation is wholly void. *Gallinger* v. *Farlinger*, 6 C. P., 512; *Ware* v. *Cann*, 10 B. & C., 433; *Holmes* v. *Godson*, 8 D. M. & G. 152; 2 Jarm. 14.

T. S. Plumb, for the defendants, children of the plaintiff. The word "children," in this will, is a word of purchase and not of limitation. The plaintiff, consequently, only takes a life estate, with remainder to his children as tenants in common in fee. The only case where the word "children" is construed as a word of limitation is when the devisee has no children living at the date of the devise: *Wild's* case, 1 Tudor, R. P. cases 669, 3rd Ed.; *Guthries'* appeal, 37 Penn. 9, 5th Am. Ed. Jarman, vol. 3, 174 and 176. It is, in this view, unnecessary to consider whether or not the clause restraining alienation is good as a restraint upon alienation, it is rather to be considered as a clause limiting the estate to be taken by the plaintiff, and its effect is to cut down the estate in fee, apparently given to the plaintiff, to a life estate. *Jeffrey* v. *Scott*, 27 Gr., is expressly in point.

Bethune, Q.C., in reply. If the plaintiff took a mere life estate, as contended by the other side, then the defendants only take a life estate in the remainder, and there is an intestacy as to

the fee. Such a construction the Court should not readily adopt. By the construction contended for by the plaintiff the whole estate is disposed of, and that is to be preferred where the will is doubtful. *Curia advisari vult.*

27th January.

BOYD, C.,—I have difficulty in defining precisely the manner of the testamentary devolution of the estate in question in this case, because the construction of the will was not argued with reference to that specifically; but, upon the general question presented on the pleadings, I have come to the conclusion that the plaintiff cannot, by his own conveyance, confer an indefeasible estate upon the intending purchaser. The will was made in 1866, at which time the testator's son had several children, who are yet alive. Some have been born subsequently to the will, but as a class they were then existing. The only clause relating to the land in question reads as follows, (the learned Chancellor read the clause above set out). The internal evidence supplied by this language, indicates that the will was the production of a draftsman learned in the law. The limitation of the land is to "John Dickson, to his heirs and executors." The inartistic expedient of prohibiting mortgaging or selling, is employed with a view to keep the farm for the use of his children after his death. The clear intention of the testator is, while giving the farm to his son, to provide "that it shall be to his (the son's) children after his decease." The first words give unquestionably an estate in fee simple absolute to the plaintiff. The last words as plainly declare, without resorting to technical language, that the son's children are to have the place after their father dies. The whole of the clause is to be read together, and if possible, effect is to be given to every part of it. If there is to be any preference in regard to conflicting limitations, the leaning of the Court should be in favour of that which is last.

Of possible constructions, the following have the most to commend them and, while it is not needful for me to decide on any one in particular, they all agree in manifesting an interest in the children of the plaintiff, which is the point I now decide as being sufficient for the disposal of of the matter in controversy.

(1.) Full effect can be given to all the words by holding that there is an estate in fee vested in the plaintiff, but subject to be defeated by executory limitation to his children after his decease, if any survive him. This would enable the plaintiff to convey in fee simply, but subject to defeasance if he predeceased his children. *Barker* v. *Barker*, 2 Sim. 249; *Spence* v. *Handford*, 4 Jur. N.S., 987.

(2.) The earlier technical words "to his heirs," may be rejected as being used ignorantly, or in misapprehension of their effect. This would cut down the first devise to one of a life estate only, and would vest the remainder in fee in the children, as tenants in common, *Sherratt* v. *Beatty*, 2 My. & K. 149. Such was the conclusion arrived at in a very tenaciously argued case, which came twice before the Supreme Court of Pennsylvania, *Wert* v. *Merkel*, 81 Penn. 332, in 1876, and *Ulrich's* appeal, 86 Penn. 386, in 1878, in which the provisions were almost identical with those in the case now in hand.

Or (3.) It may be held that the effect of the later words is to intercalate a life estate of the children between an estate for life in the plaintiff and the ultimate remainder in fee, vested in him by the first words of the clause. Such appears to have been the decision in *Chyck's* case, as reported in 3 Dyer 357*a*. This devise of the "fee simple of my estate to B. and after his decease to her son C." It was held that B. had an estate for life, remainder to her son C. for life, and the fee simple thereof to B. In the note it is said that Bendloe and Anderson both report this case as adjudged that C., the son, shall have the fee after the life estate of the mother determined. See also *Doe d. Herbert* v. *Thomas*, 3 A. E. 128, where *Chyck's* case is referred to with apparent approval by Littledale, J.; and *Doe d. Arnold* v. *Davies*, 4 M. W. 599; and *Gravener* v. *Watkins*, L. R. 6 C. P. 505.

