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IT is open to question whether the Common Pleas Divisional Court's decision in *Western Bank of Canada* v. *Courtemanche*, noted *ante* p. 391, is not, in fact, an attempt at legislation, rather than an interpretation of the Rules as they are. A sort of understanding has grown up that, when a party appeals from a judgment pronounced at a trial, the setting down of the motion operates, *ipso facto*, as a stay of proceedings, and the Divisional Court has declared this to be the practice. But when we look at the Rules we are not able to discover that any such effect is given by them to a motion of this kind. The idea that it has that effect is a sort of survival of the old common law practice, which is, however, not to be found in the Rules, but in the breasts of *quondam* common law judges and practitioners. Under the former common law practice, unless a judge at the trial granted immediate execution, judgment could not be entered on the verdict until the fourth day of the next term, and not then, if on or before that day the opposite party obtained a rule *nisi*; this rule always contained the clause, "and in the meantime let all proceedings be stayed," and, of course, operated to stay further proceedings until the rule had been argued and disposed of.

But this method of procedure has all been swept away by the Judicature Act and Rules, and the method of moving against verdicts and judgments pronounced upon the trial of actions is now more nearly like the old equity practice of rehearing, and under that practice a notice of rehearing did not operate as a stay of the proceedings on the decree or order which was the subject of rehearing. The Rules, moreover, have adopted the old equity practice of making judgments effectual and operative from the time they are pronounced, but there is a p. vision

in Rules 692 and 765 which shows that a judge may, if he sees fit, postpone the entry of a judgment which he pronounces. Under Rule 692, it has been customary for judges who were formerly common law practitioners to stay the entry of judgments until the fourth or fifth days of the then next sittings of the Divisional Court; but, assuming that the proceedings are well stayed until then, what express provision is there in any Rule which makes the setting down of a motion against the judgment a stay of proceedings until the motion has been heard and disposed of? We have not been able to discover any, and do not think any exists. It is for this reason that we think that the decision we refer to savours of legislation. The practice which is thus sanctioned may be perfectly unobjectionable, but we submit that it should be governed by some plain and explicit Rule on the point, and should not be left to implication. As the Rules now stand, we should with very great deference submit that the decision in question is wrong, and unwarranted by anything to be found in them, not forgetting even the convenient Rule 3.

A SOCIETY has been recently formed in England by several distinguished lawyers and statesmen, whose object is the promotion of the study of the course of legislation in different countries, and more particularly in the several parts of Her Majesty's dominions and in the United States. The society is to be called "The Society of Comparative Legislation," and one of its objects is to promote an assimilation of the laws of the various parts of the British Empire, as far as practicable, and the introduction of such improvements in the laws as the study of the systems of law prevailing in other countries may suggest. The object in view appears to be a very useful one, and likely to be of great practical importance if well and judiciously carried out. The active co-operation of those interested in such subjects, and particularly of the various colonial governments, will be required, and this co-operation will, we believe, be well repaid by the benefits derived from the work to be undertaken by the society.

It has often occurred to us, for instance, that a comparative study of the laws of the various Provinces of this Dominion, with a view to their ultimate assimilation, would be of great practical benefit. In all the Provinces and Territories, except Quebec, the

foundation for this assimilation of law is already well laid; but when we enter Quebec we find, to all intents and purposes, an alien system. Would it not be in the interests even of that Province that some basis should be found whereby the law of that Province may be brought into harmony with that of the rest of the Dominion? We are inclined to think that it would. At present, a French-Canadian going from Quebec to any other Province of the Dominion is at the great disadvantage of finding an entirely different system of law prevailing, and one of which he is altogether ignorant, and all Quebec lawyers are at a great disadvantage if they wish to practise the law in any other Province than their own.

A comparative study of the two systems, and the careful preservation of whatever is valuable and preferable in each, might result in a system of law being adopted throughout the Dominion acceptable to all. Nothing could, however, well be accomplished in this direction without the hearty concurrence of our French fellow-subjects in Quebec.

Here, however, is ready to hand a field to which the new society may, we think, very profitably direct its attention. To have assisted in establishing one system of law in the Dominion from the Atlantic to the Pacific would be no mean result of its labours, if it did nothing else.

