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DIARY FOR DECEMBER.

1. Thur..Re-hearing Term in Chancery begins.
4. Sun..*2nd Sunday in Advent.* Armour, J. sworn in, Q. B., [1877.
6. Tues..County Court sitt. for York begin.
10. Sat..Michaelmas Term ends.
11. Sun..*3rd Sunday in Advent.* Blake. V. C., sworn in, [1872.
13. Tues..County Court sitt. (ex. York) begin.
15. Thurs..Christmas vac. in Supreme Court and Exch. Ct. be- [gin. Morrison, J., sworn in, Ct. of Appeal, 1877.
17. Sat..First Lower Canada Parliament met, 1792.
18. Sun..*4th Sunday in Advent.*
22. Thurs..Shortest day.
24. Sat..Court of Appeal and Chancery vacation begin.
25. Sun..*Christmas Day.*
26. Mon..U. C. made a Province, 1791.
27. Spragge, V. C., appointed Chancellor, 1879. Municipal [nominations.
31. Sat..Rev. Stat. of Ont. came into force, 1877.

TORONTO, DEC. 1, 1881.

LORD JUSTICE BRAMWELL having retired into private life, his place has been filled by Mr. Justice Lindley. Mr. Ford North, Q. C., takes the seat vacated by Mr. Lindley in the Queen's Bench Division. Though not very prominently before the profession, Mr. North's appointment was not a surprise, and Lord Selborne is praised for continuing his practice of appointing Judges apart from political and party claims. Lord O'Hagan has also retired and is succeeded by Mr. Law.

MR. JOSHUA WILLIAMS, Q. C., died on the 25th Oct., at the age of 68. Though an eminent real property lawyer, and engaged in many important cases, his reputation will rest mainly on his well-known works on Real Property and Personal Property. These books have gone through thirteen and eleven editions respectively, and are perhaps the best known legal text-books in the English language. Mr. Leith is publishing a Canadian edition of Williams on Real Property which will be issued shortly.

The great majority of the profession will, probably, receive with much pleasure the report that the Law Society has at length resolved to re-establish the Law School for a period of three years at all events. Lectures have long been delivered under the auspices of the Inns of Court in London, and Lord Selborne is a leader in a movement to carry still further the objects with which the lectures were started. Apart from all question of the practical usefulness of such courses of instruction, it must be obvious to all that the more scientific and the more intellectual a lawyer's training, the more keenly he will feel the noble nature of his profession when viewed aright, and the more impossible he will find it to stoop to any of those "tricks of the trade" which have sometimes, in every country, brought discredit and odium on its name.

WHATEVER the cause may be which has delayed the renewal of courses of lectures under the auspices of the Law Society, one good result has ensued. In every community spontaneous effort for the public good is of more value than the forced product of State help, inasmuch as the former strengthens the powers of self-reliance and self-denial. So on the same principle,—*Si parva licet magnis componere rebus*—there is every reason to congratulate the Legal and Literary Society on the energy it has shown, and the success it has attained in providing in some measure, out of its own resources, the means of self-improvement. We are glad to hear that there

is a probability of the lectures now being delivered to its members being speedily published, and rejoice that the demand for greater advantages of scientific training on the part of the rising generation of lawyers has met with due recognition in high quarters.

CIRCUMSTANTIAL evidence is said to be illusory or satisfactory "according to circumstances." It is generally, and very properly, supposed that a post-mark on a letter may be relied upon with some degree of certainty that it truly gives the date of actual stamping. A case, however, recently occurred at the post-office of a large city in Ontario, which is rather startling to a blind believer in P. O. routine. On Oct. 29 a letter was posted, and the next morning it was delivered to its proper owner, the envelope being stamped Sept. 29. Let us suppose this mistake not to be noticed for a year or so, and then the envelope to be put in evidence to prove the date of a certain occurrence, would not a jury, as a matter of course, believe the "circumstance" in preference to the oath of the most respectable witness who might state the actual date of the posting of the letter; and yet in this case the circumstance would lie and possibly be the means of doing a grievous wrong.

THE CONSOLIDATION OF THE DOMINION STATUTES.

The Dominion Government have at last taken a step towards the consolidation of the Statutes over which the Parliament of Canada have jurisdiction, by the appointment of the Honourable James Cockburn, C.C., as "Commissioner for the preliminary revision and consolidation of the Dominion Statutory laws." During Mr. Mackenzie's administration, an appropriation was made for the purpose of this consolidation, and we believe, Mr. Thomas Langton, Barrister-at-law, prepared some preliminary matter; but owing to the change of Government no commission was appointed, and the matter has been allowed to rest until the present time. Of the need of this work it is unnecessary to enlarge; it is simply indispensable. It will be a work of great magnitude and extreme difficulty, as it covers not only the consolidation of the Dominion Statutes passed since the time of Confederation, but includes all the statutory laws enacted by the various provinces anterior to that time, and over which the Dominion Parliament have now jurisdiction. To consolidate, revise, and harmonize such a heterogeneous mass of legislation will take considerable time, and to decide the innumerable constitutional questions involved will require the greatest possible care. We presume a commission composed of Judges and Barristers, similar to that appointed by the Ontario Government, will shortly follow, and we trust that the preliminary matter will be soon in a shape to enable them to proceed with this much needed compilation.

We congratulate the Government on securing the services of Mr. Cockburn, a gentleman eminently qualified for the careful carrying out of the difficult work appointed him. Mr. Alexander Ferguson of Ottawa will make an efficient Secretary.

RECENT DECISIONS.

Nos. 1 and 2 of Vol. 32 of our Common Pleas reports now lie before us for review. The first case is *Re Mead* v. *Creary*, which decides two new and important points of Division Court procedure, and which came before the full Court on return of a rule *nisi*, obtained on behalf of the primary creditor, to rescind an order for a prohibition, made in Chambers, by Cameron, J., at the instance of the garnishees, on the ground of want of jurisdiction. The case in Chambers is re-

ported in 8 P. R. 374. Two points came up for decision. The first was:—Does sec. 14 of 43 Vict., c. 8, which requires that where a defendant, primary debtor or garnishee intends to contest the jurisdiction of any Division Court, he is to give a notice to that effect to the clerk of the Court within a certain number of days after the service of the summons on him,—relate merely to cases where the cause of action being within Division Court jurisdiction, the suit is brought in the wrong Court,—or is it intended to apply to all cases where jurisdiction is disputed? Cameron J. decided in favour of the restricted interpretation, and the full Court now upholds his decision on this point; holding, (per Osler, J., p. 3):—"The notice mentioned in this section is only required when a suit otherwise of the proper competence of the Division Court has been brought in the wrong division, and the section does not operate to give jurisdiction in default of notice as to causes of action over which the Division Courts Act expressly enacts, those Courts shall not have any jurisdiction."

Differing opinions on this subject were expressed by the authors of the two works we have on Division Court law. Mr. Sinclair laid it down if no notice given that "the parties may be said to have tacitly agreed that, whether the matter is beyond the jurisdiction or not, they are willing, for reasons best known to themselves, to have it disposed of in the Division Courts." Mr. O'Brien, on the other hand, interpreted the section as referring not to *amount*, which was definitely limited by other sections nor to other matters wherein no jurisdiction was otherwise given, but merely to *locality*. The Court has arrived at the same conclusion.

The second point was as follows:—Can a primary creditor garnish part of a debt due by a third person to the primary debtor for which, as between the primary debtor and the garnishee, a suit could not be maintained in the Division Court by reason of the amount being in excess of the jurisdiction? Cameron, J., held he could not, but the full Court have reversed his decision on this point. The former grounded his decision on sec. 136 of the Division Courts Act (R. S. O., c. 47), which enables the primary debtor, garnishee, and other parties interested to set up *any defence*, as between the primary creditor and the primary debtor, or as between the garnishee and the primary debtor, which the latter would be entitled to set up in an ordinary suit; and held that want of jurisdiction is a defence open to the garnishee, and that as a result of such a defence being allowed, the jurisdiction of Division Courts in proceedings to attach or garnish debts is limited to debts within the proper competence of such Court to try. The full Court, however, observed (per Osler, J., p. 4,) that if the objection, thus upheld in Chambers, was well founded, it was singular that the question did not appear to have before arisen, and they held that it is not necessary or consistent with the other provisions of the Act to give so wide a meaning to sec. 136 as that given by Cameron, J. "The defences," (per Osler, J.,) "which the garnishee and other parties are permitted to set up are defences either to the claim of the primary debtor or the debt sought to be attached. . . . . An objection to the jurisdiction is not a defence to the claim, but to the competency of the Court." And after a review of the various sections of the Division Courts Act applicable to the question raised, they held in the words of Wilson, C. J., p. 9. "The whole scope and scheme of the Act are, to leave the Judge, in case of garnishment, unfettered in his action in dealing with the debts of the primary debtor for the purpose of satisfying the claims of the primary creditor, because the Judge is only to take out of the debt which the garnishee may owe as much as will pay the primary creditor his demand, which must be one within the competence of the Division Court." The same view was expressed by Mr. O'Brien in his Manual for 1879, at p. 111.