At present I am inclined to regard the last as the preferable construction.

The plaintiff should pay the infants' costs.

FIRST DIVISION COURT—NORTHUMBERLAND AND DURHAM.

BURK V. BRITTAIN.

Division Court—Power of Judge to make order striking out defence before trial.

This was an action brought for money lent by the plaintiff to the defendant. The defendant in proper time filed a notice of defence. The plaintiff applied for an order similiar to that provided for by Rule 80, O. J. A.

Held, that by clause 244 of the Division Court Act, the Judge has power, when the plaintiff satisfies the Court of his belief in the justice of his claim, and the defendant is unable to satisfy the Court of the merits of his defence, to make an order striking out the defence, and empowering the plaintiff to sign judgment without a formal trial of the action.

[Cobourg, Dec. 30, 1882.—CLARK, Co. J.

This was an action for money lent by the plaintiff to the defendant, and was commenced by a special summons. The defendant in proper time filed a notice of defence, and the case, in the ordinary course, stood for hearing at the next sitting of the court. An application was made by the plaintiff, similar to that provided for by Rule 80 of the Ontario Judicature Act, and upon material which the learned Judge, if he had felt he had the power to make the order asked for, considered sufficient to throw upon the defendant the onus of satisfying him that his defence ought to be further inquired into.

The counsel for the defendant contended that the Judge had no authority to grant the order. No other cause was shewn.

CLARK, Co. J.—Under the circumstances of this case, I cannot escape the responsibility of deciding whether the existing law empowers me to order immediate judgment against a defendant, though, according to the statutes and rules relating especially to Division Courts, he has done all that is prescribed as sufficient to entitle him to be heard at a formal trial of the rights of the parties, before judgment is given against him.

The spirit of the legislation on such subjects, has been for many years past in the direction of sweeping away dilatory defences, so that creditors may obtain as quickly as possible judgment and execution for debts really due.

For a long period the practice in Division Courts (except where confession was voluntarily given) did not permit any judgment to be entered up against a defendant before the day appointed for hearing, though he had no defence and urged none. Every unsettled case in which the defendant had been served with process was called in Court, and it was only when the defendant failed to appear on a trial that even an undefended case could be disposed of. The unreasonableness of this delay led to a statutory amendment of the practice about fourteen years ago, since which time judgments may be entered as a matter of course by the clerk (when the defendant omits, within a specified period after service, to give notice of a defence). Since this amendment there has been no practice especially established for Division Courts, either by statutes or by rules framed by the Board of County judges or otherwise, by which any method is given for disposing of a formal defence once put in, otherwise than at the time appointed for a trial of the merits of the case.

The legislature has from time to time acknowledged the injustice of permitting debtors, by making a sham defence, to delay their creditors in recovering the amount due.

One step in that direction, was permitting a plaintiff to examine a defendant under oath, and if his answers disclosed such facts as shewed him to have no defence, then, on application to the Court, the defence might be struck out, and proceedings had as if none had been raised.

This departure from the previous practice was not, in my opinion, a matter of detail; it involved a principle, namely, that a formal defence ought not to be allowed to hinder a plaintiff, if he could show, before the time of a regular hearing, that there was no real defence.

That principle, however, still left with the plaintiff the responsibility of procuring and showing to the Court such evidence concerning the facts as would expose the fallacy of the defence.

The Ontario Judicature Act has gone one step further and has, in Rule 80, established what I conceive to be another new principle in practice, namely, that, in a certain class of cases, and after particulars given in a specified manner, the plaintiff, in his effort to get judgment, notwithstanding a formal defence, need not elicit facts upon which any opinion may be formed concerning the validity of the defence; he need shew to the Court nothing more than the sincerity of his own belief in his own case, after which the defendant has to convince the Court that he ought to be allowed to defend, or judgment goes against him.

Bearing in mind that neither the public necessity for a prompt collection of the debts, nor the practice of the Superior Courts to that end, can of itself authorize me in ordering a judgment to be now entered against the defendant in the case, I have to say whether there is any sufficient ground for my doing so.