We commend the society to the attention of all our readers who take an interest in this important subject. The honorary secretaries, we see, are Thomas Raleigh, Esq., All Souls' College, Oxford, and Albert Gray, Esq., 2 Paper Buildings Temple, London, E.C.

The annual fee for members is £1 1s., and £10 10s. is the fee for life membership.

CURRENT ENGLISH CASES.

PRACTICE—ACTION BY PLAINTIFF ON BEHALF OF A CLASS—DESCRIPTION OF CLASS—DEBENTURE-HOLDERS—RECEIVER—MANAGER.

Marshall v. *South Staffordshire Tramways Co.*, (1895) 2 Ch. 36; 12 R. June 57, may be noticed for a point of practice which is incidentally referred to. The action was brought by the plaintiff, a debenture-holder of a joint stock company, which had been dissolved and subsequently reincorporated by a special Act, under

the name of the defendant company. The plaintiff described himself as suing on behalf of himself and all other the holders of the debentures of the defendant company *and its predecessors in title*. This Kekewich, J., considered to be too vague, and he held that the plaintiffs must describe themselves as suing "on behalf of all the other holders of debentures issued by the (*naming the former company*) now dissolved," and he directed an amendment. The other points involved in the case turn upon the wording of statutes giving the power to issue debentures, and do not seem to call for extended notice here, except to say that it is held that there is no power to grant a manager, or direct a sale of the undertaking of an incorporated company in favour of a mortgagee, unless the Act authorizing the giving of the mortgage also gives the power to the mortgagee to obtain that relief. In the absence of such statutory powers, the mortgagee can, on default, only obtain the appointment of a receiver.

TRUST FOR SALE—POWER TO POSTPONE SALE—INTERIM INCOME—POWER TO CARRY ON BUSINESS—DISCRETION OF TRUSTEES—CAPITAL—INCOME.

In re Crowther, Midgley v. *Crowther*, (1895) 2 Ch. 56; 13 R. June 110, a testator devised and bequeathed his real and personal estate, including his business, to trustees, upon trusts for sale and conversion, the proceeds to be invested and held upon trust for his wife for life, and after her death for his children. The will contained a power to postpone the sale for such period as the trustees should deem expedient, with the usual direction that, until sale, the income should be applied in the same manner as the income of the trust estate. The trustees, in the exercise of their discretion, carried on the business of the testator for nearly twenty-two years, and during that time paid over the profits thereof to the widow as income. The plaintiffs, who were grandchildren, claimed that this was a breach of trust, and that the trustees were chargeable as if the business had been sold within a reasonable time after the testator's death, that 4 per cent. per annum on the value of the business should be allowed as properly paid to the widow, and that the profits, less the 4 per cent., ought to be brought into account as part of the capital of the testator's estate. Chitty, J., however, was of opinion that the trustees had not exceeded their powers, and as the trustees had an unlimited power to postpone the sale it involved a

power of continuing the business in the meantime, and, therefore, the plaintiff's contention failed.

PRACTICE—SERVICE OF WRIT OUT OF JURISDICTION—IRREGULARITY—SETTING ASIDE SERVICE—ORD. II., R. 5 (ONT. RULE 332)—ORD. XI., R. 4 (ONT. RULE 1309, S-S. 3)—ORD. LXX., R. 1 (ONT. RULE 442).

In *Dickson* v. *Law*, (1895) 2 Ch. 62; 13 R. May 221, a defendant served with a writ out of the jurisdiction applied to set aside the order allowing service of a writ—the writ and service, on the ground that no affidavit had been filed by the plaintiff on the application for the order as required by Ord. xi., r. 4 (Ont. Rule 1309, s-s. 3), and because the writ was not indorsed with the notice required by Ord. ii., r. 5 (Ont. Rule 332, and see Form No. 2). The order had been made on the application of the defendant, who had applied to issue a third party notice against the absent party, and on this application he was ordered to be made a defendant, and leave given to serve him out of jurisdiction; the affidavit required by Ord. xi., r. 4 (Ont. Rule 1309, s-s. 3), had not been filed. North, J., although of opinion that the proceedings were irregular, yet held that the irregularity was not matter of substance, and under Ord. lxx., r. 1 (Ont. Rule 442), might be condoned, and he dismissed the application with costs.

