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A SUBSCRIBER suggests an alteration in long vacation, by making it commence somewhat later on in the summer. There is much to be said in favor of his view. It is worthy of discussion, and doubtless the Judges would be glad to hear the view of the profession on the subject, that they might take such action as would be in their general interests.

AMERICAN BAR ASSOCIATION.

The American Bar Association held their annual meeting in Chicago in August. David Dudley Field presided, and his opening address is full of information and good things. Of the forty-two States and five Territories comprised in the Republic (he tells us), all but eight have now biennial instead of annual meetings of their Legislatures. During the year the local law makers enacted ten thousand laws, to which multitude the gentlemen of Congress added 517. Truly a goodly number; yet "it is worthy of remark that in all this multitude of enactments there are few, very few indeed, of general interest": much sack, little bread. Strange to say, Mr. Field does not think the change to biennial sessions a wise one; it is engendered by "a general disrespect for Legislatures." He does not agree with Dr. Sangrado, who says, "When the body is sick the blood is sick. Take from the patient half his sick blood, and he is but half as sick as he was." He does not consent to the argument that as the Legislatures do more harm than good when they meet, therefore, cut their years of meeting to one-half, and, presto! but half the mischief. He believes his countrymen can still elect honest representatives: "The upright citizens, they who desire honest government, are an immense majority of the American people; the politicians are a timorous set, who will cower and run the moment they hear the growl of the people."

His ideals of a true lawyer are high. "He is a minister of justice. Upon him and his brethren, more than upon any equal number of citizens, depends the good order of the State. . . . The lawyer is, and must always be, first in a free and peaceful nation. Of the twenty-two Presidents, eighteen have been lawyers; a majority of Senators have come from that profession," and the legal element

in the House of Representatives is strong. These things being so, Mr. Field rightly remarks (and his words apply with equal force to our own Dominion, where the lawyer is almost as prominent), the training and discipline of lawyers and their notions of duty and honour are matters of concern to the whole body politic. Whatever may tend to elevate them in their own just estimation, or in that of the public, and the better enable them to understand their true calling and prompt them to fulfil it, should be the study of their lives.

The duties of lawyers to their clients and the courts are given in the language of the Code of Civil Procedure for New York, and chiefly copied from the old Genevan oath. They are, "To support the Constitution and laws of the United States and of this State. To maintain the respect due to the courts of justice and judicial officers; to counsel and maintain such actions, proceedings, or defences only as appear to him legal and just, except the defence of a person charged with a public offence; to employ for the purpose of maintaining the causes confided to him such means only as are consistent with truth, and never seek to mislead the judges by any artifice or false statement of law or fact; to maintain inviolate the confidence, and at every peril to himself to preserve the secrets, of his clients; to abstain from all offensive personality, and to advance no fact prejudicial to the honour or reputation of a party or witness, unless required by the justice of the cause with which he is charged; not to encourage either the commencement or continuance of an action or proceeding from any motive of passion or interest, and never to reject for any consideration personal to himself the cause of the defenceless or the oppressed." These are, truly, apples of gold in pictures of silver, and worthy to be taught diligently to our students-at-law, to be talked of at all times, to be bound as a sign upon the hnad, to be written upon the posts of the house and on the gates of every practitioner.

Mr. Field thinks a lawyer is bound to deliver his opinion to every comer, with this qualification, however, that if he knows that his opinion will be abused for unlawful or unjust purposes, he should withhold it. He admits that his craft does not rigidly perform the duties due to the State. These are his words: "We (the Americans) are a boastful people; we make no end of saying what great things we have done and are doing,and yet behind these brilliant shows there stands a spectre of halting justice such as is to be seen in no other part of Christendom. So far as I am aware there is no other country calling itself civilized where it takes so long to punish a criminal and so many years to get a final decision between man and man. Truly may we say that justice passes through the land on leaden sandals." Yet for the sixty millions in the United States there are nearly seventy thousand lawyers, while France with her forty millions has but eight thousand four hundred, and Germany with forty-five millions has only seven thousand. "Is it any wonder that a cynic should say that we American lawyers talk more and speed less than any other equal number of men known to history." (On the other hand, the editor of the Albany *Law Journal* says: "There is no country in the world where there is less criminal violence and where human life is safer than in England, and the reason is the promptness, certainty, and severity of punishment.")

"The marvels of iteration and expansion, centuries old, musty and rusty," of legal documents are very objectionable to Mr. Field. Life is too short and patience too weak for "words, words, words." Cataracts of words are not pleasing to him. He insists that it is the duty of the lawyer to help remove patent defects in jurisprudence, from time to time to improve the law, and to help diffuse among the people a knowledge of all the law of the land. He does not adore the Common Law; thinks the laws at present are in a chaotic state, that they require and must have, sooner or later, applied to them a process of elimination, a process of condensation, and a process of classification. In fact he demands a code, that all the people of the land may know the law, and know it before they get into it. It seems strange after so much has been said in favour of codification, that out of the forty-two States of the Union there are but five—California, North and South Dakota, Georgia, and Louisiana — which have attempted to give to their citizens the whole body of their laws.

Much of what is said in this address is as worthy of the attention of the members of the Law Society of Upper Canada as of the American Bar Association. R.

THE NEW EMPLOYERS' LIABILITY BILL FOR GREAT BRITAIN AND IRELAND.

Sir Frederick Pollock has observed, with not less truth than wit, that the law of England consists of groups of statutes, floating like islands in an ocean of cases. The history of the Employers' Liability Act, 1880, and of the amending Bill which was last year revised by the Standing Committee of Law, and will soon, it may be hoped, receive the Royal assent, is an admirable illustration of the great English jurist's simile.

According to the common law of England—affirmed by a series of decisions from *Priestly* v. *Fowler*, in 1837, downwards—a master was not answerable to one servant for an injury arising from the negligence or misconduct of another in the same "common employment," upon the ground that the possible negligence of a fellow-servant is a risk which every employee deliberately undertakes to run, and of which, therefore, upon the venerable authority of the maxim, *volenti non fit injuria*, he has no legal right to complain. This doctrine of common employment, in its extreme form, the Scotch courts refused to recognize, till it was made binding upon them by the decision of the House of Lords, on appeal from the Court of Session, in the case of the *Bartonshill Coal Co.* v. *Reid* in 1858. In that case, the deceased, a miner in the employment of the appellants, was being drawn up the shaft in the cage or cradle of the works by a fellow-servant, Shearer. This man failed to stop the engine at the proper time. The cage, sent with great force against the scaffolding, was overturned, and the unfortunate Reid, precipitated from the height of fifty feet, was immediately killed. The Scotch judges held that Shearer was not a fellow-workman of the deceased, because their work was quite different in character—the one excavating coal, the other managing

machinery—and drew the very fine distinction between "common employment" and "superintendence," to which the Employers' Liability Act, 1880, subsequently gave an imperfect expression. Reid's representatives, therefore, recovered damages against the company, and the company appealed to the House of Lords, whose judgment reversed the decision of the Court below, and definitely incorporated the doctrine of "common employment" into the law of Scotland. "Where several workmen," said Lord Cranworth, "engage to serve a master in a common work, they know, or ought to know, the risks to which they are exposing themselves, including the risk of carelessness against which their employer cannot secure them, and they must be supposed to contract with reference to such risks. To constitute fellow labourers it is not necessary that the workman causing, and the workman sustaining, the injury should both be engaged in perfectly the same or similar acts. The driver and guard of a stage coach, the steerer and rower of a boat, the workman who draws the red hot iron from the forge and those who hammer it into shape, the engine-man who conducts a train and the man who regulates the signals, all are engaged in common work."

Public attention, however, had been aroused; a few instructive object-lessons on the hardship of the rule were given; and after the inevitable Committee of Enquiry had been appointed and reported, and the abortive measure, which seems an almost necessary prelude to useful legislation in this country, had been duly introduced and withdrawn, the Employers' Liability Act, 1880, passed into law. The provision of that modest enactment is well known to every student of law, and need not be here described. Perhaps no modern statute, with the exception of those—happily unfamiliar to colonial lawyers—which regulate bills of sale, has given rise to such difficulties as the Employers' Liability Act, 1880.

Ostensibly aimed against the doctrine of "common employment," its attack upon that doctrine was a mere half-hearted repudiation of some of its crudest applications. No new regulating principle was enunciated. No adequate definition of even its own terminology was offered; and the procedure by which the statutory remedies were to be enforced was technical and unsatisfactory to the last degree. The result was inevitable. In a few years an ocean of cases had submerged the little island raised by the ingenuity of the legislature as a basis for the doctrine of employers' liability, and the reign of chaos was restored. The new Employers' Liability Bill, now in a state of suspended animation, and ready to replace the statute of 1880, whose sickly existence has been prolonged to the 31st of December of this year by an Expiring Laws Continuance Act, is a much more satisfactory measure than its predecessor.

The following summary may serve the double end of emphasizing the defects of the old law and illustrating the mode in which it is now proposed to remedy them.

1. The benefits of the new Act are extended to tramway servants.*
2. A workman is not to be deemed to have incurred the risk of injury volun-

* In the case of *Cook* v. *The North Metropolitan Tramway Co.*, 18 Q.B.D. 683, it was held that a tramcar driver was not a workman within the meaning of the Employers' Liability Act, 1880.

tarily, only because he continued in the employment of his employer with knowledge of the defect, negligence, act or omission, which caused his injury.*

3. An action will now lie against the representatives of a deceased employer.

4. Contracts surrendering the benefits of the Act are void† unless made in pursuance of a request in writing by the workman, and unless it be shown that the employer undertook to make, so long as the workman continued in his service, an adequate contribution to the insurance of the workman, and has duly fulfilled such undertaking. On an application by a workman or the employer of a workman (*a*) in any coal mine, metalliferous mine, factory, or workshop, or (*b*) in any other employment, a Secretary of State in the former case, and the Board of Trade in the latter, may decide whether a proposed contract is good, and not that contract alone but other similar contracts shall be governed by the decision without further proof.

5. The benefits of the Act are extended to seamen, except that if a seaman is injured elsewhere than in a port of the United Kingdom, (*a*) the employer is not liable unless the injury arose from a defect in the condition or equipment of the ship, existing at the time when she last proceeded to sea from a port in the United Kingdom, and the defect or failure to discover it arose from the negligence of the employer or some person entrusted by him with authority on that behalf, and (*b*) it shall be a valid defence for the employer to show that the ship or its equipment was in accordance with the rules of the Board of Trade at the time of last proceeding from a port in the United Kingdom.

That the new Act will not itself be affected by the involuntary legislation which suitors initiate, cannot of course be affirmed, but it appears to be a well-drafted and comprehensive measure, framed with an intelligent appreciation of the defects of the existing law.

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THE CURRICULUM OF THE LAW SCHOOL.

At last the Law School, so long in contemplation and the theme of such manifold discussions, is about to become an accomplished fact. The learned Principal, after a tour of investigation among similar institutions in the United States, and with such assistance as he has been able to avail himself of, has the satisfaction of seeing the institution over which he is to preside assume definite form. A curriculum and course of instruction for the school have been drawn up, submitted to the Legal Education Committee, recommended by that committee for the consideration of Convocation, and finally approved by that body and issued for the information of those interested in the school.

We are glad that the scheme is at last practically in operation, and that the Law Society is for the future to be something more in relation to legal education

*This provision gives legislative validity to the decision in *Thrussell* v. *Handyside*, 20 Q.B.D. 359.

†C.P. *Griffiths* v. *Lord Dudley*, 9 Q.B.D. 157.

than a mere organizer of examinations. If the legal profession is to keep abreast of other learned professions and of the community, instruction in law is a necessity, and under existing circumstances all attempts at securing such instruction from other sources than the Law Society have been abandoned.