I have come to the conclusion that the last clause (244) of the Division Court Act gives me authority for adopting and applying in my discretion the principle of Rule 80, of the Judicature Act, to Division Court cases.

It says: "In any case not expressly provided for by this Act or by existing rules, or by rules made under this Act, the County Judges may, in their discretion, adopt and apply the general principles of practice in the Superior Courts of common law to actions and proceedings in the Division Courts."

If this clause had been imperative, instead of permissive; if the language had been "shall," instead of "may, in their discretion:" then, it seems clear to me, that each time a new principle was introduced into the practice of the Superior Courts it would be the duty of a County Judge to adopt it, and apply it to Division Court cases, overcoming as best he could any obstacles in the details of practice necessary to carry it out. But in the present shape, a duty remains to the Judge, namely, to exercise a discretion, and to adopt the principle, if in his judgment it is proper to do so.

This clause relates not to the practice itself, but to the principles of practice.

It is manifest that the practice, that is, the manner of proceeding from step to step in the progress of a cause, could not be the same in Superior and Division Courts; the fact that for the latter there is generally no judge to be found in the locality where the officers of these Courts are established, makes impossible a practice similar to that of the superior Courts; and there are other innumerable details which would stand in the way of adopting in these small courts exactly the practice of the higher ones. But that is no reason why the same principles of practice should not prevail, as principles of law do in both—by principles of law I mean those rules by which when they come to be heard, the merits of the contest are to be finally decided—rules which, by section 80 of the Judicature Act, are declared, within the limits of the jurisdiction, to be in force in all Courts in Ontario. By principles of practice I mean those leading objects for the attainment of which the precise method of proceeding may be shaped as a subordinate matter. Preventing an untrue plea being even temporarily an obstacle to the recovery of a just debt is an illustration of a principle. The method of making the application, the notice to be given of it, &c., are only details.

Adopting then, as I do, this principle, that a defence, though formally set up, shall not be allowed to delay the entry of judgment when the plaintiff satisfies the Court of his belief in the justice of his claim—the defendant not being able to satisfy the Court of the merits of his defence or of some other fact which would make a hearing expedient—it becomes my duty to order judgment in this case to be forthwith entered against the defendant. The manner of making the application for such an order on the one side, and of resisting it on the other side, are details which each Court by virtue of its inherent powers may settle for itself, unless and until they be otherwise settled by higher authority. It is not necessary here to discuss the inconvenience of applications such as this being in Division Court cases disposed of only at a hearing before the Judge, involving, as that does, an attendance at the county town. If the principle can be adopted, the manner of giving effect to it may be left for future consideration.

I am fortified in the general view which I have expressed, by finding that my able coadjutor, Judge Benson, has, after consideration of the subject, arrived at the same conclusion.

The order will direct that judgment be forthwith entered for the debt and interest claimed by the endorsement on the summons, and for costs to be taxed to the plaintiff.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

SUPREME COURT OF CANADA.

RUSSELL v. LEFRANCOIS.

Will, validity of—Insanity—Legacy to wife—Error—False cause—Question of fact on appeal—Duty of Appellate Court.

This was an appeal from the Court of Queen's Bench for Lower Canada. The action was originally brought in the Superior Court by Pierre LeFrancois' executor under the will of the late Wm. Russell, of Quebec, against William C. Austin, curator of the estate of Russell during the lunacy of the latter, to compel Austin to hand over the estate to the executor.

After preliminary proceedings had been taken, Elizabeth Russell, the present appellant, moved to intervene and have Russell's last will set aside, on the ground that it had been executed under pressure by Dame Julie Morni, Russell's wife, in whose favour the will was made, while the testator was of unsound mind. The intervening party claimed and proved that Morni was not the legal wife of Russell, having another husband living at the time the second marriage was contracted. Russell, who was a master pilot, died in 1881, having made a will two years previously. His estate was valued at about $16,000. The evidence in the case was very voluminous and contradictory. On 4th October, 1878, Russell made a will by which he bequeath-

ed $4,000 and all his household furniture and effects to his wife, Julie Morni; $2,000 to his neice, Ellen Russell; $1,000 to the Rev. Father Seaton, for charitable purposes, and the remainder of his estate to his brothers, nephews and neices in equal shares. On the 8th of the same month he made another will before the same notary, leaving $800 to his wife, Julie Morni, $400 to each of his neices, Mary and Elizabeth Russell, and $400 to his brother Patrick, with reversion to the neices if not claimed within a year, and the remainder to Ellen Russell. On the 27th November, 1878, Russell made a will, which is the subject of the present litigation, and by which he revoked his former wills, and gave $2,000 to Father Sexton, for the poor of the parish of St. Rocks, and the remainder of his property to his wife Julie Morni.

