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DIARY FOR JANUARY.

15. Sat......Last day for filing papers with Sec. L. S. before call or admission.
16. Sun.....*2nd Sunday after Epiphany.*
18. Tues...University graduate and matriculant seeking admission to L. S. to present papers; primary examination of students and articled clerks.
19. Wed ...Lord Langdale appointed M. R. 1836.
22. Sat......Lord Bacon born 1561. Last day for filing papers for call or admission.
23. Sun... *3rd Sunday after Epiphany.*
25. Tues...First intermediate examination.
26. Wed ...Barristers' examination. Gen. Gordon killed, '85.
27. Thur...Second intermediate examination.
30. Sun.....*4th Sunday after Epiphany.*

TORONTO, JANUARY 15, 1887.

WE have been asked to call attention to the following petition, which has been for some time in circulation among members of the Bar in Toronto, and in various cities and towns throughout the country, and has, we are informed, already received a large number of signatures, and which it is proposed to present to the Benchers at one of their meetings in the beginning of February.

To the honourable the Benchers of the Law Society of Upper Canada.

The petition of the undersigned members of the Bar of Ontario, humbly sheweth:

1. That the present is the fiftieth year of the reign of her Majesty the Queen.

2. That your petitioners respectfully submit that it is right and proper that a public body, such as the Law Society of Upper Canada, should take some steps to commemorate the occasion.

3. That your petitioners would suggest that a suitable way of doing so would be the erection of a statue or bust of her Majesty to be placed in the Central Hall at Osgoode Hall or other suitable place within its precincts.

Your petitioners therefore pray that your honourable body will vote a sufficient sum out of the funds of the Law Society of Upper Canada for the erection of such a statue or bust, or will vote a liberal contribution towards such object, the balance to be collected by voluntary subscriptions amongst members of the legal profession in Ontario.

We have also been asked to state that it is, of course, impossible to submit the petition to every member of the Bar throughout the Province, and therefore, any who would wish their names to appear to it, are invited at once to enclose their signatures on a slip of paper with a letter under cover to the Editor of the CANADA LAW JOURNAL, authorizing the affixture of the signature to the petition.

We are very glad to do what we can to aid in promoting what we regard as a very excellent idea. In the first place, the erection of a statue or bust, as suggested in the petition, would be an outward and visible sign of the inward and spiritual loyalty to the British Crown, which we know to be a living feeling—and we hope an immortal feeling—in the breasts of Canadians. Take loyalty to the Crown away, and would not the Empire collapse and fall to pieces like a house of cards? Loyalty to the Crown is the very life of the Empire, and such a manifestation of it amongst us as is asked for by the above petitioners would be well timed in this the Jubilee Year of all true-hearted British subjects.

Apart from this, however, there could not be a more fitting depository for historical monuments of any kind than Osgoode Hall, and nothing more interesting as a historical monument could be suggested than a statue or bust of Queen Victoria.

The reign of Victoria may be said to be coincident with the growth of the British Empire, as we now understand it; and whatever may be the ultimate destiny of this country the statue or bust suggested would never lose its interest from the historical point of view.

We think we Torontonians are singularly poor in respect to historical monuments, and might with advantage have many more than we at present possess.

Thirdly, and from the lowest point of view, as an embellishment of Osgoode Hall itself there are many positions in which a good statue would be very acceptable and pleasing to the eye.

We feel convinced that if the Law Society accede to the prayer of the petition in a liberal manner, it will meet the approval of the vast majority of the members of the profession. There are, however, always some individual malcontents to find fault with anything that is suggested, but we trust that no fear of a possible grumble here or there will prevent the carrying out of a scheme which would certainly give gratification and pleasure to the vast majority.

THE LIMITATION OF CERTAIN ACTIONS.

ONE of the chief requisites in jurisprudence is that there should be *certainty* in the decisions of its courts and judges. And it has been said that even if a decision is wrong in principle, but at the same time well known and recognized, it is better that it should be so rather than that there should be any uncertainty on the point decided.

We are not now about to make the Rule in Shelley's Case a text, upon which to preach a legal sermon. That case, so well fixed in the mind of every student of a couple of years' standing (owing, no doubt, to the difficulty that existed in getting it well established there in the first instance), is too old and respectable to be shaken by the assaults made upon it by divers judges in these modern days. The subject of our remarks is one of a more useful and practical character—and it is this—What is the effect of our statute (R. S. O. chap. 108) in its limitation of actions on mortgages, judgments, etc.?

It will be at once answered, that the point has been already decided in two late cases in our own courts—*McDonald* v. *McDonald*, 11 O. R. 187, and *McDonald* v. *Elliott*, 12 O. R. 98; in the former of which Mr. Justice Proudfoot, and in the latter, Mr. Justice Rose, hold that a mortgagee is entitled to recover on his mortgage, though his action is brought after the expiry of the ten years limited in the above Act.

Both of these judges refuse to be bound by the late decisions in England—the very opposite of those just quoted—preferring to follow the older cases in our own Court of Appeal, viz.: *Allan* v. *McTavish*, 2 App. R. 278, and *Boice* v. *O'Loane*, 3 App. R. 167.

The English cases laying down the opposite view are *Sutton* v. *Sutton*, L. R. 22 Ch. D. 511, decided in the Court of Appeal, and *Fearnside* v. *Flint*, *id.* 579.

In his judgment, Mr. Justice Proudfoot gives as his reason for not following *Sutton* v. *Sutton*, in preference to *Allan* v. *McTavish*, that the English Court of Appeal (by which the former was decided) is not the Court of ultimate appeal for the Province (of Ontario); while *Allan* v. *McTavish* is (to use his own words) "the decision of the highest Appellate Court in the Province, to which an appeal lies from me."

Mr. Justice Rose, in *his* judgment, says he thinks he ought to follow the course followed by Mr. Justice Proudfoot; and later on he says: "I am further of opinion that in this case it may be well to allow our own Court of Appeal to say whether they will be satisfied to reverse the holding in *Allan* v. *McTavish*, and thus change the law of this Province, because of a subsequent judgment of the Court of Appeal in England. I do not feel warranted in endeavouring to antici-

pate their action when the point comes to be raised before them."

This apparently was not the line of reasoning followed by one of our County Court judges, in a case reported some years ago in our columns, where all the cases on the subject, English and Canadian, appear to be collected (*Somers* v. *Kenny*, 20 C. L. J. 7). In the judgment there reported, we find it said: "I am under the impression (whether rightly or wrongly I cannot say positively, as I have no means of informing myself on the point) that if *Allan* v. *McTavish*, or *Boice* v. *O'Loane*, were now to be brought before the Supreme Court here, that court would feel itself bound to override them, and follow *Sutton* v. *Sutton*. I think also that if the judgment I now give be appealed from, that the Court of Appeal would follow *Sutton* v. *Sutton*, and not deem itself bound by its previous judgments."

Strangely enough this case was cited by counsel on one side, in the late case of *Ross* v. *G. T. R.*, 10 O. R. 447, while *Sutton* v. *Sutton* was quoted by counsel on the opposite side.

That case (*Ross* v. *G. T. R.*) is one which might well be referred to here. It was an action for compensation for land taken by a railway, brought after the lapse of more than ten, but less than twenty years from the taking.

Mr. Justice Armour, in his judgment says: "It was argued that the plaintiff's claim to compensation was within R. S. O. ch. 108, sec. 23, and was money secured by lien or otherwise charged upon or payable out of land, and was therefore barred . . ." and it would appear that the learned judge might have thought himself bound to admit the force of this argument, as, to evade the effect of it, he presently goes on to say: "The plaintiff's right to compensation being a statutory right, an action to enforce it would, in my opinion, not be barred except by the lapse of twenty years after the cause of action arose, and this period had not elapsed when this action was brought."

It must then, for the present, at all events, be deemed settled that *Allan* v. *McTavish* and *Boice* v. *O'Loane* lay down the law as applicable to this Province, and that twenty years, and not *ten*, is the limit to actions of every sort on mortgages and judgments.

It will be observed that neither Mr. Justice Proudfoot nor Mr. Justice Rose pretend to consider the principle involved in these various cases. But it will be instructive for any one who desires to do so to read the judgments of Jessell, late M. R., in *Sutton* v. *Sutton*, and the late Chief Justice Moss, in *Boice* v. *O'Loane*, both of them judges of the highest distinction, who, in closely reasoned judgments, arrive at conclusions the very opposite of one another. It is remarkable, however, that in the latter case, Moss, C.J., approved of the reasoning of Mr. Justice Gwynne in the court below (and whose judgment the court above reversed), but said it was not consistent with *Hunter* v. *Nockolds*: 1 Mac. & G. 640.