One cannot help remarking that, so far as can be learned from the curriculum, no changes have been made in the requirements for entrance into the Society. We have before now strongly urged the great need of a higher standard of literary qualification for admission as a student-at-law or articled clerk. The legal profession admits students of lower scholastic attainments than any other learned profession in this Province. We sincerely hope that along with the general revision of the curriculum which has come with the inauguration of the Law School we shall have a complete revision of the qualifications for entrance on the study of law, and that knowledge and training worthy of the profession will hereafter be required.

The new curriculum is, as regards the books to be read and the subjects to be studied, a decided improvement on its predecessor. Among the works added to the course are Kerr's Student's Blackstone, 4 vols., Deane's Principles of Conveyancing, Leake on Contracts, Bigelow on Torts, H. A. Smith's Principles of Equity, Powell on Evidence, Bourinot's Manual of the Constitutional History of Canada, Lewin on Trusts, Pollock on Torts, Smith on Negligence, Chalmers on Bills, Westlake's Private International Law, and Hardcastle's Construction and Effect of Statutory Law. Those who, like ourselves, think that some attention should be given to the science of jurisprudence, the foundation and development of law, Roman law, and comparative jurisprudence, will be disappointed. One would think that those engaged in a calling which lays claim to the dignity of a learned profession should know something of the scientific aspect of the various subjects within the field of that profession.

Every Canadian, and *a fortiori* every Canadian lawyer, should be versed in the constitutional history of his country. We are glad that a manual on the subject has been placed in the curriculum, and that its teachings are to be supplemented by lectures and by the study of the B.N.A. Act and the cases under it. If the primary examination included a thorough knowledge of Canadian history generally, there would be a much better prospect of thoroughness in constitutional history and law.

One of the objections heretofore strongly urged against any scheme under which the universities would do most, if not all, of the teaching in the principles of law and leave the Law Society to furnish practical training, was that under such a division of the work, so much of the student's time would be taken up in making theoretical acquisitions that it would be impossible for him to become even fairly familiar with the practice of the profession. It seems to us that the curriculum of the Law School may be open to the same objection. The time of every student will be taken up during the term with the lectures, discussions, questions, etc., of the school for two hours daily, and these hours are so arranged as to interfere seriously with any office work that a student might feel disposed to do. The time of attendance, *i.e.*, from the fourth Monday in September until

the first Monday in May in each of the last three years of the time spent under articles, is to be counted as service under articles, and it is further declared in the curriculum that "during his attendance in the school the student is recommended and encouraged to devote the time not occupied in attendance upon lectures, recitations, discussions or moot courts, in the reading and study of the books and subjects prescribed for or dealt with in the course upon which he is in attendance. As far as practicable students will be provided with room and the use of books for this purpose." Some provision is made, however, to remove the difficulty. Moot courts are to be held. In the first year of the course two hours on every alternate Friday, and in each of the following years two hours every Friday, are to be spent in this way. As far as one can judge from the somewhat meagre information supplied by the curriculum, the moot court will be a weekly argument on a case to be stated by the Principal or Lecturer, who is to preside, and it will be upon upon the lectures then in progress. Two students on each side of the case will be appointed by the Principal or Lecturer to argue it. This exercise seems to be about the same in character and value as a legal debating club in which the subjects are assigned by the chairman, and it is compulsory to take one's turn. A graduate's only other chance of gaining a knowledge of the practice, if he is in Toronto, is from May to October in each year under articles, and this time is broken in upon by the long vacation. He will, for all practical purposes, have spent rather less than nine months in an office, excluding long vacations, and will have taken part in arguments with a frequency varying inversely as the numbers in attendance. The five-year man will have the somewhat questionable advantage over his more scholarly fellow-student of having spent two years in an office before acquiring any law. Much may be done by the Principal and Lecturers to remedy what, if the school were carelessly conducted, would be a serious evil. Cases may be stated in which the student may be required to issue writs, draw pleadings, suggest amendments, and a score of other things all tending to give practical skill. We point out the danger, not because we are sure that it is inevitable, but because, ardently desiring the success of the school, we wish the evil to be guarded against. The enthusiasm, judgment and skill of the Principal and Lecturers will, we doubt not, be exercised to avert it.

Another phase of the same matter is the effect of the school, as organized, on the office routine of the legal practitioner. Here, we think, the result will be some inconvenience, with much permanent good. Many lawyers in active practice have encouraged young men to study law, rather than discouraged them, the object being to secure help in doing the routine work of the office. The absence of the law student for nearly eight months of the year, during the last two or three years of his indentures, must detract materially from his value as an office assistant, and young lawyers and paid clerks will probably find themselves in greater demand. Salaried students will also cease to be. There will be some increase in the student's outlay in all cases, and in many instances a material increase. There will probably be a diminution of the number entering the profession. Possibly some of the evils of over-crowding may be removed. The effect

on the larger firms may be to increase their expenses, on the smaller and newer ones to increase their work and income.

The attendance at lectures is compulsory, a faithful record of those present being kept; and a student, in order to have his name certified to the Legal Education Committee, must appear by the record to have duly attended at least five-sixths of the aggregate number of lectures, including moot courts, and at least four-fifths of the number of lectures, including moot courts, of each series delivered during the term and pertaining to his year. Special cases arising from illness or similar cause are to be investigated by the Principal and reported upon by him to the Committee. The examinations are to be held immediately after the close of the term, upon the subjects and text-books embraced in the work of that term and laid down in the curriculum. Special examinations are also to be held early in September for students who were not entitled to present themselves in May, or who then failed to pass their examination. The examination of each term must be passed before entering on the work of the succeeding one, and the final examinations of the school are to entitle the student to be called to the Bar or admitted as a Solicitor without further examination.

It has been announced that two Lecturers have been appointed at a yearly salary of $1 500 each, and two examiners at a salary of $700 each for the first year. A salary of $500 was at first proposed for the examiners, but it was concluded that as they would have more than two examinations per year for some time to come, on account of the number of students exempt from attendance at lectures and entitled to take them at the old times, this should in the meantime be increased. We think that, having regard to their respective duties, the examiners are better paid than the lecturers. The time of the latter will be badly broken into by lectures during those portions of the day most valuable for professional work. It seems to be intended that the Principal shall deliver one-half, and each of the Lecturers one-fourth, of the whole number of lectures in each year. With this object the subjects of each term are divided into four groups, each being the basis of a series of lectures. Two of these series are to be taken up by the Principal and one by each of the Lecturers; and, though it is not definitely stated, it would seem to be implied that only one series of lectures will be in progress in each year at the same time. This will give each Lecturer two hours' work per day while his lectures are in progress. Since the Principal is to do twice as much work as either of the Lecturers, it follows that each Lecturer will lecture in the aggregate for only one-half of the term, and the Principal must lecture on the average four hours per day.

Our readers must have observed that, as the new rules were originally drawn up, the attendance at the school must of necessity have been very small. By far the greater number of those now on the books of the Law Society were exempt, wholly or in part, from attendance. We have already summarized these exemptions (see *ante* p. 357). It appears to have been decided by the Law Society, at the last moment almost, that these exemptions were too numerous, and that, if the officers of the school were to have anything to do during the present term,

the exemptions must be reduced in number. Accordingly, at a meeting of Convocation held on September 21st, certain Rules were passed, of which the Secretary was instructed to give the students immediate notice. The object of these Rules is to increase the attendance during the first term of the school. This result is sought in three ways. All students and articled clerks in Toronto who are entitled to present themselves for either the first or second Intermediate Examination in any term before Michaelmas Term, 1890, must attend the school during the session of 1889-90, and take the examination at the end of the school term. All students and articled clerks outside of Toronto who are entitled to present themselves for either the first or second Intermediate Examination in any term before Michaelmas Term, 1890, may attend the school during the session of 1889-90, and take the examination at the end of the school term. Honours and scholarships on the first and second Intermediate Examinations are to be awarded only at the examinations of the Law School, and the number of scholarships is increased, there being one of one hundred dollars, one of sixty dollars, and five of forty dollars. The Legal Education Committee may, under special circumstances, relieve any student or clerk from compulsory attendance under the Rule of 21 September. The session will not begin this year until 7 October. The attendance will be somewhat small for two years, notwithstanding the recent change. Then numerically the school will become a flourishing institution, and we hope that it will leave lasting monuments of its usefulness in the profound legal scholarship and distinguished career of many of its pupils.

COMMENTS ON CURRENT ENGLISH DECISIONS.

We continue the Law Reports for July comprised in 23 Q.B.D., pp. 1-135; 14 P.D., pp. 73-85; and 41 Chy.D., pp. 213-438.

INFANT—GUARDIAN—NATIONALITY—ALIEN—FRENCH SUBJECT—NATURALIZATION.

In re Bourgoise, 41 Chy.D. 310, was an application to appoint a guardian to some infants resident in France who were entitled to a considerable amount of personal property in England. Before his marriage, the father of the infants, who was a Frenchman, came to reside in England in 1871 and obtained the usual qualified certificate of naturalization as a British subject under The Naturalization Act of 1870, s. 7, but he did not obtain the consent of the French Government to his becoming naturalized as a British subject. In 1880 he married an English lady and then returned to France where he resided until his death on 18th August, 1886. His will was made in French form, and by it he gave his residuary estate, which included considerable personal estate in England, to his widow for life, with remainder to his children, the infants in question; the widow died and a guardian was appointed to the infants by the French Courts. Kay, J., refused to interfere by appointing a guardian in England, because he considered the father was at the time of his death a French subject, and therefore the Court had no

jurisdiction; and the Court of Appeal (Cotton, Lindley, and Bowen, L.JJ.) thought, irrespective of the question whether the father had not been duly naturalized, that as the children had been born in France and were resident in France, and the French Court had assumed jurisdiction over them by appointing guardians for them, the English Courts should not interfere.

PRACTICE—SOLICITOR—ACTION ON UNTAXED BILL.

In *Lumley* v. *Brooks*, 41 Chy.D. 323, a question was raised as to the proper form of a judgment to be entered in the action, which was brought on a solicitor's untaxed bill. The defendant had pleaded a counter claim, but no one appeared for him at the trial. The plaintiff proved his retainer. Kay, J., held that the bill must be taxed, and to this the defendant did not object, but asked to have judgment for the amount to be found due; but Kay, J., made a simple order for the taxation, reserving further directions and costs. This the Court of Appeal (Cotton, Lindley, and Bowen, L.JJ.) were of opinion was less than the plaintiff was entitled to, and they varied the judgment by dismissing the counter claim with costs, ordered the bill to be taxed, and defendant to pay plaintiff the amount the master should certify to be due, together with the plaintiff's costs of the action.

SOLICITOR—COSTS—TAXATION—BILL DELIVERED MORE THAN TWELVE MONTHS—SOLICITOR'S ACT, 6 & 7 VICT., C. 73 S. 37—R.S.O., C. 147, S. 34.

In re Park, Cole v. *Park*, 41 Chy.D. 326, is another decision relating to the taxation of a solicitor's bill. In this case the action was brought to administer a deceased person's estate; and a firm of solicitors brought in a claim for £221, 3s. 1d., as the balance due on certain bills of costs delivered by them to the testator more than twelve months before his decease. The executor disputed some of the charges, and the Chief Clerk decided to refer the bill to a taxing master, from which decision the solicitors appealed, and Sterling, J., though of opinion as twelve months had elapsed since delivery and no special circumstances were shown, the bill could not be referred to taxation under the Solicitor's Act; yet, notwithstanding, it should be referred to the Taxing officer to inquire and state whether any and which of the particular items objected to, were fair and proper to be allowed, and to what amount. The Court of Appeal (Cotton, Lindley, and Fry, L.JJ.) sustained his order.

PRACTICE—AMENDMENT—ADDING PLAINTIFF—ORD. 16, R. 2—(ONT., RULE 445).