On the 10th January following, Russell was interdicted as a maniac, and a curator appointed for his estate. He remained in an asylum until December, 1879, when he was released and lived until his death with his sister, Ellen Russell, sister of the appellant. Mr. Justice Tessier, of the Superior Court, upheld the validity of the will, and his decision was confirmed by the Court of Queen's Bench.

Held, (i.)[reversing the judgment of the Queen's Bench, RITCHIE, C.J., and STRONG, J., dissenting,] that the proper inference to be drawn from all the evidence as to the mental capacity of the testator to make the will of the 27th November, was that the testator, at the date of the making of the said will, was of unsound mind. (ii.) That, as it appeared that the only consideration for the testator's liberality to Julie Morni was that he supposed her to be "my beloved wife Julie Morni," whilst at that time J. M. was, in fact, the lawful wife of another man, the universal bequest to J. M. was void, through error and false cause. (iii.) That it is the duty of an Appellant Court to review the conclusion arrived at by Courts whose judgments are appealed from upon a question of fact when such judgments do not turn upon the credulity of any of the witnesses, but upon the proper inference to be drawn from all the evidence in the case.

Irvine, Q.C., for the appellant.

Andrews, and *Fitzpatrick*, for the respondents.

COURT OF APPEAL.

[Dec. 29, 1882.

TOTTEN v. BOWEN.

Husband and wife—Bill of sale—Chattel Mortgage—Fraudulent Preference—Bona fides—R. S. O. ch. 118.

The plaintiff was married in 1876 without any marriage contract or settlement, being possessed of about $1,500 derived from the estate of a former husband, which she lent at different times to her husband, a small portion having been lent prior to their marriage. In January, 1879, on a further advance of $200, she obtained from her husband a chattel mortgage of certain goods, farm stock, implements and other chattels, which was duly registered but not renewed. In November, 1879, she insisted upon and obtained from her husband a bill of sale of the same, and other goods, for the express consideration of $300. The plaintiff and her husband continued to reside together, and apparently he had the use of the goods in much the same way as prior to such bill of sale being made, she and her sons working the farm on which the parties resided, and which had been conveyed by her husband to a trustee for the benefit of the plaintiff, the husband working or not as it pleased himself. The evidence established the *bona fides* of the claim set up by the plaintiff, and for the purpose of securing a creditor of the husband she executed a chattel mortgage in her own name on those goods.

Held, [affirming the Judge of the County Court, York], that the claim was not invalidated for want of registering the bill of sale, or as being fraudulent against creditors under R. S. O. ch. 118.

Rose, Q.C., for appellant.

S. M. Jarvis, contra.

[Dec. 27, 1883.

CANADIAN BANK OF COMMERCE v. WOODWARD.

Accommodation note—Security for payment of note—Renewal of note.

The defendants made a note for $200 for the accommodation of one M., and delivered the same to M. to be used by him as collaterally securing payment of a note of M.'s own for a like amount. M. discounted his own note with the plaintiffs, and delivered to them the promissory

note made by the defendant, as such collateral security. When M.'s note fell due, he did not pay it, but paid $25, and gave a new note for $175.

Held, that the defendants remained liable to the plaintiffs to the extent of the renewal note, which was in reality a continuance of the $200 note. In no sense can renewing a bill or note be treated or taken to be payment.

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

Johnson, contra.

[Jan. 17.

RE HALL'S EXTRADITION.

Appeal—Extradition—High Court, appeal from—Court of Appeal equally divided, effect of—Habeas Corpus—Res Judicata—Binding authority.

The prisoner was remanded for extradition by the Chancery Division of the High Court of Justice. On appeal, this Court was equally divided. A second writ of *habeas corpus* was then obtained, and the prisoner was again remanded for extradition by the unanimous judgment of the Common Pleas Division, before whom the question was then argued, and an appeal from that decision was dismissed.

Per HAGARTY, C. J. [SPRAGGE, C. J. O., concurring].—The appeal could not be entertained, there having already heen an appeal by the prisoner to this Court, from the judgment of the Chancery Division, which was binding on the prisoner, and he was not at liberty to make repeated applications to this Court on the same state of facts.