The next case, *Sutton* v. *Armstrong*, turned upon the question whether two chattel mortgages, and the goods comprised in them, passed under the operative words of an assignment made by the mortgagee, part of which were "all mortgages . . and also all and singular other the real and personal estate, wheresoever situate," of the assignor, and Osler, J., held that the terms were so comprehensive and all-embracing that in the absence of any evidence to show the mortgages were not intended to pass, they must be held to have passed; but that in the case of one of the mortgages there was such evidence, since at the time of such assignment the mortgagee was not the beneficial owner of it, but inasmuch as it was given to secure certain promissory notes, the then holder of the notes was in equity entitled to the security.

The next case, *Montreal City and District Savings Bank* v. *Perth*, was an action an a debenture, by which the defendants agreed to pay to the bearer £200 at the office of a named bank on a named day, upon presentation and surrender there of the debenture, and the principal question was whether the plaintiffs were required by the debenture to demand payment or to make presentation of the debenture at the time and place specially named for payment, and it was held by Osler, J., and afterwards by the full Court, that the presentation and surrender of the bond was a condition precedent, that these acts on the part of the plaintiffs were concurrent acts which they were to perform, or to be ready and willing to perform, at the same time and place the defendants paid or tendered, or were ready and willing to pay or to tender the money. It was also held that after failure to make a due presentation, there could be no recovery until a demand was made for payment, which must be made on the defendants. So far as the case concerned the form of pleadings under the old practice we need not further notice it.

In *Walton* v. *County of York* a rule *nisi* had been obtained in a certain action to enter a non-suit, or for a new trial, and the Court made it absolute to enter a non-suit. The plaintiff thereupon appealed, and the Court allowed the appeal, but made no order as to that portion of the rule *nisi* in which a new trial was asked, leaving it to be disposed of by the Court *a quo*. It was now held, however, that the rule *nisi* was completely and finally disposed of, so far as that Court was concerned, by the rule to enter a non-suit, which the defendants, by taking it without asking that any reservation should be made of that part of it relating to the new trial, had acquiesced in. It was also held by a majority of judges, that the Court of Appeal had no power, under sec. 23 of the Court of Appeal Act. (R. S. O c. 38) to direct the Court *a quo* to reopen the rule or reconsider the question whether in their discretion a new trial should be granted. It appears, therefore, that if the question had been raised in *Hamilton* v. *Myles*, 24 C. P. 309, the course there taken could not have been maintained.

In the next case of *Carlisle* v. *Tait*, p. 47, the principal questions were as follows: (1.) Whether it is necessary that the affidavit made by the mortgagee's agent under sec. 1 of the Chattel Mortgage Act (R. S. O. c. 119) should show he was acquainted with all the facts and circumstances connected with the giving of the mortgage; or whether that could be proved *aliunde*? and (2.) how far a purchaser at a sale by the mortgagees under their power of sale, who leaves the mortgagor in undisturbed possession, require renewed protection by registration? As to the first question, the Court decided that it ought to appear either in the affidavit of the agent, or in some other way from the chattel mortgage or the papers filed under it, that the agent is aware of the circumstances connected with the transaction. As to the second question, Wilson, C. J. expresses his opinion, p. 49, that the purchaser is pro-

tected so long as the mortgage under which he bought has the protection given to it by the registration; and that such protection will continue whether the purchaser is a mere assignee or holds under the power of sale; but that when the term of the mortgage expires the purchaser is no longer protected, unless he take actual possession, or procure and register a mortgage in his favour, and he cites an English case in support. Osler, J. however, declined to express any opinion on this second point, on the ground that the terms of the English Bills of Sale Act are so different from ours. Galt, J., gave no judgment.

The next case of the *Canada Permanent L. and S. Co'y* v. *McKay*, p. 51, needs only a passing notice. It was an action of ejectment. The step-brother of the defendant, the registered owner of the legal title, mortgaged to the plaintiffs, who had no notice of certain equities claimed by the defendant against the said legal owner. The plaintiffs were, therefore, declared entitled, as purchasers for value without notice, to all except a small portion comprising the house and garden. This portion had always been deemed the defendants' special property, and he had always exclusive possession thereof, and, therefore, *although his aforesaid step-brother had also always resided on the land, and had worked it jointly with the defendant*, the latter was held to have acquired a title to the portion comprising the house and plot, under the Statute of Limitations by reason of his exclusive possession of it.

In the next case requiring notice, *Mills* v. *Kerr*, p. 68, an assignment of all the goods and effects in and about the dwelling house of a member of an insolvent firm, made for the benefit of the partnership creditors only, was held to be a fraudulent preference, inasmuch as there were proved to be also separate creditors; and it was also held that the intent of the parties to include the separate creditors could not be proved by parol evidence, for "the intent in the statute mentioned, to defraud, etc., must be governed by the terms of the instrument alone;" (per Wilson, C. J.)

The case of *Ontario Bank* v. *Mitchell*, p. 73, shows that in the examination of a judgment debtor under R. S. O., c. 50, sec. 304 (Jud. Act, O. 41, r. 1), "the chief object is to show what property the debtor has at the time of the examination which can be made available to the creditor, and it is material in making or in the attempt to make out present property, to show that at some anterior time, no matter how far back, the debtor had property, and to get an account from the debtor where that property is, or what has been done with it," (per Wilson, C. J.); and therefore the enquiry is not restricted to the period of the contracting of the debt, but it may be shown that at some anterior time, no matter how far back, the debtor had property, as to which he may be required to give an account; and it is not sufficient answer to the enquiry merely to say that it has all been disposed of before the debt was incurred.

The next case, *Lee* v. *Public School Board of Toronto*, is a decision on sec. 13 of the new School Law, (44 Vic., c. 30). This section forbids a public or high school trustee (1) to enter into any contract, agreement, engagement, or promise of any kind, either in his own name, or in the name of another, and either alone or jointly with another, or in which he has any pecuniary interest, profit, or promised or expected benefit, with the corporation of which he is a member; or (2) to have any pecuniary claim upon or receive compensation from such corporation, for any work, engagement, employment, or duty on behalf of such corporation. The section then declares (3) that every such contract, agreement, engagement, or promise shall be null and void; (4) that such trustee shall *ipso facto* vacate his seat, and (5) that a majority of the other trustees may *declare the same* accordingly. It was decided in the above case, though with some doubt on the part of Osler, J. (see his judgment, page 87),

that what the section prohibits is the act of the trustee himself—something for which he is directly responsible, or can control, or can individually do or refrain from doing or being a party to; and therefore it was held that the fact of the Public School Board of the City of Toronto entering into an agreement with and purchasing their stationery and school supplies from a publishing company, and having obtained gas from a gas company and insured their property in certain insurance companies, of which said companies the plaintiff was a shareholder, did not disqualify him from acting as a trustee of the School Board, or render his seat vacant under the above section.

The case of *Oliver* v. *Newhouse*, p. 90, was an interpleader issue arising from seizure by an execution creditor of certain goods, under circumstances which are succinctly given by Wilson, C. J., in the following passage from his judgment:—"From the evidence it appears there was a verbal lease of the farm made by the father to the son for five years, determinable at any time at the will of either of them, and the son was to have the use of the stock and implements on the farm to enable him to work it; and for the farm and stock the son was to pay the father $100 a year and support the father and his family, who all lived on the farm. The son had the right to sell and deal with the chattel property as he liked, and he was to leave upon the farm at the termination of the lease as much value in chattels as he got, and whatever there was at that time above the value given to him was to be his own. The son carried on the farm under that agreement until January, 1879, when he left the place, and the father assumed possession of the land and chattels as his own. In March, 1878, the son formally surrendered the farm and crops to the father, and in April a final settlement was made between the the father and the son, the son giving up all his interest in the chattel property to his father. After that settlement these goods were taken in execution for the son's debt, and the question is, whether the goods so seized were at the time the property of the father or of the son." Wilson, C. J., and Galt, J., concurred in holding that the goods demised to the son gave him only a limited interest for the duration of his term, that those goods he got as lessee, and did not part with under the power he had, remained just as if there had been no such power given: that the goods brought on to the farm in lieu of the demised goods sold or exchanged by the lessee became subject to the terms of the demise just as the goods were and had been for which they were substituted. But if not, the substituted goods did, by the termination of the tenancy, by will of the lessor in January, 1879, when the son left the farm and the father took possession of it and of the goods upon it, and by that act of seizure and possession as of right by the father revest the residue of the original goods in the father and vest the substituted goods in the father as the former owner and lessor. Osler, J., on the other hand, held that the transaction amounted to a sale of the goods, and that the property became the property of the execution debtor liable to be seized on an execution against him.