In *Ayscough* v. *Bullar*, 41 Chy.D. 341, the Court of Appeal (Cotton and Lindley, L.JJ.) reversed a decision of North, J., on a point of practice. The action was brought to enforce a restrictive covenant against building in a particular manner. After the commencement of the action, the plaintiff was advised that as her property had, after the making of the covenant in question, become vested in the covenantor through whom she derived title, there might be some difficulty on that account, in the way of her maintaining the action, and she applied for leave to amend by adding as a co-plaintiff the proprietor of an adjoin-

ing property, who was entitled to the benefit of the covenant. North, J., refused the amendment; but the Court of Appeal thought there had been a *bona fide* mistake in bringing the action in the name of the plaintiff instead of the person proposed to be added, and therefore allowed the amendment, but terms were, however, imposed that the original plaintiff should pay the costs of the application, and also the costs of the action up to the time of the amendment, if it should appear at the trial she was not entitled to maintain the action; and further, that the party added should only be entitled to such relief as he could have got had the action been commenced at the date he was added as a party.

PROSPECTUS—MISREPRESENTATION—ACTION OF DECEIT—CIRCULAR TO CORRECT ERROR IN PROSPECTUS.

Arnison v. *Smith*, 41 Chy.D. 348, is a decision of the Court of Appeal (Lord Halsbury, L.C., and Cotton and Lindley, L.JJ.) affirming a decision of Kekewich, J., which, to some extent, follows on *Peek* v. *Derry*, 37 Chy.D. 541, which is assumed to be good law, but the recent reversal of that case by the House of Lords (see *English Law Times*, 6th July, 1889) will make it necessary for the practitioner to reconsider this decision by the light of the principles laid down by the Lords in *Peek* v. *Derry* before relying on it as an authority. In this case the misrepresentation in the prospectus was that £200,000 of share capital had been subscribed, when in fact it had only been allotted in fully paid-up shares to the contractor for the construction of the Company's works. Subsequently another circular was issued to the allottees of stock, which, amid statements about other matters, stated the truth as to the matters misrepresented, but did not admit the misrepresentation nor inform the allottees that they could retire and get back their money. The concern having proved a failure, some of the allottees sued the directors for misrepresentation, and they were held entitled to recover; but in the absence of any fraudulent intent being established we very much doubt whether this case can now be considered to be good law. According to the House of Lords, a misrepresentation, in order to be actionable, must have been made either (1) knowingly, (2) without belief in its truth, or (3) recklessly and without care whether it be true or false. Some of the plaintiffs failed to appear at the trial, and Kekewich, J., ordered them to pay the defendant's costs occasioned by their being joined as plaintiffs; the Court of Appeal, however, varied the judgment as against these plaintiffs by making it without prejudice to their bringing a new action.

MORTGAGE—PROVISO FOR REDUCTION OF INTEREST—ACCOUNTS—RIGHT TO HIGHER RATE OF INTEREST—MORTGAGEE IN POSSESSION.

In *Bright* v. *Campbell*, 41 Chy.D. 388, a mortgagee went into possession when there was no interest in arrear, and received the rents and profits which he applied in reduction of the amount due on the mortgage. The mortgage contained a covenant in the usual terms, whereby the mortgagee agreed to accept a lesser rate of interest on punctual payment. In taking the accounts of the mortgagee in possession, the question arose whether, under the circumstances, the mortgagee was bound to accept the lesser rate of interest. Kay, J., (following *Union*

Bank v. *Ingram*, 16 Chy.D. 53, and *Cockburn* v. *Edwards*, 18 Chy.D. 449, 457) held that the covenant did not apply to a receipt of rents by a mortgagee, and therefore that he was entitled to the higher rate, notwithstanding the covenant. He doubted, however, whether he would have independently come to the same conclusion.

DOMICIL—INTESTACY—LEX LOCI—LEASEHOLDS—DEVOLUTION OF UNDISPOSED OF ENGLISH LEASEHOLDS BELONGING TO DOMICILED SCOTCHMAN.

Duncan v. *Lawson*, 41 Chy.D. 394, was a case submitted by a Scotch Court, the question being, by what law of devolution certain English leaseholds undisposed of by the will of a domiciled Scotchman were to be governed, whether, as other personal property, by the law of the domicil, of the testator, or as realty by the *lex loci rei sitæ*. Kay, J., determined that they were governed by the latter, and therefore the persons beneficially entitled to take, were the next of kin of the testator, according to the English Statute of Distributions.

COMPANY DEBENTURE MORTGAGE—IMPLIED POWER OF SALE—CONVEYANCING AND PROPERTY ACT, 1881 44 & 45 VICT., C. 41, S. 19, R.S.O., C. 102, S. 18.

In Blaker v. *Herts & Essex Waterworks Co.*, 41 Chy.D. 399, the plaintiffs were mortgagees of the defendant Company's works, etc., under certain debentures issued by them, and the plaintiffs claimed by virtue of the Conveyancing and Property Act, 1881, s. 19 (R.S.O., c. 102, s. 18) that a power of sale was implied in their mortgage, which they claimed the right to enforce, but Kay, J., was of opinion that as the waterworks undertaking was for a public purpose and not a mere private undertaking, the principle of the decision in *Gardner* v. *London, Chatham & Dover Ry.*, 2 Chy., 201, was applicable, and that the debentures did not confer on the holders a power to sell the undertaking; and he therefore refused to direct a sale, or to continue the appointment of a manager who had been appointed upon an interlocutory application in the action, but he directed the usual accounts and inquiries and appointed a receiver.

WILL—CONSTRUCTION—SURVIVOR.

In re Roper, Morrell, v. *Gissing*, 41 Chy.D. 409, Chitty, J., was called on to construe a will, whereby a testator bequeathed a sum of money to be invested in consols to provide annuities of a specified amount for his widow and four children, and directed that on his widow's death her annuity was to be distributed among his four children; and if either child died, then one-fourth of the fund of consols was bequeathed to the child or children of the deceased child absolutely, and in the event of either of his children dying without issue, he gave the "fourth part or share to which the children of such dying child would have been entitled, unto the survivors of my said children in equal shares." The will contained a residuary gift. One of the testator's children survived the rest, and the question arose on his death, who was entitled to his one-fourth of the fund? Chitty, J., decided that he had become absolutely entitled to the fund as the longest liver, and consequently that his fourth belonged to his representatives.

POWER OF APPOINTMENT—EXERCISE BY WILL—CONTRARY INTENTION—WILLS ACT 1 VICT., C. 26 S. 27—(R.S.O. C. 109, S. 29).

In re Philips, Robinson v. *Burke*, 41 Chy.D. 417, Chitty, J., had to determine whether a power of appointment had been executed by will, whereby the testator gave all his leasehold estates and personal estate and effects whatsoever and wheresoever to his executors in trust in favor of other persons than those entitled in default of appointment. The settlement which contained the power of appointment was made by the testator in 1880 and provided that the trustees were to hold the property subject as he might order and direct in writing (but not by will, unless he should expressly refer therein to the trust premises) and subject thereto, in trust for R. and her children. The will was dated before the settlement, viz.: in 1879. Under these circumstances, and having regard to the terms of the settlement, Chitty, J., was of opinion that the power was not executed by the will.

PRINCIPAL AND SURETY—RELEASE OF SURETY—TIME GIVEN TO PRINCIPAL DEBTOR.

The only remaining case to be noted is *Clarke* v. *Birley*, 41 Chy.D. 422. In this case the principal debtors and six sureties had given a deed in December, 1872, to the bankers of the principals, covenanting to pay to the bank the balance due by the principals, not exceeding £25,000. In January, 1876, there being then about £26,000 due from the principals, one Heath agreed to pay off £15,000 of the amount, upon the terms that he should be entitled to a charge on certain deeds held by the bank to secure the repayment of the £15,000, and also the benefit of any covenant contained in the deed of December, 1872, except so far as it imposed any burden on the sureties, and the sureties were discharged from any liability for the £15,000 paid by Heath. It was claimed that this agreement had the effect of reducing the liability of the sureties to the Bank to £10,000, as regards any balance which might thereafter become due to the Bank; but North, J., held, that though they were thereby discharged from liability to the extent of £15,000 of the balance due, they nevertheless remained liable to the extent of £25,000 in respect of any future balance accruing due to the Bank. Three of the sureties and a third person subsequently gave the bank a continuing guarantee to the amount of £8,000, of which the sureties were liable for £2,500 each, in consideration of the bank for one year continuing to make advances to the principals. The principal debtors were not parties to the arrangement, nor did the creditors execute the agreement, though they acted on it. It was contended by the other sureties who were not parties to it, that they were released because the agreement had the effect of giving time to the principals; North, J., held that they were not released because there was no binding contract to give time to the principal debtors, which the latter could enforce. He moreover held that the effect of the agreement was to increase the liability of the sureties, who were parties to it in the proportion of the £2,500, even though the debt due by the principal debtors to the Bank should not be increased beyond the limit of £25,000.

The Law Reports for August comprise 23 Q.B.D., pp. 133-263; 14 P.D., pp. 85-130; 41 Chy.D., pp. 437-577, and 14 Appeal Case, pp. 105-336.

ELECTION—NOMINATION PAPERS—SIGNATURE—ADDITION OF WORD "JUNIOR."

In *Gledhill* v. *Crowther*, 23 Q.B.D. 136, it was held by Mathew and Grantham, JJ., that the addition of the word "junior" to the signature of a nominator to a nomination paper did not have the effect of invalidating the nomination, notwithstanding that the name of the nominator appeared on the register without the addition, that being the usual signature of the nominator.

MUNICIPALITY—CHARGE ON PREMISES FOR LOCAL IMPROVEMENTS—STATUTE OF LIMITATIONS.

Hornsey Local Board v. *Monarch Investment Society*, 23 Q.B.D. 149, was an appeal from a County Court. Under a statute certain expenses incurred by a municipal body were made a charge on the premises in respect of which the same were incurred. Mathew and Grantham, JJ., held that this charge must be enforced within the twelve years allowed by the Real Property Limitation Act, 1874; and that the period began to run from the date when the expenses were incurred.

BIGAMY—SECOND MARRIAGE WITHIN LESS THAN SEVEN YEARS AFTER HUSBAND OR WIFE LAST HEARD OF—HONEST BELIEF ON REASONABLE GROUNDS, OF DEATH OF HUSBAND OR WIFE—24 & 25 VICT., C. 100, S. 57—R.S.C., C. 161, S. 4.

In the *Queen* v. *Tolson*, 23 Q.B.D. 168, a very strong court, numerically, was summoned to dispose of an important question of criminal law upon a case stated and reserved by Stephen, J. The question being, whether a woman who had gone through the form of marriage a second time, within less than seven years after her husband had been last heard of, under a *bona fide* belief on reasonable grounds that he was then dead, could be properly convicted of bigamy. The majority of the Court, Lord Coleridge, C.J., Hawkins, Stephen, Cave, Day, A. L. Smith, Wills, Grantham, and Charles, JJ., held that she could not; but a strong minority, consisting of Denman, Field, and Manisty, JJ., and Pollock and Huddleston, B.B., dissented. This case may be taken as authoritatively settling the law on this important point, on which there were conflicting decisions. *Reg.* v. *Turner*, 9 Cox C.C. 145, *Reg.* v. *Horton*, 11 Cox C.C. 670, and *Reg.* v. *Moore*, 13 Cox, C.C. 544, being in favour of the view adopted by the majority of the Court; while *Reg.* v. *Gibbons*, 12 Cox, C.C. 237, *Reg.* v. *Bennett*, 14 Cox, C.C. 45, and *Reg.* v. *Prince*, L.R. 2, C.C.R. 154 were opposed thereto. The judgments of Wills and Stephen, JJ., are interesting for the discussion they contain on the maxim *actis non facit reum, nisi mens sit rea*, and the limitations to which it is subject.

CRUELTY TO ANIMALS—DISHORNING CATTLE—INFLICTION OF UNNECESSARY PAIN.

Ford v. *Wiley*, 23 Q.B.D. 203, was a prosecution to recover a penalty under 12 & 13 Vict., c. 92, s. 2, for cruel treatment of oxen by dishorning them. The evidence proved that the act of dishorning was accompanied by great pain and

suffering to the animal dishorned. The defendant attempted to excuse the practice by proof that dishorning changed the character of animals by rendering them quiet and preventing them goring or ill-treating others, made them graze better, and fatten more quickly, enabled a greater number to be stowed in a yard or railway truck, and slightly increased the value of each animal. But the Court, on the whole evidence, came to the conclusion that the operation of dishorning caused extreme pain without adequate and reasonable object, and was an unnecessary abuse of the animal, and therefore unjustifiable.