Per PATTERSON, J.A.—Under the Judicature Act there is not any distinction in the several Divisions of the High Court; therefore a decision of any one of them is a decision of the High Court; consequently, this matter had already been disposed of on the appeal from the Chancery Division.

Per BURTON and PATTERSON, JJ.A.—The rule of practice in the House of Lords on an equal division, does not apply to other appellate tribunals, although as here the appellate court is the one of last resort. The effect of this Court being equally divided is simply that the matter drops, and therefore the appeal is dismissed, the judgment remaining undisturbed; at the same time it is not viewed as a binding authority.

CHANCERY DIVISION.

Proudfoot, J.] [Jan. 31

COURT V. HOLLAND.

Mortgagee and mortgagor—Account—Evidence—Appeal from Master's report—Money lent—Amendment of account.

In taking an account of moneys due on a mortgage given to secure whatever might be due for money lent, part of the amount claimed was alleged to be due in respect of a bill of exchange drawn by the mortgagors and accepted by the mortgagees. It was sworn by one of the mortgagees that this bill of exchange had been accepted for the accommodation of the mortgagors. But in a statement of "bills receivable" in a list of notes due by the mortgagors to the mortgagees, subsequently made out by a clerk of the mortgagees, this item was not included.

Held, notwithstanding the omission of this item from the accounts, the positive evidence of the mortgagee that the bill was for the accommodation of the mortgagors, and the circumstances under which the mortgage was given, were sufficient evidence to rebut the *prima facie* presumption that the bill was accepted in payment of a debt due by the mortgagees to the mortgagors; and an appeal from the Master's report, disallowing the item, was allowed.

Where mortgagors who had given a mortgage to secure whatever might be due from the mortgagors to the mortgagee for moneys lent, were authorized to receive, and did receive, as agents of the mortgagees, a sum of money due to the mortgagees upon another mortgage, which moneys they retained

Held, that the moneys as received by the mortgagors, were in effect on being retained by them, "moneys lent" and secured by the mortgagee, and an appeal from the Master's report, disallowing this item, was allowed.

Where a mortgagee in putting in his claim before the Master, under a mortgage given to secure whatever might be due for moneys lent, in his account claimed an item of $1,434.06 for "balance of merchandize account," and subsequently asked to be allowed to amend the account by claiming it to be a "balance due for a loan of £1,200."

Held, that the amendment should be allowed, and it appearing from the evidence that the item in question was in fact a balance due for money

loaned, an appeal from the Master's report, disallowing this item, was allowed.

Maclennan, Q.C., and *Langton*, for plaintiff.

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

Ferguson, J.] Feb. 5.

LUMSDEN V. SCOTT.

Insolvent—Demurrer.

A creditor's assignee cannot sustain a suit to set aside a fraudulent conveyance or assignment made by the debtor, the assignor, prior to the assignment under which the creditors' assignee claims.

Demurrer to statement of claim.

Plaintiff sued under an assignment from one Moore, a debtor, to set aside as fraudulent and void a certain assignment of property, made by Moore to the defendant, prior to the assignment from Moore to the plaintiff. The assignment to the plaintiff was stated to be in trust for the benefit of the plaintiff and all other creditors of Moore. The statement of claim did not allege the plaintiff himself to be a creditor.

Demurrer allowed with costs.

Re Andrews, 2 App. R. 24, distinguished.

Sheppard, for the demurrer

B. B. Osler, Q.C., contra.

Ferguson, J.] [Feb. 5.

TIDEY V. CRAIB.

Chattel Mortgage—Frauduleut preference—R. S. O. c. 119.

Action on behalf of creditors to set aside a certain chattel mortgage on the ground of fraud and fraudulent preference.

The defendant Craib, jun., and Jaffrey, executed a chattel mortgage to the plaintiff on May, 8, 1879, to secure certain moneys owing to him by them; but the plaintiff omitted duly to renew this mortgage. Prior to September 19, 1879, Jaffrey sold his interest in the property mortgaged to Craib, jun. On September 3, 1880, Craib, jun., executed a chattel mortgage on the same property to Craib, sen., (his father), and J. Craib, his brother, to secure certain moneys. Craib, sen., and J. Craib were aware at the time of the mortgage of September, 3, 1880, of Craib, junior's debt to the plaintiff.