We may add that *Allan* v. *McTavish* reversed the decision of Mr. Justice Morrison in the court below; and that in another case of *Caspar* v. *Keachie*, 41 U. C. R. 601, Mr. Justice Wilson (now Chief Justice) took the same view as Mr. Justice Gwynne and Mr. Justice Morrison.

This last case was never carried to appeal, though decided only a few months after *Allan* v. *McTavish* (in the court below), and about an equal time before *Boice* v. *O'Loane* (in the court below).

We have thus the judgments of Mr. Justice Gwynne, (the present) Chief Justice Wilson, and Mr. Justice Morrison all affirmed by the Court of Appeal in England; while, as has been said, the reasoning of Mr. Justice Gwynne was approved of by the Court of Appeal, though that

court felt itself bound to come to a different conclusion, owing to the case of *Hunter* v. *Nockolds.*

Here then the matter rests, as far as the state of the law on the point is concerned; but we would like to see some authoritative decision as to whether the decision of the Court of Appeal in England ought to be considered paramount to that of our Ontario Court of Appeal, or not. Looking at the language used in the case of *Trimble* v. *Hill*, L. R. 5 App. Cas. 342, one might almost conclude that it ought so to be considered. The appeal there was from a judgment of the Supreme Court of New South Wales, which court had refused to depart from a previous judgment of their own, construing a statute passed in the same terms as an Imperial Statute. The House of Lords held that the court below might well have yielded to the high authority of the Court of Appeal in England, by a judgment of which court all the courts in England are bound until a contrary determination has been arrived at by the House of Lords; and their lordships thought that in Colonies where a like enactment has been passed by the Legislature the Colonial Courts should also govern themselves by it.

From this it would appear that, where our statute is identical with the Imperial statute (except that *ten* years is substituted for *twelve*), if a like case to *Allan* v. *McTavish* were again to come before the Court of Appeal here, that court should be governed by *Sutton* v. *Sutton*, and not adhere to their previous decisions in *Allan* v. *McTavish* and *Boice* v. *O'Loane.*

RECENT ENGLISH DECISIONS.

The *Law Reports* for December comprise 17 Q. B. D. pp. 689-821; 11 P. D. pp. 125-186; 33 Chy. D. pp. 223-651; and 11 App. Cas. pp. 415-664.

Trover—Post office order cashed through bankers.

Not many of the cases in the Queen's Bench Division are of much interest in this Province. *The Fine Art Society* v. *The Union Bank*, 17 Q. B. D. 705, is the first to claim attention. In this case the Court of Appeal determined that, where a post office order had been fraudulently deposited with a bank by a person not entitled thereto, the money for which was received by the bank, and placed to the credit of the person by whom the post office order had been deposited, the bank were liable to the rightful payee of the post office order for the money so obtained. The post office regulations provided that where a post office order is presented for payment by a banker, it should be payable without the signature by the payee of the receipt contained in the order, provided the name of the banker presenting the order is printed or stamped upon it; and it was held that this regulation did not give the post office order the character of a negotiable instrument transferable to bearer by delivery so as to bring the case within the doctrine of *Goodwin* v. *Robarts*, 1 App. Cas. 476.

New trial—Verdict against weight of evidence.

In *Webster* v. *Friedeberg*, 17 Q. B. D. 736, the principle upon which the court should proceed in granting a new trial on the ground that the verdict is against the weight of evidence was again discussed, and is noteworthy for the fact that Lord Esher, M.R., makes a new and somewhat different proposal for the amendment of the rule laid down in *Solomon* v. *Bitton*, 8 Q. B. D. 176, from that suggested by Lord Halsbury in the late case of the *Metropolitan Ry. Co.* v. *Wright*, 11 App. Cas. 152 (noted *ante* p. 255). In *Solomon* v. *Bitton* it may be remembered that it is laid down by Jessel, M.R., that the question whether a new trial should be granted on the ground that the verdict is against the weight of evidence, depends upon whether the verdict is one which reasonable

men "ought to have come to." In *Metropolitan Ry. Co.* v. *Wright*, Lord Halsbury suggested that the question depends on whether the verdict is one which reasonable men "might have come to," and now Lord Esher, M.R., tells us on the authority of Fry, L.J., that what Jessel, M.R. really said was that the question depends on wheth. the verdict is one which reasonable men "ought *not* to have come to."

APPEAL—EXTENDING TIME—IGNORANCE OF SOLICITOR.

The *Queen* v. *Kettle*, 17 Q. B. D. 761, is another of those cases in which the court has refused to extend the time for appealing, where the time has elapsed owing to the ignorance of the practice of the appellant's solicitors. Wills, J., says at p. 763, after observing that the rule of practice under which the appellant ought to have proceeded had been in operation a month, that "the case falls within the category of ignorance of the law suggested by Baggallay, L.J., in *Collins* v. *Paddington Vestry*, 5 Q. B. D. 368. There is, as suggested in that case, a material distinction between a slip or mistake before and after judgment; and I feel the full force of the observation. There comes a time when everything must be final. Where judgment has been given, the successful litigant has a right to be protected against the too liberal indulgence of the court." Grantham, J., though agreeing that in the case before the court the leave should be refused, reserved his opinion as to the general rule to be observed in such cases.

LESSEE—COVENANT TO LEAVE IN REPAIR—MEASURE OF DAMAGES—INDEMNITY—BANKRUPTCY.

The action of *Morgan* v. *Hardy*, 17 Q. B. D. 770, was one by a landlord against the assignee of a lease to recover damages for breach of a covenant to leave the premises in repair at the end of the term. The defendant brought in a third party from whom he claimed indemnity. It appeared that, owing to changes in the surrounding property, the demised premises had so far altered in value since the commencement of the lease, that they would be as valuable for letting purposes if some of the repairs required by the covenant, according to its strict meaning, were either omitted or executed at a cheaper rate than was usual under such a covenant; but it was held by Denman, J., that the true measure of damages, notwithstanding the facts aforementioned, was the amount required to put the premises into such repair, as was originally contemplated by the covenant. As between the defendant and the third party, it appeared that the agreement for indemnity was made in 1873, and the third party became bankrupt in 1875, and that the term expired in 1883, and the third party sought to escape from liability on the ground that it was a claim discharged by his bankruptcy, but it was held that his liability under his agreement to indemnify the defendant against the covenant in question, was not "a liability present or future, certain or contingent" within s. 31 of the Bankruptcy Act, 1869, so as to be provable in bankruptcy, and therefore, that the bankruptcy proceedings were no defence.

NEGLIGENCE—CORPORATION PERFORMING PUBLIC DUTIES.

Gilbert v. *Corporation of Trinity House*, 17 Q. B. D. 795, is deserving of a passing word. By the Merchant Shipping Act, 1854, the superintendence and management of all lighthouses and beacons in England are vested in the defendants. The action was brought to recover damages for negligence committed by the defendants' servant, and the defendants endeavoured to escape from liability on the ground that the Act had constituted them servants of the Crown, so as to exempt them from liability in the same manner as the great officers of state are exempt, but Day and Wills, JJ., held this defence untenable.

HUSBAND AND WIFE—DIVORCE—REMARRIAGE OF GUILTY PARTY.

Turning now to the cases in the Probate Division, the first which claims attention is *Scott* v. *The Attorney-General*, 11 P. D. 128, in which the validity of the remarriage of a divorced person contracted under the following circumstances came in question: A. and B., both having an Irish domicil, were married in Ireland. They resided in Ireland a year after their marriage, and subsequently removed to the Cape of Good Hope, where the husband abandoned all idea of returning home, and visited England only for short periods. In the fifth year of cohabitation the wife committed adultery with S., whose domicil was English, and in a suit instituted by the husband against the wife in the court of the Cape of Good Hope, the marriage was dissolved. By the law of that colony, the guilty

party was not at liberty to remarry so long as the innocent party remained unmarried. The wife and S., shortly after the divorce, returned to England, and there went through the form of marriage according to law, whilst the innocent husband was still unmarried. It was held by Sir James Hannen that the divorce was valid, and that as the divorce had the effect of cancelling the existing marriage, the parties were restored to the condition of unmarried persons, and were at liberty to remove to England and contract a fresh marriage according to the law of England, notwithstanding the colonial law prohibiting the remarriage of a divorced person under such circumstances, and, that therefore, the marriage to S. was valid.

CRUELTY—CONDONATION.