PRACTICE—APPEAL FROM ORDER REFUSING A PROHIBITION—NEW TRIAL IN ACTION IN COUNTY COURT STRUCK OUT FOR WANT OF JURISDICTION.

In *Lister* v. *Wood*, 23 Q.B.D. 229, it was held by the Court of Appeal (Fry and Lopes, L.JJ.) that an appeal will lie without leave to that Court from the decision of a Divisional Court, or an application for a prohibition to an inferior Court. And it was also held that where a County Court judge had struck out a cause on the ground of want of jurisdiction, and on a subsequent application being of opinion that his decision as to jurisdiction was erroneous, ordered a new trial, that he had power to order a new trial.

PRACTICE—GARNISHEE ORDER—ATTACHMENT ORDER—BALANCE IN HANDS OF GARNISHEE.

Rogers v. *Whitley*, 23 Q.B.D. 236, was an action brought against the defendant for dishonoring the plaintiff's cheques. It appeared that the defendant acted as banker for the plaintiff, but that before the cheques in question were presented "all debts" due by the defendant to the plaintiff had been attached to answer a judgment recovered by a third person against the plaintiff. It appeared that there was a balance in the defendant's hands beyond what would be sufficient to satisfy the judgment of the attaching creditor, but it was held by the Court of Appeal (Lindley and Lopes, L.JJ.) that so long as the attaching order remained in force the defendant was justified in refusing to honor any of the plaintiff's cheques.

ASSIGNMENT OF DEBT—MORTGAGE—CHARGE—JUDICATURE ACT, 1873, S. 25, S.-S. 6—(R.S.O., C. 122, S. 7.)

In *Tancred* v. *Delagoa Bay & East Africa Railway Co.*, 23 Q.B.D. 239, a Divisional Court, composed of Denman and Charles, JJ., were called on to determine whether an assignee by way of mortgage of an award was entitled to sue to recover it in his own name. The question had been previously considered by Pollock, B, in *National Provincial Bank* v. *Harle*, 6 Q.B.D. 626, and subsequently by Day and A. L. Smith, JJ., in *Burlinson* v. *Hall*, 12 Q.B.D. 347, in which different decisions had been arrived at: in the latter case it had been held that an absolute assignment of a *chose in action* by way of mortgage was not "an assignment by way of charge only," and therefore that the mortgagee was entitled to sue for its recovery in his own name, and this decision was now followed in preference to that of Pollock, B. The distinction between an assignment by way of mortgage and an "assignment by way of charge only," is thus

stated by Denman, J,, at p. 242: "A document given 'by way of charge' is not one which absolutely transfers the property with a condition for reconveyance, but is a document which only gives a right to payment out of a particular fund or particular property, without transferring that fund or property."

BILL OF EXCHANGE—FORGERY OF NAME OF PAYEE—"PAYEE A FICTITIOUS OR NON-EXISTING PERSON"—BANKER, LIABILITY OF, FOR PAYING ON FORGED INDORSEMENT—NEGLIGENCE

In *Vagliano* v. *The Bank of England*, 23 Q.B.D. 243, which we noted, ante p. 146, when before Charles, J., his judgment has been affirmed by the majority of the Court of Appeal (Cotton, Lindley, Bowen, Fry, and Lopes, L.JJ.), the head of the Court, Lord Esher, M.R., however, dissented. It may be remembered that the action was brought by the acceptors of bills of exchange for a large amount, for a declaration declaring that the defendants were not entitled to debit the plaintiffs with the amount of these bills which they had paid upon a forged indorsement of the names of the payees. The bills in question were purported to be drawn by a foreign customer of the acceptors in favour of another foreign firm, and were presented to the acceptors in the ordinary course of business and accepted by them. The names of the drawers, however, were in fact forged by a clerk in the acceptor's employment, and after procuring the plaintiff's acceptance this clerk then forged the names of the payees and procured payment of the bills. The point on which the Court differed was whether the payees were to be regarded as real or fictitious persons. There was a firm of the name of the payees, but they had nothing whatever to do with the bills, their names being inserted as payees by the forger of the name of the drawers. The majority of the Court were of opinion that the payees were real and not fictitious persons, and therefore the bank was precluded from charging the plaintiffs with bills paid on the forged indorsement. On the other hand Lord Esher, M.R., was of opinion that the bills in question were not really bills of exchange for lack of a real drawer or a real payee, but that the plaintiffs by their acceptance were estopped from disputing the validity of the signature of the drawer of the bills, but as under the Bills of Exchange Act, 1882 (45 & 46 Vict., c. 61), s 7, ss. 3, "where the payee is a fictitious, non-existing person, the bill may be treated as payable to bearer," he was of opinion that the bank was entitled to charge the plaintiffs with the bills, because though there was a real firm of the name of the payees, yet as regards these bills it was never intended that that firm should have, and they never did have, any right to the bills in question, and therefore, as regards these bills, were fictitious payees, and the bills were, therefore, under the Act above referred to, payable to bearer, and therefore the bank was entitled to charge the plaintiffs with the bills. Considering the immense sum involved, and the difference of opinion in the Court of Appeal, there can be little doubt that the case will be carried to the House of Lords.

SHIP—CHARTER PARTY—LIABILITY OF OWNERS.

The only case necessary to be noticed in the Probate Division is *The Durham City*, 14 P.D. 85. This was an action by a master against the owners of a vessel

to recover the price of coals procured for the use of the vessel. By a charter party it was agreed that the owners should keep the vessel in an efficient state during the term of the charter-party, and also that if in consequence of a breakdown of its machinery the vessel put into a port other than that to which she was bound, "port charges, pilotages, and other expenses" should be borne by the owners. The steamer put into Vigo, a port to which she was not bound, in consequence, as was alleged by the master, of a breakdown of the condenser. While at Vigo the coals in question were purchased for the use of the vessel. Butt, J., however, held that even assuming that the putting into Vigo was a necessary consequence of the breakdown of the machinery, yet the price of coals supplied to the vessel while she was there was not part of "the port charges, pilotages, and other expenses at the port," and he therefore held that the plaintiff was not entitled to recover.

The only other case in the Probate Division is *Read* v. *The Bishop of Lincoln*, in which those who care to dive into ecclesiastical law will find a learned and elaborate judgment of the Archbishop of Canterbury as to his jurisdiction to try his suffragan bishops for alleged ritual offences.

TRADE MARK—APPLICATION OF WORDS TO A DIFFERENT ARTICLE.

In re Dunn, 41 Chy.D. 439, was an application to register as a trade mark the words "Dunn's Fruit Salt Baking Powder." The words "Fruit Salt" had been used for many years by one Eno, as a trade mark for an effervescing drink, and he opposed the registration. Kay, J., and Cotton, L.J., were of opinion that although Eno had no monopoly in the words "Fruit Salt," and although the words were descriptive, and not in themselves deceptive, yet that their use by Dunn under the circumstances was calculated to deceive the public within the meaning of the *Patents, Designs, and Trade Marks Act*, 1883, s. 73, and therefore that Dunn's application ought to be refused; but the majority of the Court of Appeal (Lindley and Fry, L.JJ.) held that although Dunn had adopted the words "Fruit Salt" on account of the popularity they had acquired through Eno's use of them, yet as Dunn's trade mark was for a totally different article, which did not interfere with Eno's trade, the Court ought not to refuse its registration, which was accordingly allowed.

ATTACHMENT OF DEBTS—AGENT—BANKING ACCOUNT—APPROPRIATION OF PAYMENTS—RULE IN CLAYTON'S CASE.

In *Hancock* v. *Smith*, 41 Chy.D. 456, the Court of Appeal (Lord Halsbury, L.C., and Cotton and Fry, L.JJ.) in overruling North, J., have arrived at a conclusion which certainly seems more in accordance with natural justice than was that which was overruled. The judgment creditor of a stock broker attached a balance at a bank standing to the credit of the broker. The broker disclaimed all beneficial interest in this balance, and admitted that it was the property of certain clients of his in certain specified proportions. It appeared that since money of two of the clients, admitted by the broker to be entitled to the balance, had been paid in, drawings out in excess of the then balance had been

made, and North, J., was of opinion that under the rule in Clayton's case, the moneys so drawn out must be deemed to be appropriated to the moneys so paid in for these clients; but the Court of Appeal held that though the rule in Clayton's case would apply in case there were any dispute between the *cestius que trust* themselves, if there was not enough to pay them all, it could not be invoked against them by either the broker or by his judgment creditor, the latter having no greater right than the broker.

COMPANY—DIRECTOR'S QUALIFICATION—INJUNCTION.

Perhaps the only point necessary to be noticed in *Bainbridge* v. *Smith*, 41 Chy.D. 462, is this, that the Court of Appeal held that where a plaintiff sues for specific performance of a contract, whereunder he claims to be entitled to act as managing director of a company, and the company, besides disputing his qualification, by a resolution declare that even if he is qualified they do not wish the plaintiff to act as director, the Court will not grant an interim injunction to restrain the company from permitting the plaintiff to act as managing director *pendente lite*. The Court also pronounced an opinion as to the meaning of a director holding shares "in his own right," Cotton, L.J., being of opinion that the director must not only have the legal but also the beneficial right to the shares; while Lindley, L.J., thought that the expression meant that the director must hold the shares in such a way that the company may safely deal with them as his shares.

PRACTICE—SET OFF OF COSTS—SOLICITOR'S LIEN—ORD. LXV., R. 14—(SEE ONT. RULES 1204, 1205.)

In *Blakey* v. *Lathorn*, 41 Chy.D. 518, Kay, J., holds, following *Edwards* v. *Hope*, 14 Q.B.D. 932, that notwithstanding the terms of Ord. lxv. r. 14 (see Ont. Rules, 1204, 1205), a party can not claim the right to set off costs in separate actions to the prejudice of the lien of the solicitor for the opposite party, though he may do so as to costs payable in the same action.

Correspondence.

LANDLORD AND TENANT.

To the Editor of THE CANADA LAW JOURNAL:

SIR,—A "Subscriber" writes to you on the above subject and discusses certain features of what he is pleased to call "the O'Connor Act," now included in c. 143, R.S.O., 1887. In the first place, let me say that whatever blame is attachable, or whatever credit may be due, in respect of this legislation, Mr. O'Connor is not entitled to be charged specially with the responsibility of the Act. The Bill Mr. O'Connor introduced was withdrawn by him, and consisted of three lines, and was simply to the effect that distress for rent was thereby abolished. The Legislature never recognized the principle of Mr. O'Connor's

proposed legislation. The basis of the Act, 50 Vict., c. 23, which is now law and to which your correspondent refers, was the Bill introduced by me, the principle of which, taken from a recent Manitoba Act, on the second reading was accepted by the Attorney-General as being a good measure, and in committee subsequently, at Mr. Hardy's suggestion, the general features of a Bill introduced by the Attorney-General, I think, in 1878, were engrafted upon my Bill, and some very important additions were also made. The section number 31 specially referred to was taken from the Attorney-General's Bill, and as it expresses, was in amendment of the Common Law, and was not intended in any way as an amendment to my Bill of the previous year, part of which is now s. 9 of R.S.O., c. 143, except in so far as they are *in pari materia*. I may state, in case your correspondent may not be aware of it, that an Imperial Statute since passed has adopted the principle of our recent legislation on this subject, some evidence at least that we are right, and so far as I have heard any objection to the new law, it comes from the landlord class and not the tenants. I cannot, with the light I have on the subject, see any reason for the contention put forward by the tenant that he is entitled to fifteen days before distress. The entry intended or referred to in s. 31 is the entry for possession and not distress, in my opinion.

Yours respectfully,

Prescott, Sept. 11th, 1889. F. J. FRENCH.