Held, though they were thus aware of the existence of the debt to the plaintiff, and nevertheless took care of their own interest, this was not a good and sufficient reason for saying the mortgage to them was not *bona fide;* and, the evidence otherwise shewing the mortgage to them to be *bona fide*, the plaintiff's unrenewed mortgage was void as against them, under the Chattel Mortgage Act, R. S. O. c. 119.

Held, also, there was no fraudulent preference, for the evidence showed that Craib, jun., did not make the mortgage of September, 3, 1880, voluntarily, but was coerced into making it by the mortgagees.

Held, also, though the affidavit of the debt required by R. S. O. c. 119, was made by J. Craib only, this was sufficient on authority of *McLeod* v. *Fortune*, 19 U. C. R. 100, and *Severn* v. *Clarke*, 30 C. P. 363.

The consideration for the mortgage of September 3, 1880, was not all an existing debt at the time of the execution thereof; as to part of it, P. Craib, sen., and J. Craib, was at that time only liable on promissory notes.

Held, nevertheless, following *Walker* v. *Niles*, 18 Gr. 210, and *Hamilton* v. *Harrison*, 46 U. C. R. 127, this did not invalidate the mortgage. Our R. S. O. c. 119, not requiring, as does the corresponding English Act, that the consideration for the mortgage should be truly expressed.

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

C. Moss, Q.C., and *Nesbitt*, for the defendants.

Ferguson, J.] [Feb. 5.

MCGREGOR V MCGREGOR.

Allowance for improvements and occupation rent—Mistake of title—Master's office.

This was an appeal from the report of the Master, made pursuant to the reference directed in this case, as reported 27 Gr. 470.

M. had gone into possession of certain lands in 1857 by the consent of the then owners. The lands were never, however, conveyed to him by valid conveyance, and the rights of the plaintiffs therein accrued on May 7th, 1873. The decree directed the Master to take an account of the rents and profits received by M. since May 7th, 1873. and to charge him with a proper occupation rent since that date, and also to take an account of the amount by which the lands in question had been enhanced in value by lasting improvements made thereon by M. under the belief that the said lands were his own.

The Master found M. entitled under this reference to an allowance for only a small portion of the improvements actually effected by him on

the lands, viz., those effected since a certain conveyance of the year 1866, and he only allowed him interest on the enhanced value by reason of the improvements for which he made allowance; nevertheless he fixed an occupation rent proportionate to the full annual value of the premises as they were at the time of taking the account.

Held, since the Master only found M. entitled to a portion of the actual improvements, and only allowed him interest on the enhanced value by reason of this portion of the said improvements, he should not have charged him with an occupation rent for the increased value by reason of the improvements that were not allowed him.

Carroll v. *Robertson*, 15 Gr. at p. 177, and *Re Brazill, Barry* v. *Brazill*, at p. 257, approved of and followed. *Fawcett* v. *Burrell*, 27 Gr. 445, commented on.

C. Moss, Q.C., and *G. Lount* for the appellant.
W. Cassels for the respondent.

PRACTICE CASES.

Osler, J.] [Jan. 29.

CROZIER v. ALKENBACH.

Mortgage—Rule 322 O. J. A.

The defendant on the 21st June, 1881, executed a mortgage to one Northrop, for $1300, payable five years after date, with interest half-yearly. The mortgage contained the usual proviso that the principal was to become due on default of payment of interest.

On the 7th September, 1881, the defendant sold and conveyed the premises to one Morton for $4,500, on the following terms: Morton assumed the payment of the existing mortgage for $1,300, and gave a mortgage for $1,700 to Northrop, and executed a bond to the defendant for $1,500 to secure the balance of the purchase money. On 14th September, 1881, Northrop assigned the $1,700 mortgage to the plaintiff. The plaintiff's solicitor, it appeared, had acted as the solicitor for the parties in the above sale, and advised as to the particular manner in which the transaction was completed, and it was claimed by the defendant that the plaintiff, through his solicitor, had knowledge of the facts.

On the 19th May, 1882, Northrop assigned the $1,300 mortgage to one Vair, who re-assigned it to him on 27th October, 1882, and on the 30th October, 1882, Northrop assigned to the plaintiff.

This was a motion for judgment under Rule 322 O. J. A. in an action on the $1,300 mortgage.

The defendant submitted that the land should be sold, and proceeds applied in payment of the mortgage, and that he was only liable for the amount, if any, due after deducting proceeds of such sale; or, if he was held liable to pay the full amount, that he was entitled to an assignment of the mortgage from the plaintiff.