In *Mytton* v. *Mytton*, 11 P. D. 141, it was held that a persistent course of harsh, irritating conduct, unaccompanied by actual violence, but carried to such a point as to endanger the petitioner's health, and renewed after the resumption of interrupted cohabitation, constituted legal cruelty sufficient to justify a decree of judicial separation.

PROBATE—TWO WILLS—SECOND ACTION TO ESTABLISH A WILL—STAYING PROCEEDINGS.

Peters v. *Tilly*, 11 P. D. 145, was an action to obtain probate of a last will. There had been a previous action by the next of kin for letters of administration with the will annexed, bearing date 1868. In opposition, parties claiming to be legatees set up the contents of a late will, alleged to have been executed in 1877 or 1878, but which could not be found. The Probate Division held that the contents of this latter will had been proved, and granted probate, but the Court of Appeal reversed this decision, "without prejudice to any application for probate of the said will if found and produced," and this decision of the Court of Appeal was subsequently affirmed by the House of Lords. The present action was then brought for probate of the second will by the executor and residuary legatee thereunder, who had been the confidential solicitor for the deceased, and who had acted as solicitor for the legatees in the previous litigation. This suit was founded upon fresh evidence of the contents and execution of the second will. The defendant applied to stay the proceedings generally, and this Butt, J., declined to do, but inasmuch as the plaintiff had been privy to the prior suit, he ordered proceedings in this action to be stayed until the costs of the former suit should be paid.

BILL OF LADING—PERILS OF THE SEA—BURDEN OF PROOF—NEGLIGENCE.

The Xantho, 11 P. D. 170, was an action brought against a shipowner for the loss of goods carried under a bill of lading containing the usual exception against perils of the sea, it appeared that the goods were lost in consequence of a collision between the carrying ship and another, and it was held by the Court of Appeal that this was not *prima facie* evidence of a loss within the exception.

MORTGAGEE IN POSSESSION—ACCOUNT—DAMAGE TO MORTGAGED PROPERTY.

Proceeding now to the cases in the Chancery Division, the first to which we would call attention is *Taylor* v. *Mostyn*, 33 Chy. D. 226. The plaintiffs in this case were mortgagees in possession of a colliery, and were also lessees of the same property under a lease by way of mortgage, for a fixed term of years at a rent and a certain royalty for all coal mined. The lease contained covenants to leave pillars of coal to support the roof, and not to work or remove the pillars. The mortgagees sublet, and gave their sub-lessees permission to work and remove the pillars which they did. In taking the mortgage accounts it was held that the mortgagees must be treated as having themselves wrongfully removed the pillars and must be charged, not with the amount of royalty reserved, but with the full value of the coal so taken, subject to a deduction for the cost of bringing it to the surface, but not for the cost of severance. Some time after the usual foreclosure judgment directing the accounts, it was discovered that the mines had been flooded in consequence, as the mortgagors alleged, of the improper working of the mines or the removal of the pillars by the sub-lessees. The mortgagors then applied to have an account taken of the damage thus occasioned, under the judgment as it stood, but it was held by the Court of Appeal that though the application was wrong in form, yet that the mortgagors were entitled to relief, and a supplemental order was made directing the account sought, and further directing that the

mortgagees should be charged with the amount of damages in the foreclosure account.

EASEMENT—BUILDING—LIGHT AND AIR—PRESCRIPTION ACT—2 & 3, W. IV, c. 71 (R.S.O. c. 108, s. 36).

The case of *Harris* v. *De Pinna*, 33 Chy. D. 238, turns upon the construction of the 2 & 3 W. IV., c. 71, s. 3 (R. S. O. c. 108, s. 36). The plaintiff brought the action to restrain the defendant from building so as to interfere with the access of light and air to the plaintiff's building in respect to which the plaintiff claimed to have acquired an easement over the defendant's premises. The building in respect of which the plaintiff claimed the easement was a skeleton structure used for storing and drying timber, which had openings at the sides through which light and air could enter, but these openings were from time to time blocked up by the timber stored. Chitty, J., was of opinion that the structure was not a "building" within the meaning of section 3 (R. S. O. c. 108, s. 36), and that the building intended by that section must be a building of a like character as a "dwelling house or workshop," and the Court of Appeal, without pronouncing on this point, were of the opinion that the plaintiff failed because he had failed to prove an uninterrupted access of light by any one aperture for the statutory period. It was further held by the Court of Appeal, on the authority of *Webb* v. *Bird*, 13 C.B.N.S. 841, that a right to the uninterrupted access of air over the general surface of the alleged servient tenement cannot be acquired under the Prescription Act; and the fact that the alleged servient and dominant tenements were both held under a common lessor, coupled with the fact that the lease of the servient tenement was earlier, negatived any claim to the easement as arising out of an implied covenant.

SOLICITOR AND CLIENT—COSTS—TAXATION.

The principal point determined in *Re Hill*, 33 Chy. D. 266, was a question as to the costs taxable under an order directing the costs "properly incurred" by the plaintiff's solicitor in "recovering a fund" to be taxed; and it was held by the Court of Appeal (affirming Kay, J.,) that the costs incurred by the solicitor in establishing against the plaintiff his retainer as solicitor, upon an application made by the plaintiff to set aside the proceedings in which the fund was recovered, on the ground that the plaintiff had not retained the solicitor, were properly taxable; and also the costs of an appeal from the order by which the solicitor's retainer was established, which had come on and been dismissed after the making of the order for taxation.

MORTGAGEE IN POSSESSION—LOSS IN MANAGEMENT OF MORTGAGED PROPERTY.

Bompas v. *King*, 33 Chy. D. 279, was an action by a second mortgagee against the first mortgagee for an account of the proceeds of the sale of the mortgaged property, which consisted of a block of buildings let out as residential apartments to tenants, some of whom were supplied with food and attendance. The first mortgage contained a power to the mortgagee upon default to enter into possession and "manage" and receive the rents of the mortgaged property. Default having been made the first mortgagee entered and managed the property at a loss, and it was held by the Court of Appeal (affirming Kay, J.,) that the first mortgagees were entitled to be allowed the losses thus sustained out of the rents of the property, and, so far as they were deficient, out of the surplus proceeds of the sale.

COPYRIGHT—REGISTRATION OF COPYRIGHT.

In *Thomas* v. *Turner*, 33 Chy. D. 292, which was an action to restrain the infringement of a copyright, the Court of Appeal reversed the decision of Bacon, V.-C. The first edition o the plaintiff's book was published in November, 1881; neither this nor a second edition had been entered at Stationers' Hall before action, but the plaintiff had registered a third edition which was in fact a reprint of the first edition, describing it in the entry as the thir edition, and giving the time of the first publication as 22nd April, 1885, which was the date at which third edition was published. Bacon, V.-C., had held this to be a sufficient entry, but the Court of Appeal decided that the plaintiff had not truly stated the time of the first publication within the meaning of section 13 of the Copyright Act, 1842, and was consequently precluded by section 24 from maintaining the action.

MARRIAGE SETTLEMENT—AFTER-ACQUIRED PROPERTY.

In re Garnet, *Robinson* v. *Gandy*, 33 Chy. D. 300, the Court of Appeal reversed the decision of Kay, J., in 31 Chy. D. 648, noted *ante*, p. 203, holding that the setting aside of the re-

lease did not confer any new title, but merely removed a bar to the assertion of a pre-existing title, and consequently that the property recovered by setting aside the release was not "after-acquired property," and therefore not bound by the covenant.

PRACTICE—PLACE OF TRIAL—STATEMENT OF CLAIM.

The Court of Appeal in *Locke* v. *White*, 33 Chy. D. 308, came to a similar conclusion on a point of practice to that which had already been arrived at in this Province in *Bull* v. *The North British C. I. Co.*, 10 P. R. 622, viz.: that a plaintiff if he omits to name a place of trial in his original statement of claim, cannot supply the omission as of course in an amended statement of claim; and if he has named a place of trial in the original statement of claim he cannot alter it as of course in an amended statement of claim. In any such case the order of the court or a judge must be obtained.

PRACTICE—WINDING UP—COMPANIES ACT, 1862, S. 115—(45 VICT. C. 23, S. 82 [D.])—EXAMINATION OF DIRECTORS.

The case of *In re Imperial Continental Water Corporation*, 33 Chy. D. 314, establishes that where a person has brought an action against a company and the directors for some relief personal to himself, he cannot avail himself of the provisions of the Winding-up Act, which enables the court to direct the examination of parties capable of giving information as to the affairs of the company for the purpose of assisting him in his private litigation. Where such an action was brought by a contributory, and, before issue joined, he obtained an order, in certain winding-up proceedings which were pending against the company, for the examination of the directors, under the provisions of the Companies Act, 1862, s. 115 (see 45 Vict. c. 23, s. 82 [D.]), on the application of the directors the examination was stayed by Chitty, J., until after the trial of the action, and this order was affirmed by the Court of Appeal.