The last case, *Regina ex rel. O'Dwyer* v. *Lewis*, was an appeal from the decision of the C. J. of the Court of Q. B. The question in dispute was, whether a County Court Judge having granted his fiat for the issue out of a Superior Court of a writ of summons in the nature of a *quo warranto*, under R. S. O. c. 174, sec. 179, had power afterwards to set aside his fiat for the writ, with the writ and proceedings, for irregularity or insufficiency or whether the writ having been issued, his power was limited to trying the validity of the election impeached. The C. J. of the Q. B. refused to set aside the order. Now on appeal, Wilson, C. J., also held the County Court Judge had power to make the order, on the ground that the writ being made returnable before himself, he

had power to amend it, or to set it aside: and he held that the writ of *quo warranto*, which is issued and is returnable before a County Court Judge is his commission in the sense that without such writ he has no authority to act, but not in the sense of the old writ of error, because in the former case the Judge gives himself authority to act. Osler, J. however, refused to recognize this distinction, and held that the order complained of was made wholly without jurisdiction; and Galt, J., being absent at the assizes, and the Court thus equally divided, the appeal dropped.

We have also before us the November numbers of the Law Reports, comprising the Table of Cases, and Index to 17 Chancery Div. now completed, and also from p. 1 to p. 299 of Vol. 18 Chancery Div., and p. 485 to 502 of 7 Queen's Bench Div. The last comprises only a single case, which is concerned with the interpretation of certain clauses and rules of the Income Tax Acts, and does not require notice here. The review of the above mentioned portion of Vol. 18, Chancery Div., will be contained in our next number.

THE RIGHT TO REMOVE COUNTY COURT JUDGES.

[COMMUNICATED.]

As conflicting views on this subject have lately found expression in the leading journals of the Province, it may not be out of place to mention some of the arguments on one side of the discussion.

The British North America Act gives to the Governor-General the right to appoint the judges of County Courts, but is silent as to their removal. The Legislature of Ontario has assumed the right to make laws concerning what is thus omitted. At the Confederation, and for some time afterwards, the law on this matter, as far as it was contained in the statutes, was well understood and had been settled for several years. The statutes which were in force respecting the office in question, when the consolidation took place in 1859, were then continued and remained intact up to the passing of the Confederation Act. The tenure was described in Con. Stat. U. C. cap. 15, sec. 3, which enacts that these judges "shall hold their offices during good behaviour, but shall be subject to removal by the Governor for inability or misbehaviour, in case such inability or misbehaviour be established to the satisfaction of the Court of Impeachment for the trial of charges preferred against judges of County Courts." The constitution of the Court of Impeachment and its duties are given in Con. Stat. U. C. cap. 14.

The first attempt to change this state of the law for Ontario took place in 1869, when the Local Legislature passed the statute, 22 Vict., cap. 22, to the effect that County Court Judges should hold office *during pleasure*, subject to removal by a tribunal there named. This was amended at the following session by Ont. 32 Vict., cap. 12 which repealed the Act last mentioned, and declared that "The judges of the several County Courts . . . shall hold their offices during good behaviour, but shall be subject to removal by the Lieutenant-Governor for inability, incapacity or misbehaviour, established to the satisfaction of the Lieutenant-Governor in Council, anything in the Interpretation Act or any other Act to the contrary notwithstanding." This is substantially repeated in the Revised Statutes of Ontario cap. 42, sec. 2, and has not since been altered.

This legislation by Ontario covers two distinct matters affecting the continuance in office of a County Court Judge, the one, the terms, the nature of the tenure, and the other, the means of deciding whether he has failed to fulfil these terms. In other words if we treat the judgeship as a subject of contract between the Crown and the tenant, the Provincial Legislature assumes to pre-

scribe the conditions on which the judge may keep his office and also to create the tribunal which shall decide finally whether the conditions have been complied with.

The difference between the nature of the tenure mentioned in the Con. Stat. and in the Revised Statutes is indicated by the presence in the latter of the word "incapacity" in addition to "inability" and "misbehaviour," which in the former appeared as the only grounds upon which, or either of which, a judge could be removed. This addition suggests that "inability" and "incapacity" are not to be treated as synonymous terms, and it is possible that one might be held to apply to physical, the other to mental qualifications. However that may be, I do not propose at present to discuss the right to legislate upon the terms of holding; but that this must share the fate of the right to remove. Granting, therefore, for the purposes of the present occasion, that the Local Legislature may as part of the organization of a court, or on some other ground, prescribe the nature of the tenure, I deal only with cases in which the occupant of the office ought to be removed. And I take the question now open to debate to be this—*Has a Provincial Legislature the right to direct the proceedings by which a County Court Judge may be removed?*

As far as I have heard the arguments in favour of the provincial right, they are covered by the following propositions:

(1.) That the constitution, maintenance, and organization of these courts is by the B. N. A. Act committed exclusively to the local power.

(2.) That it is necessary in the constitution, maintenance and organization of a Court to provide for both the appointment and removal of its judges.

(3.) That, as the said Act names nothing more than the appointment as being under the Dominion authority, everything else connected with the constitution, maintenance and organization, including the removal of the judge, must be thereby put within the control of the Provincial Legislature, the more especially because under the same heading "The Judicature," it is deemed expedient in that Act to provide both for filling and vacating judgeships in superior Courts, but only for the filling of them in inferior Courts.

There may be other arguments on the same side which some persons would urge instead of or in addition to these, but I think there is a two fold answer to them all:—

(1.) The silence in the B. N. A. Act as to this right of removal has the effect of giving it to the Dominion.

(2.) The language of the Act itself shows that Local Legislatures are not to deal with the removal of a judge.

This silence must be considered in the abstract, and in connection with the above mentioned special circumstance which accompanies it. As to silence generally, I submit that where there is no law to the contrary, the right to remove is appurtenant to the right to appoint. Any other rule would amount to a preference for anomalies and confusion in the affairs of state. If these rights rested with different bodies a deadlock might be created by the removing authority vacating the office as often as it might be filled—or the removing authority might from time to time open the place till it came to be filled by an occupant to its own liking, "which is absurd." Public policy furnishes a canon of construction by which a statute giving the power of appointment to a specified body without mentioning removal must be held to mean that the same body can place and displace.

Then as to the special circumstance that the means of removal of a County Court Judge is not stated, though the Act deals with the judicature of both courts, and provides for the removal from the higher tribunal: that circumstance is entirely consistent with the theory that silence on the subject gives the right to remove as part of the right to to appoint. In fact it is because this would

be the result of silence that the Act is not silent as to Superior Courts. It does not intend that the Governor-General shall in respect to those tribunals remove as well as appoint—neither does it intend to leave it in the power of the Dominion Legislature at any time to so ordain; consequently it is enacted that an address from the Senate and the House of Commons shall precede the dismissal of a superior court judge. This, from the date of the Confederation, not only takes the statutory power of removal from the Governor-General, but it puts interference with the tenure beyond the reach of Dominion Legislation. The address from the Houses of Parliament as a condition precedent to the removal of a judge from any superior court in Canada becomes a part of the law of the Empire. There was no intention so to circumscribe the authority of the Dominion over the removal of County Court Judges; therefore, and for that reason only, the statute is silent on the subject.

In the next place as to the contention that the wording of the Act shows that the Local Legislatures have no such rights as they assume. Sec. 91 gives to the Dominion Legislature the right to make laws "in relation to all matters not coming within the class of subjects by this Act assigned exclusively to the Legislatures of the Provinces." Sec. 92 enacts that "In each Province the Legislature may exclusively make laws in relation to * * * [sub-sec. 14] the administration of justice in the Province, including the constitution, maintenance and organization of provincial courts, both of civil and criminal jurisdiction, and including procedure in civil matters in these courts."