Held, [overruling the decision of the Master in Chambers], that the application was properly made under Rule 322 O. J. A.; that the defendant as a mortgagor merely, was not entitled to an assignment of the mortgage and mortgage debt.

Aylesworth, for the motion.
Watson, contra.

Osler, J.] [Feb. 2.

ALLEN v. MATHERS.

Trial—Postponement—Costs.

The plaintiff gave notice of trial for 2nd October. On 23rd September a summons taken out by defendant to postpone the trial was made absolute on condition that the defendant paid the costs of the postponement.

On 27th September the defendant's solicitor gave notice to plaintiff's solicitor that defendant would not pay the costs, and that trial must be proceeded with; and on the same day the plaintiff moved for an order to "postpone the trial until the Spring Assizes, with costs to the plaintiff, including the plaintiff's costs of the day for putting off the said trial, the plaintiff's costs of opposing the defendant's application, and the costs of and incidental to the said summons, the hearing thereof, and of this order."

This order was granted on the 28th December following.

On appeal, OSLER, J., varied the order of the 28th December, by directing the defendant's application to postpone the trial to be discharged with costs, and by limiting the costs ordered to be paid to the costs of that application, and allowed the defendant the costs of appeal.

Holman, for the plaintiff.
Shepley, for defendant.

Mr. Dalton, Q.C.] [Feb. 2.

BRADLEY V. CLARKE.

Replevin—Third party—Rule 107, 108, O. J. A.

An action of replevin. The defendant gave notice, according to Form 18, Appendix B. O. J. A., and pursuant to Rules 107 and 108, to a third party claiming to be indemnified on a warranty.

On a motion by the defendant for a direction as to mode of procedure, and as to the extent to which the third party should be bound,

Held, that Rules 107 and 108 O. J. A., applied to actions of replevin.

Holman, for defendant.

Aylesworth, contra.

Mr. Dalton, Q.C.] [Feb. 12.

JOHNSON V. OLIVER.

Ejectment—Striking out name of joint defendant.

This was an action for the recovery of land, and for mesne profits, brought against one Oliver, who was tenant of the premises under a lease from one Ross, who resides in Scotland. Ross had obtained an order allowing him to defend with Oliver. Oliver remained in possession under the lease for two months after service of the writ upon him, and during that time paid the rent to Ross. He then went out of possession, his lease having expired, and made this motion to have his name struck out of the writ and all subsequent proceedings.

Motion discharged with costs.

Shepley, for the plaintiff.

Clement, for defendant Oliver.

Arnoldi, for defendant Ross (the landlord).

Osler, J.] Jan. 16.

VOTERS' LISTS OF THE VILLAGE OF L'ORIGNAL.

Voters' list—R. S. O. ch 9.

The assessment roll of a municipality was finally revised and corrected by the Court of Revision, on the 31st May, 1882. The Clerk of the municipality prepared the voters' list therefrom, and on 7th Sep., 1882, posted a copy thereof in his office as required by sec. 3 R. S. O. ch. 9. He did not transmit copies of the list to all the persons entitled to receive them under ss. 3 and 4. No complaints having been received by him up to 30th October, he on that day signed the certificate and report mentioned in sec. 11 of the Act, and obtained the certificate of the deputy judge of the County Court on three copies of the last as being the revised list of voters for the municipality.

The judge of the County Court set aside the clerk's certificate, and the certificate of the deputy judge.

On a motion for a writ of prohibition, Osler, J.,

Held, that as soon as the list is posted up in the clerk's office, the time for making complaints in respect of it begins to run, and that time being by sec. 9 expressly limited to thirty days from the posting up of the list, and no complaint having been made within it, that the deputy judge was bound to certify.

That the duty of transmitting or delivering the printed copies of the list to the parties entitled to receive them, is prescribed in general terms without reference to date, and consequently the omission to transmit such copies to certain of the persons entitled to them, though done with intent, was not a valid ground for cancelling the revised list.

Prohibition granted.

Rose, Q.C., for the motion.

Shepley, contra.

GENERAL ORDER.

The following order has been issued, dated February 5, 1883:—

"Except during vacations, and excepting Sundays, Christmas Day, Good Friday, New Year's Day, the birthday of the Sovereign, and any day appointed by general proclamation for a general fast or thanksgiving, the offices of the Court shall be kept open from 10 a.m. to 4 p.m. During the sitting of the Divisional Courts, and at other times, from 10 a.m. to 3 p.m."