ATTACHMENT—SOLICITOR—DEFAULT IN PAYMENT OF MONEY—COSTS OF TAXATION.

In re a Solicitor, (1895) 2 Ch. 66; 13 R. May 224, North, J., arrived at a very similar conclusion to that reached by Armour, C.J., in the recent case of *In re Knowles*, 16 P.R. 408. The motion was for an attachment against a solicitor for non-payment of money to a client. The solicitor's bill had been referred to taxation, and on the reference he was found to have been overpaid, and the order in that event directed that he should pay the client's costs of taxation. The solicitor contended that he could not be attached for non-payment of the costs of the taxation. But the court held that these were, as well as the moneys overpaid, due from him as "an officer of the court," and that he was liable to attachment for non-payment, and the attachment was directed to issue in respect of both sums.

TRUSTEE—BREACH OF TRUST—STATUTE OF LIMITATIONS—CONSENT OF CESTUI QUE TRUST—IMPOUNDING INTEREST OF CESTUI QUE TRUST—SOLICITOR PARTY TO BREACH OF TRUST—PARTNER—TRUSTEE ACT, 1888 (51 & 52 VICT., C. 59), SS. 6, 8—TRUSTEE ACT, 1893 (56 & 57 VICT., C. 53), S. 45—54 VICT., C. 19, SS. 11, 13 (O.)

Mara v. *Browne*, (1895) 2 Ch. 69, is one of those cases which incidentally illustrates the truth of the old saying that "a man who is his own lawyer has a fool for his client," but this aspect of the case will probably not find its way into the digest. The plaintiffs were the *cestuis que trustent* and the trustees of a marriage settlement, and the defendants were solicitors, one of whom defended in person. The object of the action was to compel the defendants to make good certain trust moneys subject to the settlement which had been lost by improper investments, to which the defendants were parties under the following circumstances: The two original trustees of the settlement were Walker and James, and in 1884 they were willing to retire from the trusts, and the trust fund was paid into a bank to the joint credit of James and Arthur Reeves, it being the intention that Arthur Reeves and his sister, Marian Reeves, should be appointed new trustees. Hugh Browne, who was in partnership with his brother and co-defendant, acted as solicitor for the husband and wife, and advised and carried out the investments complained of before the new trustees were actually appointed. The wife consented to two of the investments, but it did not appear that she knew that they were of such a character as to involve a breach of trust. The trust moneys were from time to time received by the defendants' firm, and paid over to the borrowers, but Hugh Browne alone transacted the business, and his brother took no part in it. The investments were all made in April, 1884; shortly afterwards the new trustees were regularly appointed, and the investments which had been so made before their appointment were scheduled as the investments of the trust estate, and the new trustees never took any steps against the defendants. By the trusts of the settlement the money of the wife was vested in the trustees, but there seems to be a discrepancy in the report as to the amount, for, from the statement of facts, it appears that the settlement only included £5,000 worth of the wife's property, and yet it appears that the investments complained of amounted to £9,200. Where the £4,200 was derived from does not appear, though this seems to be important in view of the decision of the court as to