By sec. 96. "The Governor-General shall appoint the judges of the Superior, Districts and County Courts in each Province, excepting those of the Courts of Probate in Nova Scotia and New Brunswick."

By sec. 99. "The judges of the Superior Courts shall hold office during good behaviour, but shall be removable by the Governor-General on the address of the Senate and House of Commons."

This language as a whole shows that the Imperial Legislature must have intended and adjudged that for the purposes of the B.N.A. Act, neither the appointment nor the removal of a judge was any part of the constitution, maintenance or organization of the court, for, in the face of the fact that it assigns all authority on such appointment and removal, at all events as far as Provincial Superior Courts are concerned, to the Dominion authorities, it notwithstanding awards without any exception or qualification the constitution, maintenance and organization of *the same Courts* to the Local Legislatures. This is saying in effect that there is no necessity to make any exception, because they are distinct, and different matters. In order to make the Confederation Act consistent and effective on this subject, there is, therefore, no escape from the interpretation that neither the appointment nor the removal of a judge is any part of the constitution, maintenance or organization of the Courts assigned to the Provincial Legislatures.

There are some matters connected with the Court of Impeachment which add strength to the general bearing of my argument. That tribunal which at the time of the Confederation protected County Court Judges from the bare will of the Crown, answering to some extent the same purpose as the Houses of Parliment in the case of Superior Court Judges, was then composed of the Chiefs of the Courts of Queen's Bench, Chancery and Common Pleas, all of them, by the B. N. A. Act, to be thenceforward Dominion officials, who could only be removed as aforesaid after an address from the Senate and the House of Commons. Behind such a shield, the independence of a County Court Judge was far away from the blows of Provincial politics or local excitement, and even the Governor, the appointing power, could not call it into play until he had on his official responsibility first

investigated the accusations and had found them "sufficiently sustained and of sufficient moment to require judicial investigation." This as an instrument of public good is likely to be much more effective than any Court which could be formed entirely of provincial officials. I speak of this tribunal in the present tense because I do not believe it to be merely a thing of the past. If my arguments are sound, it follows that it has not been destroyed by the local legislation to which I have alluded. However, all that can be said of the Court of Impeachment does but beg the question, for, assuming that it met the requirements of the Imperial Legislature, and was therefore not disturbed at Confederation, that fact would not solve the problem. What authority can to-day make or unmake a Court of Impeachment? I do not rely, therefore, on the existence of this court as a positive answer to the right claimed by Ontario to make laws concerning the removal of a County Court Judge, but I do submit that the substance of the British North America Act shows this Province to have no such right, and as a consequence that the portion of the Revised Statutes which purports to deal with this subject is a dead letter.

Mr. Todd's valuable article on "Complaints against the Judiciary," published in this journal, (*ante* p. 400), certainly throws a strong light on a broad matter of which I touch but a part. However, neither in this communication, nor in the last chapter of his celebrated work on "Parliamentary Government in England," where he treats still more extensively of "The Judges in relation to the Crown and to Parliament," does he seem to lead away from the conclusion which I am pointing out as the proper one to arrive at concerning the authority of one of the confederated provinces of Canada in regard to the subject here discussed. From these, his writings, I extract this as a cardinal principle—the enjoyment of his office by a judge, may not be effectually interrupted, unless it be done at or near the fountain head from which that honour flows.

The first statute of Ontario alluded to by our valued contributor in the above article, stated the tenure of a County Court Judge to be during pleasure, removable for specified causes established to the satisfaction of the Lieutenant-Governor in Council.

Soon after it was published it became an open secret that the Dominion Government objected to its becoming law, and that disallowance was averted only by an understanding that it should be altered in the ensuing session. We see that it was accordingly altered by making the tenure during good behaviour, but subject to removal by the Lieutenant-Governor under certain circumstances without the intervention of the Court of Impeachment.

The fact that this Act (the one which our correspondent attacks in its revised shape) was not so interfered with might seem to suggest that it was free from all the objectionable features of the first one. There may, however, be a better explanation than this for the difference in the attitude of the Dominion Government on the two occasions, if we accept the conclusion of the writer that the amended Act was also invalid.

A report of the Minister of Justice in June, 1868, submitted rules for adoption concerning the review of provincial legislation. These were adopted by the Governor-General in Council. Mr. Todd, in his able work on "Parliamentary Government in the British Colonies," page 361, thus summarizes two possible grounds of objection noticed in that report.

(1.) "Where exception might be urged to the law itself as being in excess of the constitutional powers of the Local Legislature or at variance with Dominion legislation." (2.) "Where it might appear that proposed enactments were contrary to the policy which in the opinion of the Governor-General in Coun-

cil ought to prevail throughout the Dominion in view of the general interests thereof."

For nearly two centuries the policy of England has been to secure the independence of her judges as far as it could be accomplished by making their office "during good behaviour," and a similar view prevailed in the Province of Canada before Confederation. We may well believe therefore, that the first of the above mentioned statutes proposed a policy opposed to that "which in the opinion of the Governor-General in Council ought to prevail throughout the Dominion," thus coming within the second objection above formulated, one which Courts could not entertain, for they have no "view" over the general interests of the Dominion.

The central government could not avoid the responsibility of challenging the dangerous step, and there was in fact no alternative but disallowance, or an arrangement for repeal. But it may be argued that the Act of the ensuing session, after discarding the "during pleasure" clause, was open only to such objections as Courts would deal with, and therefore left to its doom before the judicial tribunals of the country.

The Court of Impeachment was originally composed of "the Chief Justice of Upper Canada, the Chancellor of Upper Canada and the Chief Justice of the Court of Common Pleas." Since that time the Court of appeal for Ontario has been established, and its chief bears the title of "the Chief Justice of Ontario." (J. A. sec. 4.) Whether the change thus and in other respects made in the titles of some of the judges who were *ex officio* members of the Court of Impeachment will necessitate legislation before it can perform its functions, may be open to argument

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We are requested to announce that the library at Osgoode Hall will be open every evening (except during Christmas vacation) from 7.30 to 10 p. m., until 1st March next.

NOTES OF CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

SUPREME COURT.

NOVEMBER SESSIONS.

ONTARIO APPEALS.

MERCER (Appellant) v. THE ATTORNEY-GENERAL FOR THE PROVINCE OF ONTARIO (Respondent).

Escheat—Hereditary revenue—B. N. A. Act—Secs. 102 *and* 109.

It appeared from the statement of the case agreed upon by the parties that this was an action brought by the Attorney-General for the Province of Ontario to recover from the defendants the possession of a certain parcel of land in the City of Toronto, being part of the real estate of one Andrew Mercer, who died *intestate* and without leaving any heirs or next of kin, on the 10th June, 1871; and whose real estate, it was alleged, escheated to the Crown for the benefit of the Province of Ontario. Andrew Mercer at the time of his death was seized of the land in fee simple in possession. The action was commenced in the Court of Chancery by the filing of an information on the 28th September, 1878. The information was amended on the 23rd November, 1879, under order dated 21st November, 1878. The defendant, Andrew F. Mercer, demurred to the said information for want of equity, and his demurrer was filed on the 22nd November, 1878. On the 18th November the demurrer was argued before PROUDFOOT, V.C. On the 7th January, 1879, the learned judge made an order overruling the said demurrer.

From this decision the defendant, Andrew G. Mercer, appealed to the Court of Appeal. The appeal was argued on the 23rd of May, 1879.

On the 27th of March, 1880, the said Court of Appeal affirmed the order overruling the said demurrer and dismissed the appeal with costs. Against this judgment and order of the Court of Appeal, the defendant, Andrew F Mercer, appealed to the Supreme Court. The parties agree that the appeal should be limited

to the broad question as to whether the Government of Canada or of the Province, is entitled to estates escheated to the Crown for want of heirs.

Held [Sir. W. J. RITCHIE, C. J. and STRONG, J., dissenting] that escheat being a prerogative right and hereditary revenue of the Crown in Canada, the Province of Ontario does not represent Her Majesty in the exercise of her royal prerogative in matters of escheat in said Province.

Held also (per FOURNIER, TASCHEREAU and GWYNNE, J. J.) that any revenue derived from escheats, after the full and free exercise of the Crown prerogative of grace and bounty in favour of any person having claims upon the person whose estate the escheated property was, belongs under section 102 B. N. A. Act, to the Consolidated Revenue Fund of Canada.