LONG VACATION.

To the Editor of THE CANADA LAW JOURNAL:

SIR,—In common with many members of the profession, I believe that a change in the dates of the beginning and ending of the long vacation is advisable, and that the Judges should be asked to make an alteration. The hot weather is not really felt until the month of July, and it does not require any evidence, at present, that it lasts until the month of September. Then as far as business is concerned, it seem to me that an extension of the time after the spring circuits are over and before vacation begins, during which actions may be commenced and got ready for trial, is necessary. The sittings of the Court of Appeal and of the Chancery Divisional Court would require to be put forward ten days or so, and it might be necessary to re-arrange one or two other matters, but there is no difficulty in the matter which cannot be easily overcome.

Toronto, Sept. 13th, 1889. S.

DIARY FOR OCTOBER.

1. Tues...County Court Non-Jury Sittings exept in York. Maritime Court sits. William D. Powell. 5th C J. of Q.B., 1816.
6. Sun.....*Sixteenth Sunday after Trinity.*
7. Mon....County Court Sittings for Motions, except in York. Henry Alcock, 3rd C.J. of Q.B., 1802. R. A. Harrison, 11th C.J., of Q.B,, 1875.
12. Sat.....County Court Sittings for Motions, except in York. end. Columbus discovered America, 1492.
13. Sun.....*Seventeenth Sunday after Trinity.* Battle of Queenston, 1812. Lord Lyndhurst died, 1863, æt. 92.
15. Tues...English law introduced into Upper Canada, 1793.
18. Fri.....St. Luke.
19. Sat.....County Court Sittings for Motions in York end. Last day for notices for Prim. Exam.
20. Sun.....*Eighteenth Sunday after Trinity.*
21. Mon....County Court Non-Jury Sittings in York. Battle of Trafalgar, 1805.
22. Tues...Supreme Court of Canada sits.
23. Wed...Lord Lansdowne, Governor-General, 1883.
27. Sun.....*Nineteenth Sunday after Trinity.* Hon. C. S. Patterson, appointed Judge of Supreme Court, 27th October, 1888. Hon. Jas. MacLennan appointed Judge of Court of Appeal, 27th October, 1888.
29. Tues...Primary Examinations.
31. Thu....Admission of graduates and matriculants. All Hallows' Eve.

Reports.

ONTARIO.

FIRST DIVISION COURT, COUNTY OF RENFREW.

(Reported for THE CANADA LAW JOURNAL.)

RATHWELL *v.* CANADA PACIFIC RAILWAY CO.

Action to recover value of cattle killed by train —Adjoining owner—Township surveyed for settlement and organized—51 Vict., c. 29, s. 194—Township by-law permitting cattle to run at large.

Certain cattle of the plaintiff, whose lands did not adjoin the railway, were at large in the township of Rolph, through which the unfenced railway of the defendants runs. The township is surveyed and organized for settlement, and a by-law of the municipality permits cattle to run at large. The cattle were killed by defendants train.

Held, that the by-law relates only to roads and not to unenclosed lands of private owners, and that the cattle were wrongfully on the track of the railway.

Held, also, that 51 Vict., c. 29, s. 194, gives no right to others than adjoining owners, and those in privity with them, by which they can recover damages through neglect of the Company to fence their line.

DEACON, Co.J., PEMBROKE.

This was an action against the defendants Company to recover $60, the value of two cows of plaintiff, illed by an engine and train of defendants on that part of their line which crosses lot No. 19, in the 3rd concession of Rolph, and came up for trial at the last May sitting of this court, when the counsel for the parties agreed upon the following statement of facts, and arranged for a subsequent appointment to argue the questions of law arising thereon :

1. Plaintiff is the occupant of lot 18 in the 3rd concession of Rolph.

2. Said lot 18 does not touch the railway track within 310 feet. The railway crosses lot 19 and not lot 18.

3. Plaintiff is neither owner nor occupant of lot 19. Reference to plan or sketch annexed to statement.

4. Township of Rolph is organized and surveyed for settlement.

5. There are no fences.

6. Plaintiff's cattle were killed on the railway, having got thereon from lot 19, having first come from 18 on to 19. Accident occurred on 22nd October, 1888.

7. The value of the cattle, $50.

8. Cattle were, at the date of the accident, free commoners in Rolph.

9. No negligence either way.

Burritt for the plaintiff.

White for the defendant.

DEACON, Co.J.—The counsel for the plaintiff conceded that if the law had stood as it was declared to be in the cases of *Conway* v. *C.P.R. Co.*, 12 Ont. Ap. Reports, 708, and *Davis* v. *C. P.R. Co.*, same Vol., 724, the plaintiff would not be entitled to recover, as the cattle had gone upon the track from lot No. 19, of which he was not occupant and to which he had no shadow of a claim. His own lot No. 18, not being in any part touched by the line of railway, and he being in no sense an adjoining proprietor.

But he argued that by the effect of the 194th section of the Railway Act, 51 Vict., chap. 29, which reads as follows, "When a municipal corporation for any township has been organized, and the whole or any portion of such township has been surveyed and subdivided into lots for settlement, fences shall be erected and maintained on each side of the railway through such township, of the height and strength of an ordinary division fence with openings, or gates, or bars, or sliding or hurdle gates, of sufficient width for the purposes thereof, with proper fastenings at farm crossings of the railway, and also cattle guards at all highway crossings suitable and sufficient to prevent cattle and other animals from getting on the railway."

"(3) Until such fences and cattle guards are duly made and completed, and if after they are so made and completed they are not duly maintained, the Company shall be liable for all damages done by its trains and engines to cattle, horses, and other animals not wrongfully on the railway, and having got there in consequence of the omission to make complete and maintain such fences and cattle guards as aforesaid."

That the right of the plaintiff and in fact of each private proprietor in the whole township was enlarged beyond the limits of his own or the land occupied by him to the full extent of the limits of the township, and that he had a right to allow his cattle to roam at their free will and pleasure over the highways and unenclosed lands in the township, and of course go upon the railway line or track if in their rambles they should meet with it.

In support of this contention the plaintiff put in a copy of a by-law of the municipality of Rolph, Buchanan, and Wylie, providing for the allowing of cattle to be free commoners within the townships at certain seasons of the year, and with certain exceptions, not applying to the cattle now sued for.

This by-law was passed as long ago as the 5th of June, 1875, and before the defendants' railway was built through these townships, or even contemplated. Its provisions are somewhat peculiar. Section 1 provides, "That on and after the maturing and passing of this by-law it shall not be lawful for horses, bulls, stags, breachy or unruly cattle, oxen, cows, young cattle, pigs, sheep, geese, and turkeys to run at large or to be free commoners within the limits of the said townships of Rolph, Buchanan, and Wylie, at any seasons of the year. Proviso—that oxen, cows, and young cattle (not being breachy or unruly) shall be at liberty to run at large and be free commoners within the said townships between the 1st day of April and the 1st day of January in each year."

Section 2 provides that "any animal or animals mentioned in the first section of this by-law found running at large contrary to the provisions of the by-law shall be liable to be impounded in one of the public pounds of the said township, and being so impounded the owner or owners of such animals shall be liable to pay the fines and penalties following, that is to say, for each and every cow, ox, or young cattle running at large between the first day of April and the first day of January in any one year, one dollar."

The latter part of clause 2 of this by-law directly contradicts the proviso in clause 1, and renders it at least doubtful what the council really meant to do in regard to cows oxen, and young cattle.

I have carefully compared sec. 194 of the Act of 1888 with sec. 16 of the Act of 1883, for which it is substituted, and excepting only the provision in that section 16 as to the case of the Company taking possession of a section or a lot of land for the purpose of constructing a railway thereon, and being required in writing by the occupant thereof to fence, etc., the obligation to fence, etc., in the other cases is as clear and imperative in one sec. as the other. The phraseology of sec. 194 is certainly different in some respects from that in sec. 16 of which I have spoken; but unless it was to give the municipality, as such, some right to compel a general fencing of the line through the whole of the townships I cannot satisfactorily determine what more, if anything, the Parliament did intend. If it was intended to enlarge the right and privilege of each private proprietor to the extent contended for by Mr. Burrit, why were the words of limitation "not wrongfully on the railway" inserted in sub-sec. 3, and thereby in every case raising and presenting the issue as to whether the cattle were or were not wrongfully on the railway at the time of their being struck and killed? In the present case that issue is fairly and squarely presented. The cattle were either rightfully or wrongfully on the line on 22nd October, 1888. Now, if rightfully, where was the right, and how was it acquired? There is nothing in sec. 194 which speaks of private proprietors or occupants, or gives them any new rights or defines any old ones, in fact, nothing touching them except this sub-sec. 3, which contains the limitation just now mentioned.

If the right is given by the by-law, upon which Mr. Burritt was candid enough to say he did not place very much reliance, then all I can say is that I cannot make out from section 1 and 2 of it (which contradict each other) what this council really intended to do with respect to oxen, cows, and young cattle being allowed to run at large as free commoners. But even if their by-law was ever so clear in its provisions

it must be borne in mind that municipal councils could give no such right or authority over private lands or properties, and certainly not over any part of the railway track itself. Their by-law could only affect the streets, highways, and public squares of their municipality; and even in regard to the highways, the 271st section of the Railway Act would limit their right (so far as allowing cattle to run at large was concerned) to such parts of them as were not within a half a mile of the intersection of the highway with any railway at rail level. On the best consideration I have been able to give the matter I cannot see how the plaintiff's cattle can be said to be rightfully on the track at the time, as they were undoubtedly trespassers on lot 19, from which they got upon the railway, and as the plaintiff has not shown any right for the cattle to be put or go there, I am forced to hold that they were wrongfully on the track of the railway when they were struck and killed, and adopting the language of Mr. Justice Patterson in the Conway case at page 717, when speaking of the change effected by the section 16, then under consideration, it appears to me "there is no evidence of change so great and so uncalled for as to extend the right to either owner or occupant of lands that did not adjoin the railway." And I think the language of Mr. Justice Osler in the same case at page 721 is still, notwithstanding the change in the enactment, applicable to such a case as this: "In the absence of any statutory provision to the contrary a railway company is under no obligation to fence its track. As a general rule, however, railway acts contain enactments more or less stringent requiring them to do so, but unless the duty created by the Act is general, and the obligations imposed unlimited and unqualified, it is only the owners of adjoining lands and those in privity with them who can take advantage of it, and the Company are not bound to make good damages to cattle which were trespassing upon lands which, when they escaped upon the track ought, as between the land owner and the Company to have been fenced."

I have been favored with a perusal of the judgment recently delivered by Mr. Justice Brooks, of the Quebec Superior Court in *Morin* v. *Atlantic & Northwest Railway Co.*, and find that he takes the same view as I do of the recent sec. 194 of the Railway Act.

If Parliament intended making such an extensive change in the law as contended for it should have said so in plain terms and could have refrained from putting in any limitati ns of the right to recover.

A good deal of the language of the judges in *Douglas* v. *Grand Trunk Railway Co.*, 5 App. Rep. Ont. 585, is, I think, still applicable to the position of the plaintiff, even under this new enactment. As to the question of negligence or contributory negligence I do not touch upon it in view of the admission made in the statement, further than to say that I gathered from Mr. Burritt's argument that the absence of negligence as conceded did not include what might be deemed negligence in not having constructed the fences, and from Mr. White's that the want of negligence on the part of the plaintiff did not include what might be deemed negligence in allowing his cattle to roam at large over the lands not belonging to him and unattended and unrestrained.

I think my proper course is to direct a non-suit under the 114th section of the Act; and a non-suit is ordered accordingly.

Early Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

COURT OF APPEAL.

KENNEDY *v.* PIGOTT.

Arbitration—Progress estimate—Reference back.

This was an action by a sub-contractor against the contractor of public buildings in Galt, and for a wrongful dismissal. Case was referred to arbitration, and the learned arbitrator (Scott, Co.J.) found in favor of the plaintiffs on a *quantum meruit*, having based the award upon the last progress estimate delivered by the defendant to the Government.