there being a resulting trust as to the income. By the trust of the settlement the income of the trust fund was payable to the wife during the joint lives of herself and husband for her separate use without power of anticipation, and after the death of the survivor of them in trust for the children of the marriage, no disposition being made of the income in the event which happened, namely, the wife surviving her husband. The defendants relied on the Trustee Act, 1888 (51 & 52 Vict., c. 59). ss. 6, 8, and the Trustee Act, 1893 (56 & 57 Vict., c. 53), s. 45 (see 54 Vict., c. 19, ss. 11, 13 (O.)), claiming that the cause of action arose in 1884 and was barred by the Statute of Limitations, the action not having been commenced until November 7, 1890; and they claimed that in case there was a breach of trust of which the plaintiffs could complain that the wife's income from the trust fund should be impounded to indemnify the defendants; and also that in any case only Hugh Browne was liable. North, J., was, however, against the defendants on every point. He held that, as regarded the income after the death of the husband, the wife was entitled to it by way of resulting trust for the residue of her life, and that as her husband did not die until April, 1885, this was the starting point for the running of the statute as regards this estate, and, therefore, that the action was in time; that as to her children the action had not begun to run against them, as their interest did not come into possession until the death of their mother; but as to the trustees, who were made co-plaintiffs, he held that they were barred by the statute. He also held that no part of the wife's income could be impounded, because it did not appear that she knew that the investment to which she had consented was objectionable or a breach of trust, and that a consent to an investment is not equivalent to a consent to a breach of trust, even though the investment consented to be a breach of trust, unless the wife knew the facts which rendered it a breach of trust. He also held that both defendants were liable. The learned judge dwells once or twice upon the fact that Mr. Hugh Browne had taken pains to inform him that he (Browne) had always advised his clients against having anything to do with the court, and that if the rules of the court were observed it would be impossible to do business, and we are inclined to think Mr. Browne rather needlessly prejudiced his case by these gratuitous statements.

STATUTE OF LIMITATIONS—REAL PROPERTY LIMITATION ACT, 1874 (37 & 38 VICT., C. 57), S. 8—MONEY CHARGED UPON LAND—TENANT FOR LIFE—PRESUMPTION OF PAYMENT OF INTEREST.

In re England, Steward v. *England*, (1895) 2 Ch. 100; 13 R. May 248, a somewhat novel point, arising under the Statute of Limitations, is decided. A testator, in his lifetime, covenanted for the payment of a sum of money after his death, to be held upon trusts, under which his son was tenant for life, and charged the same with interest upon certain land. By his will he devised this land, subject to the charge, to his son in fee. The money was never raised, but the son went into possession of the land, and for more than twelve years received the rents and profits. The land had become depreciated in value, and it was doubtful whether it would now produce the amount of the charge. The present proceedings were instituted by the persons entitled to the benefit of the covenant in order to have it determined whether the testator's residuary personal estate was still liable under the covenant of the testator. It was contended on behalf of the plaintiff that the son, as devisee of the land, was bound to keep down the interest, and, as he was himself entitled to the income as tenant for life, it must be presumed that he had paid the interest, and that such presumed payment of interest on the charge prevented the Statute of Limitations from running in favour of the personal representative of the covenantor. But Kekewich, J., was of opinion that the son, as tenant in fee, owed no duty to those entitled to the benefit of the covenant, and, even if he could be presumed to have paid himself the interest on the charge, such presumed payment could not prevent the statute from running in favour of the personal representative. He considered that as it had been decided in *Coope* v. *Cresswell*, 2 Eq. 106; 2 Ch. 112, that a payment by the personal representative would not keep alive a charge against the realty, so neither could a payment by a devisee keep alive a claim against the personal estate.

PRACTICE—DISCOVERY.

In the case of *Alliott* v. *Smith*, (1895) 2 Ch. 111, Kekewich, J., held that executors examined for discovery as to trust funds alleged to have been received by their testator were not bound to make inquiries of the testator's bankers in order to

enable them to say whether or not the fund in question had been paid to the bankers at a period of twenty years prior to his death, and that inquiry as to transactions of so remote a date was no part of their duty.

COMPANY—DEBENTURE—FLOATING SECURITY—GARNISHEE ORDER.

Robson v. *Smith,* (1895) 2 Ch. 118; 13 R. July 127, was an action by the debenture-holder of a company whose debenture was a floating security upon the real and personal property, both present and future, of the company, but so that the company should not be at liberty to create any mortgage or charge upon such property in priority to the debenture, to compel a debtor to the company, who had paid over the debt due to him under a garnishee order obtained by another creditor of the company, to refund the amount so paid, on the ground that the debenture operated as an equitable assignment of the debt to the debenture-holder, of which notice had been given to the garnishee after the order to pay over, but before payment. Romer, J., dismissed the action, holding that the debenture-holder, so long as his debenture remained a "floating security," could not single out any particular debt and claim a specific charge upon it; and that a garnishee order was not a "charge" created by the company, but was in the nature of execution.