W. McDougall, Q. C., and *Z. Lash*, Q. C., for appellants.

Ed. Blake, Q. C., *Loranger*, Q. C., and *James Bethune*, Q. C., for respondents.

CORBY ET AL, (Appellants), v. WILLIAMS, (Respondent).

Contract—Vendor and purchaser—Property in goods—Delivery.

This was a bill filed in the Court of Chancery to recover a portion of the amount of a bill of exchange drawn by the respondent on the appellants, and accepted by them in payment of a cargo of corn purchased and shipped by the respondent, a commission merchant residing in Toledo, Ohio, on the order and for account of appellants, distillers at Belleville, Ont. Upon the arrival at Belleville of the cargo, between the dates of the acceptance and maturity of the draft, the defendants refused to receive it and afterwards to pay the said draft, alleging the corn to be useless and heated. The respondent sold it for the best price he could obtain, gave credit for the proceeds to appellants on account of their said acceptance, and sued appellants for the balance and interest.

The appellants contended that the respondent was bound by his contract to deliver the corn in good order at Belleville. It was proved the corn was shipped in good condition at Toledo, and that its deterioration took place *in transitu* and before the arrival of the cargo at Belleville. The respondents assigned the bill of lading, together with the policy of insurance, to the National Bank, Toledo, and drew through them at ten days upon the appellants, endorsing at the same time the bill of exchange for the purpose of vesting the property in the corn, in the Bank to hold to their use, until the bill of exchange should be paid and in default of payment to sell to reimburse themselves to the amount of the bill of exchange.

Held, (STRONG, J., dissenting) that the property in the corn remained by the act of the respondent in himself and his assignees, the Bank, until and after the arrival of the corn at Belleville, and the damage of the corn having occurred while the property continued to be in the respondent and his assignees, the appellants should not bear the loss.

W. Cassels, for appellants.

James Bethune, Q. C., for respondent.

QUEBEC APPEALS.

F. X. COTE (Appellant), v. STADACONA INS. COMPANY, (Respondents).

Company—Action for calls—Misrepresentation—Repudiation—Acquiescence by receipt of dividend.

In an action to recover the 3rd, 4th, 5th and 6th calls of five per cent. on fifty shares of one hundred dollars, alleged to have been subscribed by the appellant in the capital stock of the respondent Company, the appellant by his pleas denied that he ever subscribed for more than five shares, which were fully paid up shares, and alleged that after he had ascertained that he might be held to have only paid ten per cent. on fifty shares, he at once complained to the principal agents of the Company, and asked that his subscription be paid down at the amount he had in reality meant them to be, and that he believed he would never have anything more to pay on his shares; the pleas also averred misrepresentations and fraud on the part of respondent's agent. The Company was incorporated in 1874, and at the trial it was proved that the appellant's subscription was obtained through one of the local agents, who received a commission on the shares subscribed, and that

the appellant did not know the extent or responsibilities which he assumed, and that the amount set down in the subscription list was entered by the agent without appellant's knowledge or consent. At the end of the year 1875 the Company declared a dividend of 10 per cent. on the paid-up capital, and appellant received a cheque for $50, being a dividend of 10 per cent. on the amount paid "*montant verse.*" In the following year the Company suffered heavy losses, and appellant again endeavoured to be relieved from further liability without success, and calls having been made, he refused to pay.

Held, That the defendant immediately after setting his name to the subscription book, communicated to the respondents the true state of the case, and before any action had been taken by the Company upon the faith of the appellant's signature having been obtained, there was no completed contract entered into between them for fifty shares, and that appellant was not estopped by anything which took place afterwards from showing that he was never in fact holder of fifty shares in the capital stock of the Company.

Languedoc, for appellant.

Bedard, for respondents.

MANITOBA APPEALS.

WOOD (respondent) v. SCHULTZ (appellant).

Vendor and Purchaser. — Fraud — Supreme Court Amendment Act, 1879, *Sec.* 6.

The plaintiff charged fraud against the defendant in respect of a sale of a lot of land to him in Winnipeg. The defendant, being unable to be present at the hearing, applied for a postponement on the grounds that he was a material witness on his own behalf, and that it was not safe for him in his state of health to travel from Ottawa to Winnipeg.

Mr Justice Dubuc refused the postponement, and made a decree in favour of the plaintiff, directing an account to be taken. The Chief Justice of the Supreme Court, under sec. 6 of the Supreme Court Amendment Act of 1879, allowed an appeal direct to the Supreme Court, it being known that there were then only two judges on the bench in Manitoba, the plaintiff and Mr. Justice Dubuc, from whose decree the appeal was sought.

Held (*per* Chief Justice) that the cause was forced to a hearing with unjustifiable haste, and was conducted with such irregularity as would justify this Court in holding that there was a mis-trial, and in sending it back to the Court below. But he considered this unnecessary, as he was of opinion that the plaintiff had failed to establish his case, and that the appeal should be allowed with costs, and the bill dismissed with costs. STRONG, J., was of the same opinion as to the manner in which the case should be dealt with. FOURNIER and HENRY, J. J., were of opinion that the appellant should have been granted a postponement of the hearing, and that the appeal should be allowed with costs, and the appeal remitted to the position it occupied before the hearing GWYNNE, J., was of the opinion that the appeal should be allowed with costs, and the bill dismissed with costs. The appeal was allowed with costs, and the bill dismissed with costs.

Jas. Bethune, Q.C., for appellant.

J. A. Boyd, Q.C., for respondent.

CHANCERY.

Proudfoot, J.] [Nov. 16.

RE DONOVAN—WILSON v. BEATTY.

Administrator ad litem—Suits improvidently instituted—Solicitor of administrator ad litem—Costs paid to solicitor—Order to refund costs improperly paid—Res judicata—Sureties of administrator ad litem.

An administrator *ad litem* had allowed suits to be brought in his name without the sanction of the Court, and which both he and his solicitor had been notified was necessary, and a sum of $2,738.37 for costs in respect of such suits had been paid out of the funds to the solicitor, and which, it was alleged, had been so paid improvidently ; the Court in a suit by the executors' against the administrator directed a taxation of the solicitor's bill, when a sum of $2,012.81 was disallowed, and thereupon the sureties for the administrator, who was unable

to pay, applied by petition on an order that the solicitor should repay this amount with costs.

The Court [PROUDFOOT, J.] under the circumstances made the order asked, although no taxation of the costs as between the solicitor and his client had been had, and it was denied that any arrangement existed that the solicitor should only be paid such costs as the administrator might be allowed against the estate, that any privity existed between the solicitors and the executors, and a bill filed by the executors against the administrator and his solicitor had as against the latter been dismissed with costs on the ground of such want of privity, such dismissal, not having been on the merits, could not be claimed to be *res judicata*. *Crooks* v. *Crooks*, 1 Gr. 57, remarked upon and followed.

Proudfoot, J.] [Nov. 16.

BOARD OF EDUCATION OF NAPANEE v. MUNICIPAL CORPORATION OF NAPANEE.

School Trustees—Requisition for money to build school-house—Mandamus.

By the R.S.O., chap. 114, sec. 461, s. s. 6; ch. 204, s. 104, s.s. 10; and ch. 205, sec. 39, s.s. 4, 5, 6, 7, and secs. 29, 30, 31, a Municipal Corporation has not any discretion to accept or reject the requisition of school trustees for money to be expended in the purchase of a site for, and the construction of a public school; their duty is simply to comply therewith.

Where the Corporation refuses or neglects to comply with such a requisition they may apply to this Division of the High Court for a mandamus for the purpose of compelling the Corporation to provide the money. But in such a case the proper course it would seem is to proceed by a mandamus *nisi*, as the Corporation might be able to show that a mandamus absolute ought not to issue.

CHAMBERS.

Mr. Dalton.]] [November 20.

BANK OF HAMILTON v. BROWNLEE & CO.

Service—Partnership—Rule 40.

Brownlee, Brown and O. carried on business in partnership under the name of Brownlee & Co.; Brownlee absconded and the business continued some time when O assigned his interest to Brown.

Held, that the service of a writ against the firm, in the firm name, upon O., after the assignment to Brown, but before the same was made public, was regular.

Proudfoot, J.] [Oct. 10.

RE DEVITT.

Jurisdiction of Master in Chambers in part of subject matter—Confirmation of order as to part without—Rule 424—*Practice.*

A motion by petition for the sale of infants estate and for the application and distribution of the proceeds.