ACTION FOR RECOVERY OF LAND—DISCOVERY—TITLE DEEDS—PURCHASE FOR VALUE WITHOUT NOTICE.

In *Emmerson* v. *Ind*, 33 Chy. D. 323, the plaintiff as devisee brought the action to recover possession of the land devised. The defendants by their statement of defence pleaded (1) Possession. (2) Purchase for value without notice. By their affidavit on production they objected to produce certain documents on the ground that they were purchasers for value without notice, and certain others on the ground that they did not prove or tend to prove the case or title of the plaintiffs. Chitty, J., held that both classes of documents were privileged from production. But the Court of Appeal determined that the defendants by pleading possession, had put the plaintiff to proof of her title, that she had the ordinary right of a plaintiff to discovery of matters tending to support her title, and that the defendants could not resist production on the ground of their being purchasers for value without notice. But it was held that these documents which were sworn not to prove or tend to prove the plaintiff's case, were sufficiently protected, though the affidavit did not go on to state that they did not contain anything to impeach the title of the defendants. As to the latter point Cotton, L.J., says at p. 329:

> They have not indeed deposed that these documents do not contain anything to impeach the defendants with, but, in my opinion, it was not necessary that they should say so, for a plaintiff must recover by the strength of his own title, and is not entitled to discovery for the sole purpose of showing that the defendant has not a title.

As to the former point the reasoning of the Court of Appeal may be gathered from the following remarks of Lopes, L.J., at p. 331:

> It is easy to see why a plea of purchase for value without notice should be a defence to a bill for discovery, because on such pleadings nothing would be in issue but the fact of purchase for value without notice—the plaintiff's title would be admitted, and he could not have any right to discovery, except for the purpose of disproving the plea. Here the plea of possession puts the plaintiff to proof of her title *in omnibus*, and the defendants are not entitled to the same privileges as in a proceeding where they admit the plaintiff's title.

CHARITY—MORTMAIN—HARBOUR TOLLS—INTEREST IN LAND.

The question *In re Christmas, Martin* v. *Lacon*, 33 Chy. D. 332, for the consideration of the court, was whether a bond made by harbour commissoners in pursuance of a statute assigning tolls which they were empowered to levy on ships, and which were to be applied by them in payment (1) of the expenses of obtaining the Act relating to the harbour. (2) The interest of any money which should have been advanced for defraying such expenses. (3) The interest on any money borrowed and then due under repealed acts. (4) The ex-

penses attending the execution of works authorized by the Act. (5) In repaying moneys due which had been or should be borrowed under the Act or any repealed act, was or was not pure personalty. Chitty, J. held that it was an interest in and affecting land, and therefore, within the meaning of the Mortmain Act, 9 Geo. II., c. 36; but the Court of Appeal reversed this decision, and in doing so distinguished the case from *Attorney-General* v. *Jones*, 1 Mac. & G. 574, threw doubt on the authority of *Knapp* v. *Williams*, 4 Ves. 430, etc., and refused to follow *Ion* v. *Ashton*, 28 Beav. 379.

TRUSTEE—INVESTMENT—HAZARDOUS SECURITY—CESTUI QUE TRUST—LIEN.

In re Whiteley, Whiteley v. *Learoyd*, 33 Chy. D. 347, the Court of Appeal affirmed the decision of Bacon, V.-C., noted *ante* p. 253. The court further decided that a *cestui que trust*, who has been paid the extra income secured by the investment of the trust funds in a hazardous security which ultimately proves deficient, cannot be compelled to refund to the trustee the excess of income thus obtained. The court also held that where a trustee has been ordered to replace a trust fund which has been invested on an insufficient security, the *cestui que trust* is entitled to a lien on the security until the fund is replaced.

TRADE MARK.

In re James's Trade Mark, James v. *Soulby*, 33 Chy. D. 392. The plaintiff, in 1861, registered a design for the shape of blocks of black lead, being a cylinder terminated by a dome at one end as a trade mark, and the question the Court of Appeal had to decide was whether Mr. Justice Pearson was right in saying that such a design could not be registered as a trade mark. This question they answered in the negative.

INFANT—MAINTENANCE—CHARGE ON INFANTS' ESTATE IN REMAINDER.

Cadman v. *Cadman*, 33 Chy. D. 397, was an application to raise money on infants' estates for their past and future maintenance. The infants, five in number, were entitled to successive estates tail in remainder expectant on the death of their grandmother, who was tenant for life, and there being no income available for their maintenance, the grandmother offered to release her life estate in a portion of the property so as to give the first tenant in tail an estate in possession for the purpose of raising money thereon, for the past and future support of himself and the other infants, but this the Court of Appeal refused to sanction.

LUNACY OF ONE OF SEVERAL MORTGAGEES—TRUSTEE ACT, 1850, S. 3.

In re Jones, 33 Chy. D. 414, the Court of Appeal determined that when one of two mortgagees (who were also trustees) had become lunatic, and a new trustee had been appointed in his place under a power, the Court had jurisdiction under the Trustee Act, 1850, to appoint a person to convey the interest of the trustee of unsound mind in the mortgage which formed part of the trust estate, for the purpose of vesting the mortgaged estate in the continuing trustee and the new trustee.

TRUSTEE ACT, 1850—NEW TRUSTEE—VESTING ORDER.

The Court of Appeal, following its decision in *Re Vicat*, 33 Chy. D. 103 (see *ante* p. 397), refused in *Re Dewhirst*, 33 Chy. D. 416, to reappoint a new trustee already validly appointed under a power, in order to vest the trust estate in the continuing trustees and the new trustee. *Re Dalgleish*, 4 Chy. D. 143, which was not cited in *Re Vicat*, was relied on by the applicants but was overruled.

EASEMENT—LEASE—MERGER.

In *Dynevor* v. *Tennant*, 33 Chy. D. 420, the Court of Appeal affirmed the decision of Pearson, J., 32 Chy. D. 375, noted *ante* p. 301.

PRACTICE—FOREIGN CORPORATION—SERVICE OF WRIT.

In *L'Honeux* v. *Hong Kong Banking Corporation*, 33 Chy. D. 446, the defendants applied to set aside service of a writ of summons. They were a foreign bank doing business in London, and the writ had been served on the head manager of the London agency of the bank. This was held by Bacon, V.-C., to be good service on the defendants, and he also held that the fact that the defendants had applied for security for costs was a waiver of any objection as to service of the writ.

CHARITY—CY-PRES—FAILURE OF OBJECT—LAPSE OF LEGACY.

In re White's Trusts, 33 Chy. D. 449, a testator who died in 1853 had bequeathed £1,000, after the death of a tenant for life, to the master and wardens of the Tinplate Workers

Company upon trust with the proceeds when a proper site could be obtained to build almshouses for the use of poor liverymen of the company, then of poor freemen of the company, and, lastly, of any poor man of the trade of a tinplate worker; and he declared that he made the bequest in the hope that some other person, actuated by the same charitable feelings, would thereafter sufficiently endow the almshouses; and he bequeathed the residue of his estate to various persons.

After the death of the tenant for life, who died in 1882, the company unsuccessfully endeavoured to obtain a site for the almshouses, and it appeared that there was no reasonable prospect of a site being obtained, and even if it could be, the company had no income available for the endowment and maintenance of the almshouses. Under these circumstances it was held by Bacon, V.-C., that as the object of the gift had failed, the fund fell into the residue as a lapsed legacy, and was not applicable *cy-pres*.

Easement—Ancient lights—Alteration of—Dominant tenement—Injunction or damages.

The case of *Greenwood* v. *Hornsey*, 33 Chy. D. 471, was a suit to restrain the interference with the plaintiff's ancient lights. On a motion for an interim injunction the defendant was suffered to proceed with the building objected to, on his giving an undertaking to pull it down if so ordered. At the trial it appeared that the plaintiff's buildings were erected in 1872, upon the site of old buildings which had been pulled down in 1871. In the new buildings the windows were so arranged as to preserve the light which had been enjoyed in respect of the old buildings. The new buildings were somewhat higher than the old, and had an additional story. The front was advanced two feet nearer defendants' land. The defendants relied on the alterations in the plaintiff's building as an abandonment of the easement, but this contention failed, Bacon, V.-C., holding that an alteration of a building entitled to the access of light is not an abandonment of the right, unless the intention to abandon is manifest. The defendants further claimed that even if the right existed damages should be awarded under Lord Cairns' Act (see R. S. O. c. 40, s. 40) in lieu of an injunction, but in this also they failed, the learned Vice-Chancellor following *Scott* v. *Pope*, 31 Chy. D. 554, noted *ante* p. 201, holding that the way in which the case had been dealt with in the motion for the interim injunction precluded him from entering on the question.