It appeared in evidence that the progress estimate was wrong, and that it did not correctly represent the balance due upon the work. On appeal to the Court of Appeal, the Court unanimously referred the case back to the arbitrator, with directions as to the mode of estimating the amount due, not having regard to such progress estimate.

McCarthy, Q.C., and *W. F. Burton* for the appellant.

Guthrie, Q.C., and *Lash*, Q.C., for the respondents.

This case was since appealed to the Supreme Court and stood over for judgment. The Court has since reversed the Appellate Court, directing that the award as originally made should stand.

HIGH COURT OF JUSTICE FOR ONTARIO.

Queen's Bench Division.

Div'l Ct.] [June 22.

MOONEY *v.* SMITH.

Assessment and taxes—Sale of land for taxes—Purchase by wife of treasurer who conducted sale—Sale and conveyance void—Fraud—R.S.O., c. 193, s. 189.

A purchaser of land at a tax sale was made nominally by one G. for the plaintiff, but was in reality made with the money and for the benefit of the plaintiff's husband, the treasurer of the county, who conducted the sale.

Held, in an action of trespass, that the treasurer's position absolutely debarred him from becoming a purchaser at the sale, and the sale and conveyance to the plaintiff were void; and as the land remained in the hands of the persons guilty of the original fraud, the sale was not cured by the provisions of R.S.O., c. 193, s. 189, although it took place in 1883 and the action was not brought till 1889.

G. T. Blackstock for the plaintiff.

Masten and *H. B. Dean* for the defendant.

Div'l Court.] [June 22.

PIZER *v.* FRASER.

Intoxicating liquors—Liquor License Act, R.S.O., c. 194, s. 11, ss. (8) (14)—Petition against issue of license in polling sub-division—Form of petition—Particularity.

The Liquor License Act, R.S.O., c. 194, s. 11, ss. (14), provides that "No license shall be granted to any applicant for premises not then under license, or shall be transferred to such premises if a majority of the persons duly qualified to vote as electors in the sub-division at an election for a member of the Legislative Assembly, petition against it, on the grounds hereinbefore set forth, or any of such grounds.

More than one-half of the electors in a certain polling sub-division petitioned the license commissioners of the district "against the issue of any license within the bounds of said polling sub-division . . . for reasons specified in sec. 11, sub-sec. (8), of the Liquor License Act, R.S.O., or for one or more of such reasons,"—not otherwise specifying any grounds or referring to any applicant or premises.

The plaintiff was an applicant for a license for premises not under license, situate in the sub-division, and the question stated for the opinion of the Court was whether under s. 11, ss. (14), the presentation of the petition precluded the defendants, the license commissioners, from certifying for a license to the plaintiff.

Held, that the petition did not conform to the statute, which requires that the objection shall be to the granting of a particular license, and also that some one or more of the reasons given in ss. 8 shall be set forth, or all of them specifically alleged; and therefore the defendants were not precluded from certifying for a license.

Aylesworth for plaintiff.

J. J. Maclaren, Q.C., for defendant.

Div'l Court.] [June 22.

MAGEE *v.* GILMOUR.

Landlord and tenant—Verbal lease of land—Expiry of term upon day certain—Notice to quit—Sub-lease—Overholding tenants—Warrant of distress—Creation of new tenancy—Payment of rent.

The result of a verbal lease of real property to continue until and expire upon a day certain is that the tenant is bound to give up possession at the end of the stipulated period without any notice to quit. And where McC., the tenant for such a term, sub-let to the defendants, but not for any definite period,

Held, that their term also expired upon the day the original tenancy expired, and when they continued in possession thereafter they were overholding tenants.

The plaintiff, the landlord, issued a distress warrant for rent of the premises in question after the expiry of the term, and the defendants, without the concurrence of McC., who had tried to dislodge them and refused to receive rent

from them since the expiry of the term, paid the rent demanded to the plaintiff's bailiff, not as being due by themselves, but as being due by McC. to the plaintiff. The warrant recognized McC. as being tenant on the day of its date, some months after the expiry of the term, but did not recognize the defendants' rights in any way. In an action of ejectment the defendants disclaimed being tenants under the plaintiff, and insisted that they were still in under McC.

Held, that the payment of the rent did not, under the circumstances, establish a new tenancy between McC. and the defendants, even if McC. ever became the tenant of the plaintiff after the expiry of his original term, which was not shown.

The aintiff, after the expiry of the term served on the defendants a written notice to quit, in which they were recognized as his tenants.

Held, that, having disclaimed being tenants to the plaintiff, the defendants were not entitled to notice to quit, and if they were, the one they received was sufficient.

J. H. Macdonald, Q.C., for the plaintiff.

W. H. Barry for the defendants.

Div'l Court.] [June 22.

RUDD *v.* FRANK.

Evidence—Admissibility—Communications by deceased person to solicitors—Privilege—Judgment for possession of land—Practice on entering—Order of trial judge—Writ of possession—Rules 273, 274, 275, 341, 379, O.J.A—R.S.O., 1877, c. 51, s. 34.

In an action by the devisee of R. to recover possession from the defendant of land conveyed by him to R., of which the defendant remained in possession, the defendant set up that the conveyance to R., though in form absolute, was really intended to operate only as a mortgage, and offered to redeem.

The evidence of E. and P., two solicitors as to statements made to them by R. in his lifetime as to his intentions with regard to the land, was taken subject to objection.

The evidence of E. showed that R.'s statement to him was made in E.'s office, in the presence of P. and of another person who was a a friend of R.'s, but not a professional man. E. thought R. made the statement as a preliminary to instructing him as to something that was to be done by him as a solicitor, but R. did not give any instructions, there was nothing to show that he ever intended to do so, and no professional employment followed from the conversation. E. could not recollect whether he was asked for his advice or opinion at the time; at any rate he made no charge for professional services.

P.'s evidence was that he had spoken to R. about the affairs of F. as the solicitor and friend of the F. family, and had advised R. to try to save the property in question for the F. family.

It also appeared that R. was an occasional client of E. and P., but that in the transactions in question he had employed other solicitors.

Held, that the communications to E. and P. were not made to them in their professional capacity, and were therefore not privileged and were properly receivable in evidence; FALCONBRIDGE, J., doubting as to the evidence of E.

The action was tried without a jury, and the trial judge on the 23rd June, 1888, decided that judgment should be entered for the plaintiff for possession of the land, and judgment was at once entered accordingly and the plaintiff put in possession by the sheriff under a writ of possession. This was before the Consolidated Rules came into force.

Held, that under the practice, and having regard to Rules 273, 274, 275, 341, and 379 of the Ontario Judicature Act, 1881, there was nothing to remove actions for the recovery of land out of the general rule and the entry of judgment, and subsequent proceedings were regular.

Sec. 34 of R.S.O., 1877, c. 51, was repealed by Rule 273 of the Ontario Judicature Act, 1881.

E. R. Cameron for the plaintiff.

W. R. Meredith, Q.C., and *R. M. Meredith* for the defendant

Common Pleas Division.

ROSE, J.]

HAMILTON *v.* BROATCH.

Malicious prosecution—Leave granted to put in original information and judgment of acquittal.

In an action for false arrest and malicious prosecution, arising out of false information laid by defendant, a certified copy of the inform

ation having been put in and objected to, leave was given to put in the original as also an exemplification of the judgment of acquittal, for it appearing that the merits were not with the defendant, technicalities should not be allowed to defeat justice.

Burdett and *S. O'Brien* for the plaintiff.

W. Kerr, Q.C., for the defendant.

GALT, C.J.]

ST. CATHARINES RAILWAY CO. *v.* MORRIS.

Railway—Loss of local custom by use of railway—Compensation—Speculative damages.

Where under the Railway Act, 51 Vict., c. 29 (O.) the owner of a mill who was also the owner of a lot adjoining the mill which was used as the principal means of communication between the mill and a public highway and across which lot a railway company had erected a trestle bridge, also sought compensation for the loss of local custom to and from the mill, not arising from the construction of the railway but from a subsequent use of it.

Held, that the damages were too remote and speculative to be allowed.

Aylesworth and *Ingersoll* for defendants.

Collier contra.

ROBERTSON, J.]

MCCONNELL *v.* MCCONNELL.

Domicile—Evidence of.

Held, upon the facts set out in the judgment in this case, that although a testator's domicile was in Ontario he had changed it to the United States, which was his domicile at the time of his death, and his will therefore must be construed according to the laws of Minnesota, U.S., as regards all his personal estate, and his real estate there, and according to the laws of Manitoba, as regards his lands there, and as to the Ontario lands they devolved on his executors.

Douglas, Q.C., for plaintiff.

Cassels, Q.C., for defendant.

GALT, C.J.]

HENDERSON *v.* STISTED.

Assessment and taxes—Exemptions—51 Vict., c. 29, s. 3 (O.)

By s. 3 of the Assessment Amendment Act, 51 Vict., c. 29 (O.), which came into force on August 21st, 1888, s. 7 of the Assessment Act, R.S.O., c. 193, was amended by adding to the exemptions "all horses, etc., owned and held by any owner or tenant of any farm, and when carrying on the general business of farming or grazing." The defendant township was instituted under the Municipal Institutions Act for Algoma, Muskoka, etc., R.SO.., c. 185, s. 20 of which provided for the making of an assessment roll, which said roll, by s. 28, when finally revised, was to be the roll of the municipality until a new roll was made, the Council by s. 29 to fix the time for making the assessment roll, at periods of not less than one year nor more than four years, and the year for the purposes of the Act was to commence on first of January thereof, and by s. 364 of the Municipal Act, R. S.O., c. 184, the rates or taxes were to be considered imposed on and from 1st January and to end with 31st of December, unless otherwise provided. By s. 30 the Council might each year, after the final revision of the roll, pass a by-law levying a rate on all the real and personal property. The assessment for the year 1888 was made in the months of March and April, and the roll was returned to the clerk of the municipality on or about 1st of May, and was finally revised by the Council sitting as a Court of Revision on 16th June. On 14th August a by-law was passed directing a rate to be levied to meet the current expenses for the year.

Held, under the circumstances the personal property mentioned was not exempt for the year 1888.

Urquhart for the plaintiff.

George Bell for the defendant.

FALCONBRIDGE, J.]

GRIFFIN *v.* PEMBROKE.

Copyright—Right of author to deposit copy, etc. —Right to proceed for infringement—Railway ticket—Subject of copyright.

S. 5 of the Consol. Stat. Can., c. 81, is merely directory, and so the neglect of the author of a work to deposit a copy thereof in the library of Parliament does not incapacitate him from proceeding for infringement of it.

A railway ticket is not a subject of copyright under said Act.

Bain, Q.C., for plaintiff.

Cattanach and *R. Vashon Rogers* for defendant.

PROUDFOOT, J.]

SAMS *v.* HUTCHINSON.

Winding-up Act—Necessity for liquidators to sue by order of court—Objection made too late—Mortgage received as collateral security—Production before judgment entered.

Action by plaintiffs to recover the price of an implement manufactured by them. A winding-up order had previously been obtained against plaintiffs, and a liquidator appointed. An objection was taken at the trial, after the evidence had been given, that the action should have been brought in the name of the liquidator and with the approval of the Court, under s. 31 of R.S.C., c. 129. The order authorizing the liquidator to sue either in his own name or that of the plaintiff was put in after the hearing.

Held, that the objection was too late and must be overruled.

Semble the proper course is to move in Chambers to dismiss the action for want of authority to sue; and *semble*, also, as the plaintiffs under the statute had power to sue, they could do so without the authority of the Court, if they chose to run the risk of costs.

The plaintiffs had obtained a mortgage from one of the defendants as collateral security for the debt, which they had assigned to a bank. The Court directed that judgment was to be entered for plaintiffs only on the production of the mortgage and a reconveyance or discharge thereof to the mortgagor.

ROBERTSON, J.]

WADDELL *v.* ONTARIO CANNING CO.