MR. STEPHENS made the order subject to confirmation by a judge in Chambers so far as it exceeded his jurisdiction. PROUDFOOT, J., confirmed the order, holding that the Official Referee in Chambers should continue to exercise the jurisdiction formerly vested in him in such matters, subject only to the confirmation of so much of his order as directed the distribution and payment out of Court of the moneys to be realized.

H. Cassels, for the applicant.

Proudfoot, J.] [Nov. 17.

DALE v. HALL.

Production—Rule 222.

See a full report of this case *post* p. 456.

Proudfoot, J.] [Nov. 18.

RE WILSON.

LLOYD v. TICHBOURNE.

Administration order—Right of infants.

This was an application for an administration of the estate of Daniel Wilson, deceased, by Mary Wilson, now Lloyd, his widow, and his seven infant children, by their next friend.

The testator died in 1876, leaving his property to his wife and children, as stated in his will, and appointed the defendant one of his executors.

The defendant is now the sole executor under the probate, and the debts of the testator ap-

peared to have been paid. The application was on the ground of the alleged misconduct of the executor.

PROUDFOOT, J., granted the order without going into the merits between the widow and the defendant the executor, on the ground that the infants, have a right to an administration order of an estate in which they are interested on the mere suggestion of their next friend that it would be for their benefit.

Costs reserved.

Langton, for the motion.

Hoyles, contra.

Proudfoot, J.] [Nov. 18.

BARKER v. LEESON.

Interpleader issue—County Court—Power of an issue directed from Superior Court.

An interpleader issue had been directed by the Court of Chancery to be tried at the sittings of a County Court. The plaintiff sent a jury notice and the trial was had accordingly, and a verdict returned for the plaintiff. The defendant took certain objections at the trials and afterward the County Court judge made absolute a rule to set aside the verdict and enter a non-suit.

Held, affirming the decision of the Master in Chambers, that the County Court judge had no power to set aside the verdict and enter a non-suit, because the grounds on which he did so embraced matters of law as well as matters of fact. The Court (PROUDFOOT, J.) desired to express no opinion as to whether in this case the County Court judge had power to reserve the question whether the evidence at the trial sufficed to establish the plaintiff's case.

Bain, for the appeal.

Reeve, contra.

Osler, J.] [November 12.

CLARKE v. CREIGHTON.

Costs—Taxation—Married woman—Retainer.

Plaintiff sued C. and G., of whom G. was a married woman, and obtained a verdict against both. In turn both defendants obtained a rule to enter a nonsuit for them or a verdict for G The latter part of the rule was made absolute. The taxing officer disallowed the plaintiff any costs in term because he had not abandoned his verdict against G., and taxed to her one half the costs of the term motion, both defendants having appeared by the same attorney.

Held, on appeal, that a proportion of the costs in term should be allowed to the plaintiff, and it was referred to the Master to enquire whether any binding contract of retainer had been entered into by G., and if not, that no costs other than disbursements should be allowed to her.

S. R. Clarke, for plaintiff.

N. Miller, for defendants.

Osler, J.] [Nov. 21.

IN RE MURDOCK, AN INFANT.

Habeas Corpus—Infant, custody of.

Where the father and mother of a female child under five years of age were living apart, the Court refused under the circumstances mentioned in the judgment to take the child out of the custody of the mother, but allowed the father to have access to the child at stated times.

S. H. Blake, Q. C., for mother.

Murphy, for father.

Osler, J.] [Nov. 19

HUGHES v. FIELD.

Attachment—Absconding debtor—Costs—Order ex parte.

M. obtained a judgment in the ordinary way against the defendant, who had absconded. Several writs of attachment against defendant, as an absconding debtor, were issued. H., one of the attaching creditors, but not the first one, obtained *ex parte* an order that the costs of all the writs of attachment should be paid out of defendant's assets before anything should be paid to the judgment creditor, although there was a fund not liable to the execution creditor, but which was available for the attaching creditors.

Held, that the order must be set aside with costs.

Held also, that under R. S. O. cap. 68, sec. 20, only the costs of suing out and executing the writ can be allowed.

An application to discharge an *ex parte* order

on the ground of suppression of facts, is not an appeal from that order.

Armour, for judgment creditor.

Miller, for attaching creditor.

Wilson, C. J.] [Nov. 24.

FRANCIS v. GRACEY.

In an application to dismiss the plaintiff's action under Rule 255, the six weeks mentioned in the rule may be made up of time that elapsed before, as well as since, the coming into force of the Judicature Act.

REPORTS.

RECENT ENGLISH PRACTICE CASES.

(Collected and prepared from the various Reports by A. H. F. LEFROY, ESQ.)*

FARROW v. AUSTIN.

Imp. J. A. 1873, *s.* 49, *O.* 55, *r.* 1—*Ont. J. A. s.* 32, *O.* 50, *r.* 1 (*No.* 428—*Appeal for Costs.*

[June 21, C. of A.—L. R. 18 Ch. D. 58, 45 L. T. N. S. 227.

This was a suit for administration of the trusts of a will. On further consideration MALINS, V. C. made an order refusing the plaintiff, a married woman, who was a residuary legatee, and one of the executors under the will, any costs of the suit, and ordering the next friend to pay the costs of taking an account of what, if anything, was due from another of the executors on an account current between him and the testator.

The plaintiff appealed.

The preliminary objection was taken that this was an appeal for costs only.

JESSEL, M. R.—According to the rules acted upon by Courts of Equity prior to the Judicature Act, a residuary legatee filing a bill for administration was entitled to costs out of the estate unless some special grounds were shown for depriving him of them; and if he was also a personal representative, his *prima facie* claim to costs out of the estate was all the stronger. This right is expressly saved by rule 55 (Ont. O. 50). The appellant has a *prima facie* right to costs out of the estate which can only be defeated by shewing some special grounds, and I consider that her costs do not come within the description of costs which are in the discretion of the Court.

BAGGALLAY and LUSH, L. JJ., concurred.

NOTE.—*Imp. J. A.* 1873, *s.* 49, *O.* 55, *r.* 1, *and Ont. J. A. s.* 32, *O. No.* 428, *are identical, respectively.*

BEDDALL v. MAITLAND.

Imp. O. 19, *r.* 3. *Ont. O.* 15, *r.* 3 (*No.* 127).

Pleading—Counter-claim.

A counter-claim may be brought in respect of a cause of action arising after the issue of the suit in the original action.

[Feb. 24, Ch. D.—50 L. J. N. S. 401, L. R. 17 Ch. D. 174.

In this action, part of the wrongful act alleged by the defendant's counter-claim, for which he claimed damages, consisted of forcible ejectment at a date subsequent to the issue of the writ.

Counsel for plaintiff took an exception to jurisdiction as regarded the counter-claim, on grounds indicated in above head-note, and cited *The Original Hartlepool Collieries Co.* v. *Gibb*, L. R. 5 Ch. D. 713; *Vavasseur* v. *Krupp*, L. R, 15 Ch. D. 474; *Stooke* v. *Taylor*, L. R. 5 Q. B. D. 569; *Winterfield* v. *Bradnum*, 47 L. J. Q. B. 270. Counsel for defendant, *contra*, contended that a counter-claim was in the nature of a fresh action, and relief could be given upon it in respect of any cause of action accrued before the counter-claim was put in, and cited *Child* v. *Stenning*, L. R. 7 Ch. D. 413; 11 Ch. D. 82; *Fritz* v. *Hobson*, L. R. 14 Ch. D. 542; *Chatfield* v. *Sedgwick*, L. R. 4, C. P. D. 459; *Neale* v. *Clarke*, L. R. 4 Ed. D. 286.

FRY, J., after remarking that he had a strong opinion on the subject, and regretting that it differed from that of the M. R. in *The Original Hartlepool Co.* v. *Gibb*, *supra*, and after citing Imp. J. A. 1873, sec. 25, sub-sec. 3 (Ont. J. A., sec. 16, sub-sec. 4), and observing on the generality of its terms, turned to the rules and forms

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It is the desire of the compiler to make the above collection of cases a complete series of all current English decisions, illustrative of our new pleading and practice, under the Supreme Court Judicature Act.

of pleading. As to Imp. O. 19, r. 3, he observed :—"It is to my mind evident, then, that there is no intention to confine the claim made by the counter-claimant to damages, or to an action of the same nature as the original action ; and therefore, when it is said that the defendant may set up against the claims of the plaintiff a claim of his own, it does not mean necessarily that that is a claim *ejusdem generis*, because it says expressly 'whether such set off or counter-claim sound in damages or not.'"