Married woman—Infant—Ward of court—Settlement—(R. S. O. c. 40, s. 87).

In *Buckmaster* v. *Buckmaster*, 33 Chy. D. 482, an attempt was made to invalidate a settlement made by a married woman whilst an infant and a ward of court. The settlement was made and sanctioned by the court under the following circumstances: Upon the death of her father in 1848, the settlor became entitled under his will to a reversionary interest in his estate. In 1856 a suit was instituted for the execution of the trusts of the will. In 1862, the settlor being then eighteen, and a ward of court, married without the sanction of the court or the knowledge of her guardian. By an order made in the suit upon motion an inquiry was directed whether there had been a valid marriage, and if so, what the lady's fortune was, and what would be a proper settlement of it. And in pursuance of a report made under this order a settlement was executed in 1863 by the settlor and her husband, which was duly approved by a judge. There were four children of the marriage. In 1882 the marriage was dissolved by the Divorce Court, on the ground of the husband's adultery. In 1881 the tenant for life died, and the present petition was presented by the settlor for payment out of the fund which was in court to her, on the ground that the settlement not having been sanctioned by the court in manner required by the Infants' Settlement Act, 18 & 19 Vict. c. 43, and she being then an infant and a married woman, it was not binding on her. But Bacon, V.-C., was of opinion that the settlement was valid, as having been sanctioned under the inherent jurisdiction of the court over the property of its wards, or under the Infants' Settlement Act, and that there being an action pending it was not necessary that the order sanctioning the settlement should be made upon a petition intituled under the Act. He also held that even if invalid in its inception it had been adopted and confirmed by the settlor by various acts done by her during her coverture and after its termination.

SELECTIONS.

IRREGULAR INDORSEMENT BY THIRD PERSON—CHARACTER OF THE LIABILITY ASSUMED.

IF a person who is neither the maker nor payee of a negotiable promissory note, payable on time or on demand, indorses it in blank, before its delivery to the payee, and for the purpose of lending faith and credit to the instrument and making it acceptable to the payee, what is the character of the liability which he assumes? The conflict of the authorities upon this point is too wide and too deeply settled to make any reconciliation possible, except through the intervention of statutes. No less than four distinct views have been presented, and each has been urged with able and forcible reasoning. It is impossible to say where the truth lies; and as each State manifests a fixed intention to abide by the rule established by its own courts, it is vain to hope for any ultimate harmony of the decisions. The different theories can merely be placed side by side and contrasted.

The first view—and this prevails in more than half the States—is that the person so indorsing becomes liable as a joint-maker of the note, exactly the same as if his signature appeared below that of the maker at the foot of the paper, and, consequently, that he is not entitled to notice or protest, and should be sued in a joint action with the maker. This theory proceeds upon the following reasoning: he certainly means to pledge his responsibility in some way, and to the payee; he cannot be considered a first indorser of the note, because no one but the payee can occupy that position; neither can he be regarded as the second indorser, because, to bring about that effect, he must appear on the face of the paper to stand in the relation of an assignor, and to have given currency to the paper by his transfer of it for a valuable consideration. Nor is it possible to treat him as a guarantor of the note, for that would import a separate consideration which is not assumed in the case. We are thus brought, by the exclusion of every other hypothesis, to the necessity of holding him as an original promisor jointly with the maker of the note. But it is generally held, in those States which adopt this doctrine, that parol evidence is admissible to show that it was the contemporaneous and mutual understanding of all the parties to the transaction that he should be held liable only as an indorser and not as an original promisor, and in that case he would be entitled to notice and protest. It is stated, however, that this permission will be accorded only as between parties who are entitled to look into the original transaction; that such proof cannot be admitted against one who took the note before it was due, in the usual course of business, for value, and without notice. In Massachusetts and Minnesota, however, it is held that no evidence can be received to change the character of his liability as a joint-maker, and that neither parol proof, nor a mortgage, given with the note to secure its payment, is admissible to show that he was to be bound only as an indorser. And the fact that he agrees with the maker to be simply surety for the latter will not alter his attitude toward the payee. But it appears that he will not be liable as a joint-maker if the payee afterwards indorses his own name above the stranger's, before the note is delivered; in that case he merely becomes a second indorser. In Massachusetts, it is now provided by statute that "all persons becoming parties to promissory notes payable on time, by a signature in blank on the back thereof, shall be entitled to notice of the non-payment thereof the same as indorsers"; which will take that State hereafter out of the category of those holding this doctrine.

The view just presented is also definitely established as the rule of the federal courts. In the language of Mr. Justice Clifford: "Third persons indorsing a negotiable promissory note before the payee, and before it is delivered to take effect, cannot be held as first indorsers, for the reason that they are not payees; and no party but the payee of the note can be the first indorser, and put the instrument in circulation as a commercial negotiable security. Such a third party may, if he chooses, take upon himself the limited obligation of a second indorser; but if he desire to do so he must employ proper

terms to signify that intention, the rule being that a blank indorsement supposes that there are no such terms employed, and that he is liable either as promisor or guarantor. . . . But if any one not the payee of a negotiable note, or, in the case of a note not negotiable, if any party writes his name on the back of the note, at or sufficiently near the time it is made, his signature binds him in the same way as if it was written on the face of the note, and below that of the maker; that is to say, he is held as a joint-maker, or as a joint and several maker, according to the form of the note." And the circuit courts will follow this construction, holding that for them the question is one of general commercial law, and that the decisions of the State courts, though entitled to the highest respect, are not to be followed as authorities unless agreeing with the decision above quoted, which case is regarded as conclusively settling the doctrine for the federal courts. The anomalous state of affairs which will follow upon this course is apparent at a glance. For example, a citizen of New York, who indorses a note in this way, will be an indorser when brought into the courts of that State, but an original promisor if he can be sued in the circuit court. Or, supposing him to have had no notice of non-payment, he will be liable in the federal courts, but not in the courts of his own State. However, since the supreme court has adopted a definite rule of construction, it is evidently better that those courts over which it has an appellate jurisdiction should follow the same rule than that they should conform to the practice of the particular State where they happen to be sitting.

The second view is, that a third party indorsing a note in blank before delivery to the payee enters into the original contract of the maker of the note as a co-maker, but in the character of surety or guarantor. And this opinion obtains principally in Louisiana, Texas and Arkansas. It is founded upon the theory that the place of signature, and the general import of the note indicate an intention to become responsible as surety for the maker, while, for the reasons already given, the person so signing cannot properly be regarded as an indorser. But here, also, it is generally held that evidence is admissible to show that a different obligation was designed to be assumed.

The third view is the one maintained in Illinois, Kansas, California and Connecticut; that the person so signing assumes the responsibility of a guarantor pure and simple; that his liability is only secondary, and cannot be fixed except by proof that the remedies against the maker have been exhausted; but that he is not generally entitled to notice unless injury be shown to have resulted from the want of it. This doctrine is supported in several important cases. But again we find the courts permitting him to rebut the presumption that he put his name on the note as guarantor, by showing the true character of his obligation.

Finally, the doctrine entertained in New York, Pennsylvania, Wisconsin, and in a few cases elsewhere, is as follows: Taking the note as it stands, and without any extrinsic proof of the intention of the parties, the person who indorses in blank before delivery to the payee is to be regarded as a second indorser. In this capacity he is not liable to the payee at all; nor is he liable to any subsequent holder for value, unless the payee complies with the implied condition of his signature by writing his own name above that of the blank indorser, and thus assuming the place and responsibilities of a first indorser. But parol evidence is admissible to show that the object designed to be attained by the addition of the stranger's indorsement was to give the note faith and credit, and render it acceptable to the payee; and this may also be shown by the stranger's express acknowledgment of that fact to the payee. With this extrinsic light upon the contract, he will assume the position of first indorser, the payee being second. Thus, he becomes liable to the payee (but only upon receiving all the rights of a regular indorser), and also, in like manner, to any subsequent indorsee of the payee. As remarked by Church, C.J.: "As the paper itself furnishes only *prima facie* evidence of this intention, it is competent to rebut the presumption by parol proof that the indorsement was made to give the maker credit with the payee." But it is not competent to show by parol that it was the intention to hold him liable as a joint-maker.