Company—Illegal acts done by majority of shareholders—Right of minority to investigation—By-law ratifying illegal acts—Invalidity of—Injunction.

In a company consisting of seven shareholders, the plaintiffs, four of the shareholders, holding 25 per cent. of the stock, claimed that there had been mismanagement of the company's funds in the payment of large sums to the president and secretary for salaries or services without any legal authority therefor, and in failure to declare any dividends, though the company had made large profits, and that no satisfactory investigation or statement of the company's affairs could be obtained though frequently applied for, and it was impossible to ascertain the company's true financial standing. Under these circumstances an investigation of the company's affairs was directed.

At a meeting of four of the directors, constituting the majority, held after proceedings taken by the minority to disallow the illegal payments made to the president and secretary, and without proper notice to the minority of such meeting or its object, a resolution was passed ratifying the payments made to the secretary, and at an adjourned meeting, of which also the minority received no notice, by-laws were passed ratifying the payments made both to the president and secretary.

Held, that the resolution and by-laws were invalid and could not be ratified by the shareholders; and an injunction was granted restraining the company from acting thereunder, or from holding a meeting of shareholders to ratify and confirm same.[1]

Bain, Q.C., and *F. R. Waddell* for plaintiff.
E. Martin, Q.C., and *Duff* for defendants.

DIV'L COURT.]

REGINA *v.* RICHARDSON.

Recognizance—Absence of affidavit of justification—Sufficiency—R.S.C., c. 178, s. 90.

By s. 90 of R.S.C., c. 178, and the rule of court thereunder, no motion to quash any conviction brought before any court by *certiorari* shall be entertained unless the defendant is shown to have entered into a recognizance with two or more sufficient sureties.

Held, that the sufficiency of the suretyship is not shown by the mere production of the recognizance, but there must be evidence on which the court can say there were sufficient sureties.

When, therefore, there was no affidavit of justification to the recognizance it was held not to comply with the statute.

V. Mackenzie, Q.C., for motion.

REGINA *v.* FLOREY.

Closing shops- By-law for—Discrimination—Illegality—Distress—51 Vict., c. 33 (O.)—37 Vict., c. 33, s. 2, ss. 14, R.S.O., c. 184, s. 421.

A by-law passed by the town of A. under s. 2, ss. 2 of the Ontario Shop Regulation Act, 51 Vict., c. 33 (O.), provides (1) That all shops, etc., where goods were exposed or offered for sale by retail in the town should be closed at seven p.m. on each day of the week, excepting

Saturday, from 15th of January to 15th of September, etc. Sec. 3 provided that it should not be deemed an infraction of the by-law for any shop-keeper or dealer to supply any article after seven p.m. to mariners, owners, or others of steamboats, or vessels calling or staying at the port of A.

Held, that the by-law was bad, for that s. 3 was illegal in discriminating between different classes of buyers and different classes of tradesmen, and was in controvention of ss. 9 of said section 2.

A conviction of defendant under the by-law was therefore quashed.

Held, also, that a provision for distress in default of payment of the fine and costs imposed did not constitute a part of the penalty or punishment imposed by the by-law, but merely a means of collecting the penalty, as authorized by s. 2, ss. 14 of 37 Vict., c. 33 and s. 421 of the Municipal Act, R.S.O., c. 184.

Aylesworth for the applicant.

Langton contra.

REGINA *v.* COPP.

Municipal corporation—Internal walls of buildings—Right to prescribe thickness of—Party walls—What constitutes.

The 10th sub-sec. of sec. 496 of the Municipal Act R.S.O., c. 184, as regards walls of existing buildings, only applies to external walls thereof and not to internal walls, and therefore municipal councils have no power to prescribe of what materials or of what thickness such internal walls should be. Sub-sec. 18, relating to party walls, does not apply to internal walls separating buildings belonging to the same owner, for to constitute party walls they should separate the adjoining properties of different owners. Where, therefore, a by-law was passed by the corporation of the City of Hamilton, prescribing the material and thickness of the internal walls of every building, which therefore included existing buildings, and the defendant was convicted thereunder, by reason of, in the course of dividing a building owned by him into three separate shops, making the dividing walls of less thickness than that prescribed by the by-law.

Held, that the by-law was bad, and a conviction made thereunder was quashed.

Aylesworth for the applicant.

Mackelcan, Q.C., contra.

REGINA *v.* GOOD.

Indian lands—Removing hay from—What constitutes "hay"—Right to include costs of commitment and conveying to jail in conviction—Indian Act, R.S.C., c. 43, s. 26.

The defendant was convicted for removing hay from Indian lands, contrary to s. 26 of the Indian Act, R.S.C., c. 43.

Held, that the word "hay" used in the statute does not necessarily mean hay from natural grass only, but what is commonly known as hay, namely, either from natural grass, or grass sown and cultivated.

Held, also, that under this Act and the legislation incorporated therewith there is no power to include in the conviction the costs of commitment and conveying to gaol.

Mackenzie, Q.C., supported motion.

Aylesworth contra.

MADDEN *v.* HAMILTON FORGING CO.

Workman's Compensation for Injuries Act—Injury sustained by workman through improper instructions by superintendent—Liability of master.

The defendants, an iron works company, used in their business a pair of shears for cutting up boiler plate and scrap iron prior to its being placed in the furnace to be melted. It was the duty of the plaintiff and another workman to put the iron into the shears. While a large iron gate was, by the superintendent's orders, being put into the shears to be cut up, by reason of the improper instructions given by the superintendent the plaintiff in the course of his duty was injured. The plaintiff, though apprehensive of danger, was not aware of the nature and extent of the risk, and obeyed through fear of dismissal. In an action against defendants under the Workman's Compensation for Injuries Act for the damage sustained by plaintiff,

Held, that defendants were liable.

Carscallen for defendant.

Bain, Q.C., and *Waddell* for defendant.

GOOSE *v.* GRAND TRUNK RAILWAY CO.

New trial—Omission to swear juror.

The court will not grant a new trial because one of the jurors has not been sworn when no injustice has been done thereby.

Douglas, Q.C., for plaintiff.

Osler, Q.C., for defendant.

MARKS *v.* CORPORATION OF WINDSOR.

Jury—Dispensing with after evidence taken.

The judge at the trial of an action has the power to dispense with the jury after all the evidence has been taken, but the power should be sparingly exercised.

Aytoun Findlay for plaintiff.

W. R. Meredith, Q.C., for defendant.

KEARNS *v.* TENNANT.

Partnership — Continuing deceased partner's share in business—Evidence of—Debt due deceased partner's estate.

K., a partner in a firm, by his will made in 1884, appointed plaintiff executor and trustee, and after a general bequest to plaintiff to hold all his real and personal estate in trust, directed him within six months after his death to ascertain the proper amount due his estate for his share in the firm's business, and when ascertained to allow the same to remain in the business with interest at six per cent., and to pay such interest to his wife during her life; but if he deemed it advisable to do so to withdraw said share from the business in the proportion of twenty per cent. annua y from the time said amount was ascertained, and to invest said sums so withdrawn and to pay the interest thereon to his wife for life. The evidence showed that after the share was ascertained it was not continued in the business for the purpose mentioned in the will, but was treated and made a debt to K.'s estate.

Held, that under the circumstances, the plaintiff, as executor of K.'s estate, was not as to K.'s share, in the position of a partner in the firm.

The firm in question was from 1860 to 1862 composed of K. and R., when T. was taken into the firm, the firm thus constituted to continue so long as deemed advisable for the mutual benefit. In 1871 K. and R. insured their joint lives for $10,000, to be paid to the survivor. In 1876 R. assigned his interest to K., and in 1884 K. assigned same as collateral security to a person who had endorsed for the firm. On K.'s death the insurance company paid the insurance money to the holder of the policy, who handed the amount to T., who retired the notes therewith.

Held, that the plaintiff was entitled to recover the amount as a debt due to K.'s estate.

Osler, Q.C., and *MacCracken* Q.C., for plaintiff.

Snow and *A. Cassels* for defendant.

Div'l Ct.]

JONES *v.* GRACE.

Justice of the peace—Backing warrant of commitment in adjoining county — Illegality—Joint trespass—Damages—Constable executing—Liability of—24 Geo. II., c. 24—Notice of action—Interpretation Act.

The plaintiff, who resided in the County of H., was convicted before defendant G., a police magistrate for the County of B., for giving intoxicating liquor to an Indian, and fined, with committal to the county goal of B. on non-payment of the fine. The fine not having been paid, G. issued a warrant of commitment directed to all the peace officers of B. to arrest plaintiff, and prepared a form of endorsement to be signed by a Justice of the Peace of H. County, authorizing the defendant N., a constable, to arrest the plaintiff in H. G. handed the warrant to N., telling him plaintiff lived in H. and he would have to get the warrant endorsed. N. took it to R., a Justice of the Peace for H., who signed the endorsement, and plaintiff was arrested by N. and taken first before G. in B. to see if he would accept a note in payment, and then to the county jail of B. The plaintiff was afterwards discharged on *habeas corpus*, but the conviction was not quashed.

Held (Galt, J., dissenting), that the action was maintainable against the defendants G. and R.; that there was no power enabling R. to back the warrant, and that he was guilty of trespass in so doing, and that G. was liable as a joint trespasser, for by his interference he was responsible not only for the arrest but for the subsequent detention in the jail at B.

At the trial the jury found that plaintiff had sustained no damage as against R., and they assessed the damages solely against G. Judgment was thereupon entered as against G, and the action dismissed as to R.

Held, that the finding of the jury as to the damages was in law permissible, but, if R. should have been held liable, as plaintiff at most could only have a new trial or elect to retain his judgment as against G. alone, the Court would not interfere with the finding.

Quære. Whether the constable N. was protected under 24 Geo. II., c. 24?

The endorsement on the notice of action herein was that it was given by V. M. of Queen Street in the City of Brantford, in the County of Brant, solicitor for the within named James Jones. Within was the notice, namely: "I do hereby, as solicitor for and on behalf of James Jones, of the village of Jarvis, in the County of Haldimand, farmer," etc.

Held, that the notice, taken in connection with the Interpretation Act, 31 Vict., c. 1, s, 29, was sufficient, etc. *Morgan* v. *Palmer*, 13 C.P. 528 not followed, as decided prior to said Act; but *quære*, whether any notice of action was necessary.

Form of order as to costs of N. given.

McCarthy, Q.C., for plaintiff.

Delamere and *Brewster* (of Brantford) for the defendant G.

Aylesworth for defendant B.

S. A. Jones for defendant N.

Div'l Ct.]

BROWN *v.* MCCRAE.

Damages—Fire caused by defendant's negligence —Right to set off amount received from Insurance Co.

In an action by plaintiff to recover damages for the destruction of his dwelling house and a quantity of chattel property, caused by sparks emitted from the defendant's steam tug through defendant's negligence,

Held, that the defendant was not entitled to deduct from the amount of damages found to have been sustained by the plaintiff an amount paid to the plaintiff by an insurance company under an insurance on the property.

Meredith, Q.C., for plaintiff.

Osler, Q.C., and *M. Wilson* for defendant.

Div'l Ct.]

REGINA *v.* FIFE.

Justice of the peace—Malicious Injuries to Property Act, R.S.C. 168—Warrant of commitment—Omission of "unlawfully"—Effect of —Omission of amount of damage.

Under s. 58 of the Malicious Injuries to Property Act, R.S.C., c. 168, the offence must be unlawfully and maliciously committed, and the damage must exceed $20. In this case the warrant of commitment charged the offence as having been wilfully and maliciously committed, omitting the word "unlawfully."

Held, that this was fatal to the commitment, and it was directed to be quashed.

Held, also, that the commitment should have alleged that the damage exceeded $20.

W. M. Douglas for defendant.

Moore contra.

Div'l Ct.]

SINDEN *v.* BROWN.

Justice of the peace—Action against—Summary Convictions Act—Imprisonment for non-payment of fine after payment of costs.