He then referred to Imp. O. 20, (Ont. O. 16) whereby provision is made for enabling the defence to be brought down to a date later than the commencement of the action, and that, in his opinion, opposed as it was to that of the M. R., the rule introduces this liberty with regard to defence only, because the liberty already existed with regard to counter-claim by the statute. He then continued as follows :—

"I cannot help observing that the construction of M. R. appears to me to be open to this very serious objection, that it requires the defendant, who has separate cause of action beginning before and after the date of the original writ, to separate those causes of action ; the one which goes down to the date of the original writ he may ventilate by means of cross-claim ; in respect of the other he must issue an independent writ. Now, I think that the general spirit of the Jud. Acts is especially to prevent multiplicity of procedure, and to enable the parties to settle, as far as may be, by one hearing and one judgment, all questions in controversy between them."

He then referred, in confirmation of this view, to *Stooke* v. *Taylor*, supra ; *Winterfield* v. *Bradnum*, supra ; and the utterances of the judges therein ; and observed that in the light these authorities, the decision of the M. R. in *Vavasseur* v. *Krupp*, supra, which is very inconvenient, appears, to say the least, of doubtful correctness, finally expressing a hope that the matter would be carried to the Court of Appeal.

[NOTE.—*Imp. O.* 19, *r.* 3, *is identical with Ont. O.* 15, *r.* 3, *No.* 127.]

MORRIS V. RICHARDS.

Imp. O. 57, *r.* 3—*Ont. O.* 52, *r.* 4, (*No.* 457).

Action on promissory note barred, where limit of time under Statute of Limitations expired on a Sunday, and the writ was not issued till the following Monday, since above order was not intended to extend the time fixed by said Statute.

[March 11, Q. B. D.—45 L. T. N. S. 210.]

The above point came up on a question reserved at the Assizes by A. Wills, Q C., Commissioner.

In delivering judgment Mr. Commissioner Wills at first determined that the Statute of Limitation for bringing the action in question expired on June 13th, 1880, which was a Sunday. He then continued as follows :—"It is said that under O. 57, r. 3 (Ont. O. No. 457) the cause of action did nevertheless arise within six years of the commencement of the action. I am o opinion that this rule has no such application in this case. The "time for doing any act" in this rule refers to times limited by the practice of the Court for taking proceedings, and the effect of the rule is, that in the cases to which it is applicable, a proceeding which but for that enactment would not, if taken on Monday, be duly taken according to the practice of the Court, whether established by definite enactment or otherwise, shall nevertheless be held to be duly taken. It certainly was never intended that the provision should affect the Statute of Limitations. The writ in this case was 'duly issued' on the Monday without the protection of Order 57, r. 3, and there is nothing in the enactment to alter the actual date of the commencement of the action."

[NOTE.—*The Imp. and Ont. orders are identical.*]

DAVIES V. WILLIAMS.

Imp. J. Act 1873, *sec.* 90—*Ont. J. Act*, *sec.* 78.

Where an action has been transferred from a County Court into the High Court, the proceedings must thenceforth be regulated by the practice of the High Court. Hence, in an action for ejectment so transferred, discovery cannot be obtained before the delivery of a statement of claim.

[Dec. 17, 1879—45 L. T. N. S 469.]

The point in question is indicated by the head-note, and came up on an application for

discovery made by the plaintiff, before filing any statement of claim, other than the plaint in the County Court from which the action was transferred.

BACON, V. C.—Whatever may be the practice of the County Courts, this Court, into which the action has been transferred, can only deal with the case according to its own practice. Courts know their own practice; they are not bound to know the practice of other Courts. The case has been transferred into this Court that justice may be administered between the parties, but this can only be according to the practice of the Court. That practice is founded on the most just and necessary reasons; and the order I am asked to make would be most oppressive. I do not yet know what are the matters in question between the parties, in respect of which I am called upon to give discovery; and until I do, I cannot accede to such an application as the present.

[NOTE.—*The section of the Imp. Act and that of the Ont. Act seem to be virtually identical.*]

CANADA REPORTS.

ONTARIO.

CHAMBERS.

(Reported by G. S. Holmested, Esq., Registrar of the Court of Chancery.)

DALE v. HALL.

Order for production—Time when plaintiff entitled to.

A plaintiff is entitled to an order for production on præcipe against any defendant whose time for putting in a statement of defence has expired, whether a statement of defence has been put in or not.

[Nov. 14, 15—PROUDFOOT J.

H. Cassels, for plaintiff, applied for a direction to the Clerk of Records and Writs to issue an order for production against the plaintiff under the following circumstances:

Plaintiff's statement of claim had been delivered, and the time for delivery of statement of defence had expired. A statement of defence had been delivered.

He stated that the Clerk of Records and Writs had, after consultation with FERGUSON, J. refused to issue the order on the ground that the pleadings were not closed. He contended that the plaintiff was not bound under Rule 222, to wait until the close of the pleadings, but was entitled to the order against each defendant as soon as the time for each defendant putting in a defence had expired, whether a defence had in fact been put in or not. This had been held to be the proper construction of Rule 222 by the Master in Chambers, in *Clarke* v. *Whiting*, on 24th October, 1881.*

Any other construction of the rule requires the introduction of words into the Rule which are not there. Either the time for putting in the statement of defence can expire when one has in fact been put in, or it cannot. To say that it cannot is manifestly absurd, and if it can, as is obviously the case, then the plaintiff is within the terms of the Rule and entitled to the order.

PROUDFOOT, J., was of opinion that the plaintiff was entitled to the order as claimed; but before disposing of the application desired to consult Ferguson, J.

Nov. 15th. 1881.

After consulting with my brother Ferguson, I am still of opinion (although he retains the opinion expressed by him) that the plaintiff is entitled to the order, and as my brother Ferguson has not given any decision in the matter which can be appealed from, I am bound to follow my own opinion. I may say that I find that there is considerable difference of opinion among the members of the High Court on this point, and it is therefore desirable that it should be without delay settled by an appeal to a Divisional Court.

* In this case *Isaac Campbell* applied on motion to set aside a statement of defence on the ground that an order for production had not been complied with.

A. Hoskin, Q. C., showed cause, contending that the order for production had been granted on præcipe, and was a nullity, as the pleadings were not closed as required by Rule 222.

It was on the other side, however, contended that the order on præcipe could be obtained as soon as defendant put in his statement of defence, and without formal pleadings.

THE MASTER held that the order was good and gave three days further time to produce on payment of costs.

LAW STUDENTS' DEPARTMENT.

RECENT EXAMINATIONS.

The following is the result of the recent examinations at Osgoode Hall:—

CALLS TOTHE BAR--R. S. Neville, E. V. Bodwell, W. C. Hamilton, E. A. Peck, G. W. Beynon, J. H. D. Munson, C. C. Going, F. F. Baines, and F. McDougall, (æq.); A. B. Cox, A. J. Sinclair, G. H. Muirhead, H. Yale, S. Wood, F. P. Graydon, J. Russell, and A. Stewart, (æq.); R. Cassidy, V. Chisholm, G. McLaurin, T. H. Bennett, F. A. Hilton, J. R. Dowlin, and G. H. Smith, A. McKay and W. Proudfoot, G. M. Lee, D. F. McWatt, H. B. Weller, N. Mills.

ATTORNEYS.—J. H. D. Munson, W. C. Hamilton, I. F. Hellmuth, J. L. Geddes, (without oral), E. A. Peck, F. M. McDougall, C. E. Irvine, Arch. Stewart, R. S. Neville, A. J. Sinclair, W. A. McDonald, J. Russell, A. Craddock, A. McKay, W. L. Palmer, G. W. Beynon, R. Cassidy, C. Widderfield, G. H. Muirhead, J. B. O'Brian, G. R. Sanderson, G. McLaurin, R. A. Pringle, J. Harrison, J. H. Ingersoll, J. R. Haney, D. F. McWatt, T. G. Rothwell, W. C. Penny, T. A. O'Rourke, S. G. McGill, V. Chisholm, R. Gilray.