LIBEL—SLANDER OF GOODS—DISPARAGEMENT WITHOUT SPECIAL DAMAGE—INJUNCTION.

In *White* v. *Mellin,* (1895) A.C. 154; 11 R. April 1, the House of Lords has not been able to agree with the judgment of the Court of Appeal, (1894) 3 Ch. 276 (noted *ante* p. 80). Even assuming the law to be as laid down by the Court of Appeal, their lordships (Lord Herschell, L.C., and Lords Watson, Macnaghten, Morris, Shand, and Ashbourne) were of opinion that the plaintiff had not made out a case on the facts, but Lord Herschell doubts very strongly whether statements of a trader disparaging the goods of a rival, made without any malice, even though false and resulting in damage, would be actionable. In the present case they came to the conclusion that the evidence failed to establish either that the statements complained of were untrue, or that any damage resulted therefrom; and, though the plaintiff was claiming an injunction, their lordships were agreed

that even in the exercise of the common law jurisdiction vested in the High Court by the Judicature Act an injunction could not be granted to restrain an act which was not illegal. The judgment of Romer, J., dismissing the action was restored.

PRINCIPAL AND AGENT—EXCESS OF AUTHORITY OF AGENT—PRINCIPAL, LIABILITY OF, FOR UNAUTHORIZED ACT OF AGENT—AUTHORITY TO PLEDGE FOR A PARTICULAR SUM—FORGERY—REDEMPTION.

Brocklesby v. *Temperance Building Society*, (1895) A.C. 173; 11 R. May 1, which, in the Court of Appeal, (1893) 3 Ch. 130, was noted *ante* vol. 29, p. 713, has been affirmed by the House of Lords (Lord Herschell, L.C., and Lords Watson, Macnaghten, and Morris), following *Perry-Herrick* v. *Attwood*, 2 DeG. & J. 21. It may be remembered that the question in controversy was whether a principal who had entrusted an agent with securities and instructed him to pledge them in order to r[illegible] a certain sum could, in a redemption action, be required to pay as the price of a redemption a much larger sum which the agent had fraudulently raised on the securities and diverted to his own use, the lender having acted *bona fide*, and in ignorance of the limitation of the agent's authority. Their lordships agreed with the Court of Appeal in deciding the question in the affirmative, even though the agent had been guilty of fraud and forgery in carrying out the transaction.

WILL—DIRECTION TO ACCUMULATE INCOME—ACCUMULATION.

Wharton v. *Masterman*, (1895) A.C. 186; 11 R. May 11, is a decision of the House of Lords affirming the judgment of the Court of Appeal in *Harbin* v. *Masterman*, (1894) 2 Ch. 184 (noted *ante* vol. 30, p. 629). By the way, what an absurd and inconvenient practice it is to metamorphose in this way the name of a case when it goes to the Supreme Court or the House of Lords! It appears to us that if, in addition to the rearrangement of the parties required by the practice of the Supreme Court and Privy Council, the short style of the cause as originally entitled were always placed at the head, a case might then be traced through the reports in all its stages without any change of name. Thus an action of *Jones* v. *Smith* would not be able to become *Smith* v. *Tompkins* in the Supreme Court, or *Tompkins* v. *Jacobs* in the Privy Council, as it is apt to do at present. Their lordships

(the Lord Chancellor and Lords Macnaghten and Davey) agreed that a trust to accumulate income in favour of a legatee, whether an individual or a charity, may, where such individual or charity alone is interested in such accumulation, be at any time stopped at the election of the person or charity entitled, and that they are entitled to be paid the future accruing income directed to be accumulated as it accrues, as well as the past accumulations and interest arising therefrom, without waiting until the period of accumulation named by a testator has elapsed.

MANITOBA SCHOOL ACT, 1890—33 VICT., C. 3, S. 22, S-SS. 2, 3 (D.)—APPEAL TO GOVERNOR-GENERAL IN COUNCIL.