The courts of Indiana, although they hold that the presumptive liability of one signing a note in this irregular fashion is that of an indorser (in harmony with the

view last set out), yet permit parol evidence to show that the mutual understanding of the parties at the time of the transaction was that he should be held as a maker or surety. At least a note thus indorsed is admissible evidence in a suit by the payee against such indorser and the maker, as joint-makers, as a link in the chain of the plaintiff's evidence. And in Ohio, it is thought that if the undertaking of the third party can be made to take effect as an indorsement, it should always be held to do so, as conforming more nearly to the general intention of parties assuming that position upon it. Hence, if the note is not designed for the payee, and it is contemplated that the latter should indorse it as an accommodation party before it is used, then he who indorsed it at the time, or before, the note was drawn should be treated as a second indorser.

If there is no date appended to the signature of the irregular indorser, nor anything to show when it was put on, it will be presumed that he added his name at the inception of the note and before its delivery, or (what is equivalent) that he did so afterwards in pursuance of a previous agreement. But parol evidence is admissible to rebut this presumption and to show that he did not sign the instrument until after it had taken effect as between the maker and the payee, and, succeeding in this, he will change his liability from that of an original promisor to that of guarantor. It is said, however, in one case, that in favour of the original payee there is no presumption that the indorsement was before delivery; the fact must be proved; but it is otherwise in favour of a subsequent *bona fide* holder.

In Minnesota, it is held—and probably in all those States where a person so signing is regarded as an original promisor—that when the signature before delivery is proved, there arises a presumption, in the absence of evidence to the contrary, that the indorsement was made for the purpose and with the effect of giving additional credit to the note with the payee. But, as we have already seen, in New York and Pennsylvania it is directly the reverse—it is necessary to prove that such was the intention of the indorser in order to make him liable to the payee at all.

One who indorses a note that is not negotiable, as security, before delivery to the payee, cannot be charged as an indorser of the note; because there is no such thing as an "indorsement," speaking in the strict commercial sense, of non-negotiable paper; he will therefore be liable to the payee as maker or guarantor. Or, as stated in Connecticut, he contracts that the note is due and payable according to its tenor, that the maker shall be able to pay it when it comes to maturity, and that it is collectible by the use of due diligence. Of course if the note is payable to the maker or his order, the person so signing it is simply an indorser.—*Central Law Journal.*

[The authorities will be found on reference to the above publication, vol. 24, p. 3.]

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

QUEEN'S BENCH DIVISION.

JOHNSTON V. SHORTREED ET AL.

By deed dated 4th April, 1884, made between J. and S. & L., J. agreed to sell and S. & L. to purchase all the merchantable pine suitable for their purposes, standing, lying, and being on certain described property, for a sum which was then named and paid, "provided, however, that the said timber and logs shall be cut and removed off said lot on or before the 4th of April, 1884."

The defendant B. (claiming through S. & L.), after the expiration of the time agreed upon, removed logs which J. had cut after said 4th day of April, 1884, and for this J. brought this action and recovered a verdict for $125.

B. moved against the verdict on the ground that under the deed and the assignment to him he was the absolute owner of the timber, subject merely to such claim as the vendor might have against the vendees for breach of the covenant to remove the pine within the time named.

Held (O'CONNOR, J. dissenting), that the agreement could not be construed as an absolute grant of the pine trees suitable for the business of the grantees, subject to a *covenant* by them to cut and remove the trees within ten years; *but* that it was a grant of the pine subject to the *condition* that the timber and logs should be cut and removed off the property on or before the 4th day of April, 1884.

Held; also, that this condition applied as well to trees severed before as to those severed after the expiration of the term.

Held, per O'CONNOR, J., that the case was within the meaning of the law as decided by the court in the case of *McGregor* v. *McNeill*, 32 C. P. 538, and that the defendant was the absolute owner of the timber, with an affirmative license to cut and remove the same, which the vendor could not revoke, although the time within which the timber was to be removed had expired, though the vendor might have other remedies.

Pepler, for motion.
Strathy, Q.C., contra.

RIVER STAVE CO. v. SILL.

A company incorporated in Michigan, while insolvent had given a mortgage on chattels in Ontario to defendant, a Michigan creditor, to secure previous cash advances made to the company under verbal promises by two directors that security would be given. The effect was to delay and prejudice other creditors and give defendant a preference over them.

Held, under 48 Vict. ch. 26 (O.), that without regard at all to any questions of *bona fide* pressure or knowledge of the company's position by its officers or defendant, the effect alone of the transaction voided it.

Held, also, that the mortgage was not given in pursuance of any antecedent contract or promise of the company; but even so, it could not be upheld, because not shown to have been given for a money advance made in the *bona fide* belief that it would enable the debtor to carry on and pay in full.

Held, also, that the property mortgaged being in Ontario, the transaction was governed by its laws, without regard to those of Michigan.

Aylesworth, for the motion.
Douglas, Q.C., contra.

IN BANCO.

MCMICHAEL ET AL. v. GRAND TRUNK RY. CO.

Plaintiffs' horses, because of insecure fastening of the gates at the farm crossing, got through the gates and were killed on the railway track by a passing train.

Held, that the contention that by reason of the continual user by plaintiffs, without complaint, of the defective fastenings, they had adopted them as sufficient, and could not complain, was not well founded, but defendants were bound to see the fastenings were sufficient.

47 Vict. ch. 11, sec. 9, commented on.
McMichael, Q.C. for plaintiff.
W. Nesbitt, contra.

MASTERS v. THRELKELL.

Covenant—Proviso for acceleration of time for payment.

A covenant that one half of the surplus proceeds of goods transferred by a debtor to his surety after deduction of liabilities should be paid to the debtor by the surety by his promissory note at two years, with a proviso that should the defendant or the firm of T. & S., of which the defendant was a member, dispose of their business, or make an assignment for the benefit of creditors, the note should become due. S. retired from the business, and transferred to the defendant all his interest therein.

Held, that the time of payment of the note was not by that means accelerated.

Lash, Q.C., for motion.
Geo. Bell, contra.

MITCHELL v. CITY OF LONDON INSURANCE CO.

G. insured a tug while navigating the rivers Sydenham, St. Clair, Detroit and Thames, and Lake St. Clair, loss, if any, payable to M. as his interest may appear. At the time the insurance was effected the tug was libelled in the American Admiralty Court, and to avoid the claim therein, he used the proceedings of the

Maritime Court, upon a claim for wages, to make a fraudulent sale of the tug to I. Afterwards G. procured a renewal of the policy without disclosing the sale. G. then assigned the policy to M., who sent it to the defendants for their consent thereto, but before it was given the tug was burned in the Chenal Ecarte. At the time of the fire crude petroleum and rock oils were kept in the tug for lubricating purposes. M. and I. delivered proof papers of claim, but G. did not deliver any. At the trial leave was given to add G. and I. as co-plaintiffs, andjudgment was directed to be entered for the full amount of the insurance.

Held, 1. That the leave to add G. and I. as co-plaintiffs had been properly given, but that the judgment should be reduced to the amount of M.'s claims.

2. That the tug was, at the time of the fire, in one of the localities allowed by the policy.

3. That the crude and rock oils being kept for lubricating purposes, clause f of the 10th Statutory Conditions did not apply.

4. That there was a sufficient compliance with the 12th and 13th Statutory Conditions.

Per WILSON, C. J. There was not sufficient proof of loss, and the defendants were not liable by reason of the crude and rock oils being kept in the tug.

Per O'CONNOR, J. A tug is not a building within clause f of the Statutory Conditions.

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

Robinson, Q.C., and *Millar*, contra.

Wilson, C.J., in Single Court.]

BELL TELEPHONE COMPANY V. BELLEVILLE ELECTRIC LIGHT COMPANY.

License from municipal corporation—Telephone and Electric Light Companies—Interference by second licensee with rights of first—R. S. O. ch. 157, secs. 59, 70; 45 Vict. ch. 19, sec. 3 (O.).

An interlocutory injunction having been granted to restrain defendants who were carrying on business in partnership as an Electric Light Company under license from a municipal corporation from running their lines in such a way as to interfere with the safe and efficient working of the business of the plaintiffs, an incorporated Telephone Company, also licensees of the corporation under authority granted two years previously to the defendants' license,

Held, that, although the circumstance that the plaintiffs were in possession of the ground, and had their poles erected about two years before the defendants put up their poles, did not give them the exclusive possession or right to use the sides of the road on which they had placed their poles, yet, their possession being earlier than that of the defendants, the defendants had not the right to do any act interfering with or to the injury of the plaintiffs' rights.