FIRST INTERMEDIATE.—J. D. S. C. Robertson, (scholarship), J. A. Richardson, (scholarsnip), F. J. Palmer (scholarship), A. E. Grier, C. A. Grier (with honours and without oral) W. F. Allan, H. J. Wickham, G. Bolster, R. Christie, A. Carswell, E. L. Curry, W. S. Morphy, W. Cook, and W. A. Proudfoot (æq.); A. Sutherland, J. C. Grace, F. H. Phippen, F. L. Brooke, and A. E. Dixon (æq.); A. W. Morphy, J. McIntosh, W. G. McDonald, J. P. Lawless, H. Spence, H. J. Burdett, E. A. Wismer, James Miller, and W. M. Shoebottom (æq.); J. B. Chambers.

SECOND INTERMEDIATE.—C. L. Mahoney (scholarship), R. S. Cassels (scholarship), J. C. Delaney and A. Foy, (æq.); (scholarships), W. G. Wilson and G. F. Ruttan (with honours), F. W. A. Haultain, W. J. Wallace, D. M. Fraser, R. E. A. Laird, J. A. Culham (without oral), C. R. Irvine, H Canniff and B C. Murchison, (æq.); J. P. Fisher, J. J. O'Meara, C. S. Start, D. H. Tennant, H. C. Mack, J. A. Mulligan G. D. Douglas, J. A. Walker, J. W. Hammond, H. C. Hamilton, J. A. Palmer, F. W. Garvin, M. McDermott.

OBITUARY.

Arthur Holmested, Esq., formerly Clerk of Records and Writs of the Court of Chancery, died at his residence, in Toronto, on the 27th ult., in the 74th year of his age.

Mr. Holmested was born at Bocking, in the County of Essex, in 1808; the son of Mr. Thomas Holmested, a surgeon, a profession which his grandfather and great-grandfather had likewise practised in the same place. He studied law in England, and was admitted as an attorney of the English Courts, and for a short time practised his profession in London, England. He afterwards turned his attention, however, to other pursuits, and in 1857 emigrated to Canada and took up his abode in Toronto. In December, 1857, he obtained employment as a clerk in the Registrar's office of the Court of Chancery, and in 1868, when the Records and Writs department was separated from the other duties of the Registrar's office, he was appointed by the judges as the first Clerk of Records and Writs of the Court. This office he held until the autumn of 1880, when being incapacitated by a stroke of paralysis, he resigned his office. From this attack Mr. Holmested never fully rallied, but though his mind suffered from a temporary cloud, he gradually recovered his faculties of speech and memory which he retained until within a few moments of his end. He leaves a widow and five sons and three daughters. His son, Mr. G. S. Holmested, is now the efficient Registrar of the Court of Chancery.

Mr Holmested was an excellent officer, and by his strict attention to his duties and courteous demeanour won the respect and confidence of all those with whom he came in contact.

LIST OF ARTICLES OF INTEREST IN CO-TEMPORARY JOURNALS.

Crimes against the elective franchise.—*Crim. Law Rev.*, July, 1881.

Judicial problems relating to the disposal of insane criminals.—*Ib.*, Sept, *et seq.*

Misconduct of juries.—*Southern Law Rev.*, Oct., 1881.

Title from fraudulent vendors of chattels.—*Ib.*

Liability of servants for negligent injury to co-servant.—*Irish L. J.*, Sept. 24., *et seq.*

Negotiable note signed by public agent.—*Albany L. J.*, Oct. 22.

State Legislation and charity organization.—*Ib.*, Oct. 29.

Street railroads—their origin, organization, compensation, location, and liabilities.—*Ib.*, Nov. 5.

Contracts for sale under Lord Cairns' Conveyancing Act.—*London L. J.*, Oct 15, 22.

Challenge to the array.—*Am. Law Rev.*, Nov.

Insanity as a defence.—*Ib.*

The law of domicile in connection with the right of succession to both personal and real estate.—*Am. Law Reg.*, Nov.

The law of bicycles and tricycles.—*London L. J.*, Oct 29.

Dormant partners.—*Central L. J.*, Nov. 11.

Imputed negligence.—*Ib.*, Nov. 18.

Law Society of Upper Canada.

OSGOODE HALL.

TRINITY TERM. 45TH VICT.

During this Term the following gentlemen were called to the degree of Barrister-at-Law. The names are placed in the order of merit:—

CALLED WITH HONOURS.

John Henry Mayne Campbell.

CALLED.

George Anthony Watson, John Sanders Macbeth, Horace Edgar Crawford, George Gordon Mills, Jeffrey Agar McCarthy, Charles Miller, Allan McNab, James Scott, Conrad Bitzer, William Elliott Macara, Samuel George McKay, James Brock O'Brian, Frederick Herbert Thompson, Frederick William Kittermaster, Alexander Ford, James Walter Curry, Edward Norman Lewis, Frederick Case, Abraham Nelles Duncombe, William Franklin Morphy.

The following gentlemen who passed their examination in Easter Term, 1881, were also called to the Bar this Term:—

Frederick Faber Harper, Solomon George McGill.

The following gentlemen were admitted into the Society as Students-at-Law, namely:—

GRADUATES.

Hugh St. Quentin Cayley, William Durie Gwynne, Thomas Chalmers Milligan, Alpin Morrison Walton, Douglas Armour, Thomas B. Bunting, Walter Laidlaw, Thomas Joseph Blain, George Washington Field, Samuel Clement Smoke, Henry Herbert Collier, Frederick W. Hill, Charles William Lasby, John Bell Jackson, James Metcalf McCallum, Thomas Edward Williams, George Morton, Frederick Ernest Nellis, Alexander Cameron Rutherford, Frank Henry Keefer, Lucius Quincy Coleman, Henry Thomas Thibley, Joseph Wesley St. John, John Douglas.

MATRICULANTS OF UNIVERSITIES.

Edward W. Hume Blake, Herbert Carlton Parks, Edward Charles Higgins, William H. Holmes, R. S Smith, John Wesley White, John Paul Eastwood.

JUNIOR CLASS.

William Murray Douglas, George Marshall Bourinot, Thomas Urquhart, Alexander William Matquis, John Bell Dalzell, Osric L. Lewis, Frederick Stone, Alexander David Hardy, Donald James Thomson, Joseph Coulson Judd, Parker Ellis, John O'Hearn, Francis McPhillips, Henry Clay, Robert Casimir Dickson, Arthur Clement Camp, John Carson, Douglas Harington Cole, Thomas Steele, Andrew Charles Halter, Matthew Joseph McCarron, Robert G. Fisher, Charles Meek, W. H F. Holmes, Paul Kingston, Harry George Tucker, Richard Vanstone.

And the Preliminary Examination for Articled Clerks was passed by William Mansfield Sinclair.

RULES

As to Books and Subjects for Examination.

PRIMARY EXAMINATIONS FOR STUDENTS AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

All other candidates for admission as articled clerks or students-at-law shall give six weeks notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects:—

Articled Clerks.

1881.
- Ovid, Fasti, B. I., vv. 1-300; or, Virgil, Æneid, B. II., vv. 1-317.
- Arithmetic.
- Euclid, Bb. I., II., and III.
- English Grammar and Composition.
- English History—Queen Anne to George III.
- Modern Geography—N. America and Europe.
- Elements of Book-keeping.

In 1882, 1883, 1884 and 1885 Articled Clerks will be examined in the portions of Ovid or Virgil, at their option, which are appointed for Students-at-Law in the same year.

Students-at-Law

CLASSICS.

1881.
- Xenophon, Anabasis, B. V.
- Homer, Iliad, B. IV.
- Cicero in Catilinam, II., III., IV.
- Ovid, Fasti, B. I., vv. 1-300.
- Virgil, Æneid, B. I., vv. 1-304.

1882.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. VI.
- Cæsar, Bellum Britannicum, (B. G. B. IV. c. 20-36, B. V., c. 8-23.)
- Cicero, Pro Archia.
- Virgil, Æneid, B. II., vv. 1-317.
- Ovid, Heroides, Epistles V. XIII.

1883.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. VI.
- Cæsar, Bellum Britannicum.
- Cicero, Pro Archia.
- Virgil, Æneid, B. V., vv. 1-361.
- Ovid, Heroides, Epistles V. XIII.

1884.
- Cicero, Cato Major.
- Virgil, Æneid, B. V., vv. 1-361
- Ovid, Fasti, B. I., vv. 1-300.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. IV.

1885.
- Xenophon, Anabasis, B. V.
- Homer, Iliad. B. IV.
- Cicero, Cato Major.
- Virgil, Æneid, B. I., vv. 1-304.
- Ovid, Fasti, B. I., vv. 1-300.