A conviction under the Summary Convictions Act required the defendant to pay fine and costs, in default of payment distress, and in default of sufficient distress, imprisonment. The plaintiff paid the costs, and was subsequently arrested and imprisoned for non-payment of the fine; the conviction and commitment remained in force unquashed.

Held, that the conviction could be enforced by imprisonment for non-payment of the fine, notwithstanding the payment of the costs; and therefore, with the conviction remaining in force, the action was not maintainable.

The law laid down in *Frigerson* v. *Board of Police, of Cobourg*, 6 O.S. 405, not followed in this respect.

Mackenzie, Q.C., for plaintiff.

E. Martin, Q.C., contra.

Div'l Ct.]

BALZER *v.* GOSFIELD.

Municipal corporation—Assumption of township road by county—Liability of county—Remedy over against township—Municipal Act, s. 531, s.s. 1, 4, s. 533, 566, s.s. 5.

Action by plaintiff for damages for the loss of his horse, which was killed by falling into a ditch dug by the township, in a road therein, under a drainage by-law. The Township Council had passed a by-law for opening and establishing this road and shortly after the County Council had passed a by-law assuming the road as a county road of the said county, for the purpose of expending thereon the county appropriation, and for such purpose only. The money of the county was expended from year to year on the said road. The county by-law was proposed and seconded by the township reeve, and its validity, although never assented to by by-law, was never disputed by the township.

Held, that by their by-law the county had assumed the road as a county road, and there was no power in the statute authorizing them to limit the assumption in the manner proposed, and that, under the circumstances, the county could not set up the absence of a township by-law assenting to the assumption.

Secs. 533 and 566, s.s. 5 of R.S.O., c. 184, relied on by the county, were held not applicable to this case.

Held, also, that the county, under s. 531, s.s. 4, were bound to keep the road in repair, and were liable to plaintiff, but under s.s. 4 they were entitled to judgment over against the township.

Lash, Q.C., for plaintiff.

Aylesworth for defendant county of Essex.

Meredith, Q.C., for defendant township of Gosfield South.

Div'l Ct.]

REGINA *v.* DOWLING.

Justice of the peace—Fraud on cheese factory—51 Vic., c. 32 (O.)—Offence outside of county—Jurisdiction of police magistrate—Certiorari—Ultra vires.

The defendant was tried at Belleville before the police magistrate of the County of Hastings, and convicted for, amongst other things, supplying milk from which the cream or strippings had been taken or kept back. The factory was in Hastings, but the defendant resided, and the milk was supplied, in the counties of Lennox and Addington.

Held, that the police magistrate of Hastings had no jurisdiction to try the offence, and the conviction must be quashed.

Held, also, that the *certiorari* had not been taken away in such cases; but even if it had, the Court would not be justified in refusing to examine the evidence to see if the magistrate had jurisdiction.

Shepley for defendant.

Burdett and *C. J. Holman* contra.

Div'l Ct.]

OWEN SOUND STEAMSHIP CO. *v.* ONTARIO AND QUEBEC RAILWAY CO.

Railway company—Agreement to pay minimum sum out of joint traffic rates—Ultra vires—Legislation legalising.

By an agreement entered into between the plaintiffs and the T. G. & B. R'y Co., it was agreed that there should be certain joint rates chargeable to passengers and freight by the steamship company and the railway company, to be divided in certain proportions, and, if it should be found that the proportion payable to the steamship company did not at the end of the season amount to the sum therein stipulated, then that the deficiency should be made good by a rebate from the share of the railway company; and on the other hand if the steamship company received more than the sum mentioned in the agreement the railway company were entitled to a share of the surplus. Subsequently an agreement was entered into whereby the T. G. & B. R'y Co. leased their lines to the O. & Q. R'y Co., the latter agreeing to assume the contract with the plaintiff. This agreement was ratified by Act of Parliament. The O. & Q. R'y Co. made a lease of their lines to the C.P.R. Co., which was confirmed by Act of Parliament, and by which Act the C.P.R. Co. were to assume all contracts of the T. G. & B. R'y Co., including the one with the plaintiff.

Held, that even if the agreement between the plaintiffs and the T. G. & B. R'y Co. were *ultra vires* the latter company, it was made valid by the subsequent legislation; but apart therefrom it was in no sense objectionable.

D. E. Thomson and *G. Bell* for plaintiffs.

McCarthy, Q.C., and *G. T. Blackstock* contra.

REGINA *v.* AUSTIN.

Taverns and shops—Liquor License Act—Club incorporated under Benevolent Societies Act—Sale of liquors by.

Held, that the meaning of sec. 53, sub-sec. 3, of the Liquor License Act is that where in a club or society incorporated under the Benevolent Societies Act, liquor is sold or supplied to members, but such sale or supplying is not the special or main object of the club, etc., but is merely an incident resulting from its principal object, as here a gun club, there is no violation of the License Act, but it is otherwise, if the sale or supplying the liquor is the main object of the incorporation.

The question, however, is for the decision of the magistrate on the evidence, and there being evidence here to support the finding of the magistrate that the sale of liquor was the special or main object of the club, with the intent to evade the Liquor License Act, the court re-

ferred to interfere with his finding, and dismissed a motion to quash a conviction made by him against defendant.

Bigelow for the defendant.

J. J. Maclaren contra.

Div'l Ct.]

ANDERSON *v.* C.P.R.

Railways—Condition limiting liability for loss of baggage—Letters written between the company's officers—Admissibility of.

In an action by the plaintiff, a passenger by defendants' railway, for loss of her baggage, and in which the defence was, the defendants' liability was limited, by a condition on the ticket, to $100, certain letters were admitted in evidence, one written by the defendants' general baggage agent to the passenger agent asking whether plaintiff's attention had been called to the condition on the ticket, and why it had not been signed by her; and the other the reply thereto, stating that the Company's rules did not require unlimited first-class tickets signed, and that this ticket had been sold at full tariff rate.

Held, that the letters were properly admitted, but they were of no consequence as the ticket on its face showed that it was not purchased subject to the condition.

Held, also, that the six months limitation clause, R.S.C., c. 109, sec. 27, does not apply to an action of this character arising out of contract, but to actions for damage occasioned by the company in the execution of the powers given or assumed by them to be given for enabling them to maintain their railway.

Wallace Nesbitt for the plaintiff.

G. T. Blackstock for the defendant.

Chancery Division.

ROBERTSON, J.] [Sept. 5.

O'SULLIVAN *v.* PHELAN.

Will—Devise—Condition in restraint of sale—Restricted to name and family of testator.

A testator by his will devised certain real estate to two of his nephews, subject to the following condition: "But neither of my said nephews is to be at liberty to sell his half of the said property to any one except to persons of the name of O'S. in my own family. This condition is to attach to every purchaser of the said property."

Held, that as all power of alienation was not taken away the condition was good in respect to a sale, but that there was nothing in it to prevent disposing of the property in any other way, as by gift, devise, or otherwise, and that there was power to mortgage.

Re Macleary, L.R. 20 Eq. (p. 188) followed.

Re Watson v. *Woods*, 14 O.R. 48, referred to.

Anglin for plaintiff.

Moss, Q.C., for infant defendants.

No one appeared for adult defendants.

Full Court.] [Sept. 12.

CUMBERLAND *v.* KEARNS

Covenant against incumbrances and for quiet enjoyment—Local improvement rates.

Action in covenants in a deed of land whereby the defendants covenanted that he had done no act . . . whereby or by means whereof the lands . . . were, or should, or might be in anywise impeached, charged, or affected, or encumbered in title, estate, or otherwise howsoever, and that the grantee should enjoy them free from all incumbrances.

It appeared that a scheme of local improvement which resulted in the imposition of a fixed rate for 10 years to defray the expense of the improvement was undertaken at the instance and upon the petition of the defendants and other property holders interested under R.S.O. 1889, c. 184, s. 612, ss. 9.

The by-law creating the charge was passed before the conveyance to the plaintiff, although the precise sum to be paid by each parcel was not ascertained by apportionment till after the conveyance.

Held, affirming the decision of ROBERTSON, J., that the plaintiff was entitled to recover for breach of the covenants, and to be indemnified in full.

Per BOYD, C.—Different would be the conclusion if the taxes had been imposed by municipal authority without the intervention of the defendants.

Haverson for the defendants.

Ferguson for the plaintiff.

Practice.

Q. B. Div'l Ct.] [June 22.

FORD *v.* LANDED BANKING AND LOAN CO.

Administrator ad litem—Rule 311.

The plaintiff claimed from the defendants a

sum of money, part of which had been deposited by E. P. and part by herself, but all in the name of E.B., who was a non-existent person. E. P. died intestate before this action was brought, and no letters of administration to his estate having issued, the plaintiff applied under Rule 311 for the appointment of an administrator *ad litem.*

The Court refused to make an appointment.

Meir v. *Wilson*, 13 P.R. 33, approved and followed.

Carscallen for plaintiff.

Mackelcan, Q.C., for defendant.

C. P. Div'l Court.] [Sept. 7.

In re McGREGOR *v.* NORTON.

Prohibition—Division Court—Money paid into court by defendant—Plaintiff's intention to proceed—Failure to notify in writing—R.S. O., c. 51. ss. 125, 126, 127—Motion to inferior court to set aside judgment.

The defendant in a Division Court suit paid a sum of money into court as a full satisfaction of the plaintiff's demand, under R.S.O., c. 51, s. 125, and the plaintiff was notified thereof.

The plaintiff notified the clerk of the court, but not in writing, that he intended to proceed for the remainder of his claim.

Sec. 126 of R.S.O., c. 51, provides that when payment is made into court under sec. 125 the plaintiff is to be notified, "and the sum so paid shall be paid to the plaintiff, and all proceedings in the action stayed, unless within three days after the receipt of the notice the plaintiff signifies in writing to the clerk his intention to proceed . . in which case the action shall proceed as if brought originally for such remainder only."

Held, that the words of the statute are imperative; and in the absence of the written notice all proceedings were stayed. A trial which took place afterwards was therefore a nullity; and prohibition was granted restraining proceedings upon the judgment recovered by the plaintiff at such trial.

Held, also, that an application by the defendant to the inferior court to set aside the judgment so recovered was not a bar to the motion for prohibition.

Semble, it was a convenient practice to move in the inferior court.

Decision of FALCONBRIDGE, J., 13 P.R. 28, reversed.

Kappele for plaintiff.

Bicknell for defendant.

Appointments to Office.

LOCAL MASTER.

Prescott and Russell.

Louis A. Oliver, of L'Original, Judge of the C.C. of said counties to be a Local Master of the Supreme Court of Judicature for Ontario, in and for the said counties, *vice* F. W. Thistlethwaite, resigned.

DIVISION COURT CLERKS.

Waterloo.

A. Boomer, of Linwood, to be Clerk of the Sixth Division Court of the County of Waterloo, *vice* Robert Morrison, resigned.

Bruce.

Angus McKay, of Ripley, to be Clerk of the Ninth Division Court of the County of Bruce, *vice* J. Humberstone, resigned.

Miscellaneous.

LITTELL'S LIVING AGE.—The numbers of *The Living Age* for September 7th and 14th contain The Papacy: a Revelation and a Prophecy, Mr. Wallace on Darwinism, by Geo. J. Romanes, F.R.S., and The Civil List and Grants to the Royal Family, *Contemporary;* The French in Germany, *Nineteenth Century;* Giordana Bruno, *Fortnightly;* Some Few Thackerayana, *National;* In Macedonia, William Cowper, Hippolytus Veiled, and Orlando Bridgman Hyman, *Macmillan's;* Seen and Lost, *Longman's;* In praise of the Carnots, *Murray's;* The Papacy, *Spectator;* with instalments of "Sir Charles Danvers," "A Modern Novelist," and "Patience," and poetry. For fifty-two numbers of sixty-four large pages each (or more than 3,300 pages a year) the subscription price ($8) is low; while for $10.50 the publishers offer to send any one of the American $4.00 monthlies or weeklies with *The Living Age* for a year, both postpaid. Littell & Co., Boston, are the publishers.