Held, also, that independently of the provisions of R. S. O. ch. 157, secs. 59 and 70, as extended to Electric Light Companies by 45 Vict. ch. 19, sec. 3 (O.), the plaintiffs were entitled to relief on the general ground upon which protection and relief in cases of this kind are granted.

Quære, whether defendants were liable to indictment.

S. G. Wood, for motion.

Dickson, Q.C., contra.

HISLOP V. TOWNSHIP OF MCGILLVRAY.

In an action against a township charging, (1st) the stopping up of a high way, thereby preventing access to plaintiff's farm; (2nd) the obstructing of a highway, thereby, etc.; (3rd) the not maintaining and repairing a highway, thereby. etc.,

Held, per WILSON, C. J., that as the part of the highway complained of was part of an original allowance for road which had never been opened or made, the statement of claim did not properly describe the subject of complaint, and the plaintiff must therefore fail.

2. That an action claiming a mandamus will lie against a municipality for not opening an original allowance for road, by reason of which the occupant of land cannot have access to and from his land, to and from a public road, if there be no other convenient way to and from his land, and if there be no good reason in respect of means or otherwise, why such allowance should not be opened; and if the work required to be done for that purpose be worth the outlay required to open and maintain the same.

3. That although the municipality must be allowed a very large discretionary power to do or not to do such a work, it has not the sole and uncontrolled right to avoid doing it.

4. That if the claim made had been proved as stated, a new trial would have been granted, for the facts found by the jury were not warranted by the evidence.

Semble, if the evidence given will not warrant the court in granting a mandamus upon motion to the court, and the court has before it all the materials necessary for finally determining the question in dispute, judgment may be given for the defendants under Rule 321 of the Judicature Act.

Per ARMOUR, J., that the action would not lie, the matter in question being strictly in the discretion of the municipal council: that the verdict was not sustained by the evidence, and if necessary a new trial should be granted.

Per O'CONNOR, J., that the action was sustainable in law, and the verdict was supported by the evidence.

W. R. Meredith, Q.C., for motion,
McCarthy, Q.C., and *R. Meredith*, contra.

IN BANCO.

FROST v. HINES.

Action to recover land—1st and 2nd mortgagee—Lease by mortgagor after mortgage—Mortgagee in possession.

C., owner of the premises in question, mortgaged them on 6th February, 1880, to the C. P. L. and S. Co. On 17th March, 1883, C. made a second mortgage to L., who assigned to plaintiff. On 5th October, 1883, C. leased the premises to defendant for ten years from 1st April, 1884, at $175 for the first year, and $165 for subsequent years, payable in advance on 27th October in each year. The lease contained a clause that rent should be paid to H., or sent to the mortgagees "as payments of interest on loan made by the lessor." H. was the local agent of the first mortgagees. The clause referred to was inserted in the lease at the defendant's request. The rent payable on 27th October, 1883, 1884 and 1885 was paid by defendant to H., who remitted the mone to the company. H. gave defendant receipts for the rent as agent for C. The company sent H. receipts for the money forwarded by him, expressing that the money was received on account of advances made to C. H. had no authority to receive money for the company. The company were not made aware of the existence of the lease or of its provisions. The plaintiff brought this action to recover possession of the mortgaged premises, his mortgage being in default. The defendant set up the lease, and the clause referred to, the payment of rent to the company, and that he was tenant to the company whose mortgage was in default.

Held, that plaintiff, as second mortgagee, was entitled to recover, unless it could be established that defendant was in possession as tenant of the first mortgagees, and not as tenant of the mortgagor.

Held, also, that as the company received the money sent them by H., not as rent of the mortgaged lands, but on account of advances made to C., they could not under the evidence be held to be mortgagees in possession, and that defendant was not their tenant.

Held, also, that even if the company had been aware of the provision in the lease, and had received the money with such knowledge, they would not have been mortgagees in possession with defendant as their tenant, as the money under the very terms of the provision would not have been received as rent, but "as payments of interest on a loan made by the lessor."

Lash, Q.C., for motion.
Hoyles, contra.

PRACTICE.

RE REDDAN.

"The Devolution of Estates Act, 1886," 49 Vict. c. 22 (O.)—Rights of widow of intestate deceased—Release of dower—One third absolutely.

R. died intestate, entitled to real and personal property, leaving a widow and children.

Held, that the widow having elected to take her interest under section 4 of "The Devolution of Estates Act, 1886," 49 Vict. c. 22 (O.), was entitled to one third of the real estate absolutely.

J. Hoskin, Q.C., for the infants.

Huson Murray, for the widow.

E. T. Malone, for the inspector on behalf of a lunatic son.

Proudfoot, J.] [Jan. 13.

TEMPERANCE COLONIZATION SOCIETY V. EVANS ET AL.

Jury notice—Exclusive jurisdiction of equity—Judicature Act, sec. 45—Action for declaration of right to specific performance—Equitable issues between defendants—Misrepresentations—Construction of agreement, statute, and correspondence—Prejudicing the jury—C. L. P. Act, sec. 255.

The action was brought (1) for the recovery of instalments under a scrip contract, and (2) for a declaration of the plaintiffs' rights to a specific performance of the part of the contract as to settlement duties. The time for the performance of the settlement duties had not arrived, but the defendants denied any right in the plaintiffs upon the contract at all, and the consequence of the non-performance it was shown would be not only to prevent the plaintiffs from getting a rebate in price, but under the terms of the contract with the Dominion Government might result in the forfeiture of the whole agreement.

Held, that the plaintiffs, if they established their case, would be entitled to a declaration of the liability of the defendants to perform the contract, and that the (2) cause of action was not one that could be answered in pecuniary damages, or upon which there would have been before the Judicature Act any adequate remedy at law, and a jury notice was therefore improper under section 45, and should be struck out.

Held, also, that the circumstance that equitable issues were raised between the defendants was also a ground for striking out the jury notice.

One of the defences relied upon was the falsity of representations in the prospectus, and whether or not the representations were false depended in part upon the construction of the agreement between the plaintiffs and the Dominion Government, and of the Public Lands Act, 1879, and of the nature and effect of a correspondence between the plaintiffs and the government.

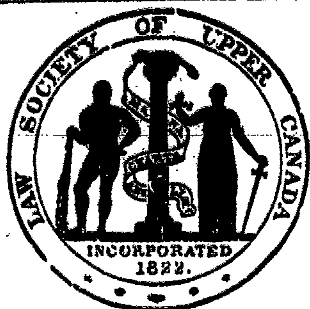
Held, that the question whether there were any and what statements in the prospectus that amounted to a representation the falsity of which would afford a defence, and the determination of the fact of the falsity were matters, if not exclusively for the judge, at least more proper for the consideration of a judge than a jury.

But even assuming that all the grounds of action would have been of common law cognizance, a judge has power under section 255 of the C. L. P. Act to direct the action to be tried without a jury, and it is a reason for such direction that by acts of persons other than the defendants, but of which the defendants may get the benefit, the plaintiffs may be prejudiced before a jury.

A. H. Marsh, for the plaintiffs.

Hoyles, for the defendants.

Law Society of Upper Canada.



OSGOODE HALL.

TRINITY TERM, 1886.

During this Term the following gentlemen were called to the Bar, namely:—*Sept. 6th.*—John Murray Clarke (Honours and Gold Medal); William Smith Ormiston, Edward Cornelius Stanbury Huycke, William Murray Douglas, William Chambers, William Nassau Irwin, George Henry Kilimer, Francis Cockburn Powell, Lawrence Heyden Baldwin, Lyman Lee, Robert Charles Donald, George Hutchison Esten, Thomas Urquhart, Joseph Coulson Judd, Walter Samuel Morphy, John Wesley White, Thomas Johnson, William H Wardrope, Francis Edmund O'Flynn. *Sept. 7th.*—Thomas Joseph Blain (who passed his examination in Trinity Term, 1885), William Lees, Charles True Glass, Alexander David Hardy, John Campbell, Richard John Dowdall, John Carson, Richard Vanstone, George Edward Evans, Charles Bagot Jackes. William Hope Dean; and *Sept. 17th*, William Robert Smythe (who passed his examination in Hilary Term, 1886). The following gentlemen received Certificates of Fitness to practise as Solicitors, namely:—John Murray Clarke, George Hutchison Esten, Wm. Smith Ormiston, Wm. Chambers, Alex. McLean, Robt. George Code, Henry Smith Osler, Edward C. S. Huycke, Wm. John McWhinney, Wm. Murray Douglas, Chas. True Glass, Robt. Charles Donald, Herbert Mcdonald Mowat, Francis Edmund O'Flynn, Lawrence Heyden Baldwin, John Bell Dalzell, Lyman Lee, Augus McCrimmon, Ranald D. Gunn, Joseph Coulson Judd, Heber Hartley Dewart, John Wesley White, Alex. David Hardy, Wm. Mansfield Sinclair, Hubert Hamilton Macrae, John Geale (who passed his examination in Hilary Term, 1886, also received his Certificate of Fitness). The following were admitted into the Society as Students and Articled Clerks, namely:—

Graduates.—George Ross, John Simpson, George Wm. Bruce, John Almon Ritchie, James Armour, John Miller, Frederick McBain Young, Malcolm Roblin Allison, Robert Baldwin, Charles Eddington B rkholder, Alexander David Crooks, Andrew Elliott, Robert Griffin Macdonald, Thomas Joseph Mulvey, James Milton Palmer, James Ross, John Wesley Roswell, Richard Shiell, Alfred Edmund Lussier, Charles Murphy, George Newton Beaumont, Charles Elliott.

Matriculants of Universities.—William Johnston, Samuel Edmund Lindsay, Nelson D Mills.

Junior Class.—Richard Clay Gillett, Alexander James Anderson, George Prior Deacon, Louis A. Smith, Andrew Robert Tufts, William Wright, Kenneth Hillyard Cameron, Harry Bivar Travers, John Alfred Webster, Thomas James McFarlen, William Elijah Coryell, John Henry Glass, Albert Henry Northey, Archibald Alexander Roberts, Charles B. Rae, George S. Kerr, William Egerton Lincolm Hunter, Francis Augustus Buttrey, Frederick Thomas Dixon, Hector Robert Argue Hunt, Daniel O'Brien, Franklin Crawford Cousins, Thomas Alexander Duff, William G. Bee, Stephen Thomas Evans, William Mott, Thomas Arthur Beament, and John Alexander Mather was allowed his examination as an Articled Clerk.

SUBJECTS FOR EXAMINATIONS.

Articled Clerks.

1884 and 1885.
- Arithmetic.
- Euclid, Bb. I., II., and III.
- English Grammar and Composition.
- English History—Queen Anne to George III.
- Modern Geography—North America and Europe.
- Elements of Book-Keeping.

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

Students-at-Law.

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

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

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations: Euclid, Bb. I., II. and III.

ENGLISH.

A Paper on English Grammar.
Composition.
Critical Analysis of a Selected Poem:—
1884—Elegy in a Country Churchyard. The Traveller.
1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

HISTORY AND GEOGRAPHY

English History from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography, Greece, Italy and Asia Minor. Modern Geography, North America and Europe.

Optional subjects instead of Greek

French.

A paper on Grammar,
Translation from English into French prose.
1884—Souvestre, Un Philosophe sous le toits.
1885—Emile de Bonnechose, Lazare Hoche.

or Natural Philosophy.

Books—Arnott's elements of Physics, and Somerville's Physical Geography.

First Intermediate.

Williams on Real Property, Leith's Edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and cap. 117, Revised Statutes of Ontario and amending Acts.

Three scholarships can be competed for in connection with this intermediate.

Second Intermediate.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three scholarships can be competed for in connection with this intermediate.

For Certificate of Fitness.

Taylor on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

For Call.

Blackstone, vol. 1, containing the introduction and rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris' Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law and Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

1. A graduate in the Faculty of Arts, in any university in Her Majesty's dominions empowered to grant such degrees, shall be entitled to admission on the books of the society as a Student-at-Law, upon conforming with clause four of this curriculum, and presenting (in person) to Convocation his diploma or proper certificate of his having received his degree, without further examination by the Society.

2. A student of any university in the Province of Ontario, who shall present (in person) a certificate of having passed, within four years of his application, an examination in the subjects prescribed in this curriculum for the Student-at-Law Examination, shall be entitled to admission on the books of the Socity as a Student-at-Law, or passed as an Articled Clerk (as the case may be) on conforming with clause four of this curriculum, without any further examination by the Society.

3. Every other candidate for admission to the Society as a Student-at-Law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this curriculum.

4. Every candidate for admission as a Student-at-Law, or Articled Clerk, shall file with the secretary, six weeks before the term in which he intends to come up, a notice (on prescribed form), signed by a Bencher, and pay $1 fee; and, on or before the day of presentation or examination, file with the secretary a petition and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:
Hilary Term, first Monday in February, lasting two weeks.
Easter Term, third Monday in May, lasting three weeks.
Trinity Term, first Monday in September, lasting two weeks.
Michaelmas Term, third Monday in November, lasting three weeks.

6. The primary examinations for Students-at-Law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity and Michaelmas Terms.

7. Graduates and matriculants of universities will present their diplomas and certificates on the third Thursday before each term at 11 a.m.

8 The First Intermediate examination will begin on the second Tuesday before each term at 9 a.m. Oral on the Wednesday at 2 p.m.

9. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

10. The Solicitors' examination will begin on the Tuesday next before each term at 9 a.m. Oral on the Thursday at 2:30 p.m.

11. The Barristers' examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2:30 p.m.

12. Articles and assignments must be filed with either the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

13. Full term of five years, or, in the case of graduates of three years. under articles must be served before certificates of fitness can be granted.

14. Service under articles is effectual only after the Primary examination has been passed.

15. A Student-at-Law is required to pass the First Intermediate examination in his third year, and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second year and his Second in the first six

months of his third year. One year must elapse between First and Second Intermediates. See further, R.S.O., ch. 140, sec. 6, sub-secs. 2 and 3.

16. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive certificates of fitness, examinations passed before or during Term shall be construed as passed at the actual date of the examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

17. Candidates for call to the Bar must give notice, signed by a Bencher, during the preceding Term.

18. Candidates for call or certificate of fitness are required to file with the secretary their papers and pay their fees on or before the third Saturday before Term. Any candidate failing to do so will be required to put in a special petition, and pay an additional fee of $2.

FEES.

Notice Fees	$1 00
Students' Admission Fee	50 00
Articled Clerk's Fees	40 00
Solicitor's Examination Fee	60 00
Barrister's " "	100 00
Intermediate Fee	1 00
Fee in special cases additional to the above.	200 00
Fee for Petitions	2 00
Fee for Diplomas	2 00
Fee for Certificate of Admission	1 00
Fee for other Certificates	1 00

PRIMARY EXAMINATION CURRICULUM

FOR 1886, 1887, 1888, 1889 AND 1890.

Students-at-law.

CLASSICS.

1886.
- Cicero, Cato Major.
- Virgil, Æneid, B. I., vv. 1-304
- Cæsar, Bellum Britannicum
- Xenophon, Anabasis, B. V.
- Homer, Iliad, B. VI.

1887.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. VI.
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. I.
- Cæsar, Bellum Britannicum.

1888.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. IV.
- Cæsar, B. G. I. (vv. 133.)
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. I.

1889.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. IV.
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. V.
- Cæsar, B. G. I. (vv. 1-33)

1890
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. VI.
- Cicero, In Catilinam, II.
- Virgil, Æneid, B. V.
- Cæsar, Bellum Britannicum.

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's Arnold's Composition, and re-translation of single passages.

Paper on Latin Grammar, on which special stress will be laid.

MATHEMATICS.

Arithmetic: Algebra, to the end of Quadratic Equations: Euclid, Bb. I., II., and III.

ENGLISH.

A Paper on English Grammar.
Composition.
Critical reading of a Selected Poem:—
1886—Coleridge, Ancient Mariner and Christabel.
1887—Thomson, The Seasons, Autumn and Winter.
1888—Cowper, the Task, Bb. III. and IV.
1889—Scott, Lay of the Last Minstrel.
1890—Byron, the Prisoner of Chillon; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography — Greece, Italy and Asia Minor. Modern Geography—North America and Europe.

Optional Subjects instead of Greek:—

FRENCH.

A paper on Grammar.
Translation from English into French Prose.
1886, 1888, 1890 — Souvestre, Un Philosophe sous le toits.
1887, 1889 — Lamartine, Christophe Colomb.

or, NATURAL PHILOSOPHY.

Books—Arnott's Elements of Physics; *or* Peck's Ganot's Popular Physics, and Somerville's Physical Geography.

ARTICLED CLERKS.

Cicero, Cato Major; *or*, Virgil, Æneid, B. I., vv. 1-304, in the year 1886: and in the years 1887, 1888, 1889, 1890, the same portions of Cicero, *or* Virgil, at the option of the candidates, as noted above for Students-at-Law.
Arithmetic.
Euclid, Bb. I., II., and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-Keeping.

Copies of Rules can be obtained from Messrs. Rowsell & Hutcheson.