Brophy v. *The Attorney-General of Manitoba*, (1895) A.C. 202; 11 R. April 35, is the much-discussed decision of the Privy Council reversing the decision of the Supreme Court of Canada, and affirming the right of the Roman Catholics in Manitoba to appeal to the Governor-General in Council for relief from the Manitoba School Act, 1890, so far as it operates to their prejudice.

COLONIAL SERVANTS OF THE CROWN—TENURE OF OFFICE—PETITION OF RIGHT—DISMISSAL OF SERVANT OF THE CROWN—LEAVE TO APPEAL—COSTS.

In *Shenton* v. *Smith*, (1895) A.C. 229; 11 R. April 25, the status of servants of the Crown in a colony having representative institutions is discussed. The action was a petition of right, in which the plaintiff claimed compensation for wrongful dismissal. He had been gazetted in the Colony of Victoria, without any special contract, to act temporarily as medical officer during the absence on leave of the holder of the office, and, before the leave of the latter officer expired, the plaintiff was dismissed. The Privy Council (Lord Herschell, L.C., and Lords Watson, Hobhouse, Macnaghten, and Shand) held that the plaintiff held office during pleasure, and had therefore no cause of action. The respondent had succeeded in the court below, and had recovered a verdict for £200, which was not a large enough sum to have warranted an appeal; but, owing to the importance of the question involved, special leave to appeal was given, but only on the terms of the appellant paying the respondents' costs of the appeal in any event.

RIPARIAN PROPRIETOR—NAVIGABLE RIVER—WATER POWER ARTIFICIALLY CREATED, SALE OF.

Hamelin v. *Bannerman*, (1895) A.C. 237; 11 R. April 19, was an appeal from the Court of Queen's Bench of the Province of Quebec, but involves a question of law of general interest. The vendors of land on the banks of a navigable river, who were also the owners of a water power derived from a pool or reservoir formed by the erection of a dam across the channel of the river, sold with the land a quantity of water power equivalent to fifty horse power, "to be taken from the water power and dam" of the vendors. The deed contained no reservation of the power to the vendors in priority to the purchasers. The water fell short, and became insufficient to supply the power needed by the vendors and the purchasers, and the latter brought the present action, claiming that it was diverted by the defendants to their own use, and the plaintiffs claimed a declaration that they were entitled to the power sold to them in priority to the defendants or their tenants. The defendants, among other things, contended that the river being a navigable one its water could not be the subject of commerce. The court below decided against this contention, and this was the point on which the appeal to the Privy Council turned. There was a provision in the deed to the effect that if through any leakage, or damage to the dam, or want of repair thereto, there should be loss of power, the purchasers should have no claim for any damages, provided the dam were repaired within a reasonable time, and during that time the vendors might withdraw the supply of water from the purchasers if absolutely necessary. The Judicial Committee (Lords Watson, Hobhouse, Macnaghten, and Morris, and Sir R. Couch) agreed with the court below, holding that, notwithstanding the river was navigable, there was nothing to prevent the vendors from acquiring by artificial means a water power as appurtenant to their land, which they could sell along with and as appurtenant thereto; and even if the vendors could not acquire a valid right to this power as against the public, they could not nevertheless for that reason dispute the right of their vendee to it on any such ground; and there being no reservation of any prior right to the power in favour of the vendors, the purchasers were entitled to the power which they had purchased, in priority to the vendors or their tenants, in the event of the supply of water being insufficient for

both. Lord Watson, by the way, who delivered the judgment, seems inclined to the judicial phraseology of his native Scotia, and talks of "the proof led by the parties." We trust, however, that the peculiar diction of Scotch law may not become thus imported into English law, inasmuch as we have quite enough technical phrases of our own.

COMPANY—POWER OF COMPANY TO CREATE A CHARGE ON ITS UNCALLED CAPITAL.

In *Newton* v. *Debenture Holders of A. I. Co.*, (1895) A.C. 244; 11 R. May 56, the Judicial Committee (Lord Herschell, L.C., and Lords Watson, Hobhouse, Macnaghten, Shand, and Davey, and Sir R. Couch) affirmed the judgment of the Supreme Court of New South Wales. The question raised upon the appeal was whether, under the New South Wales Companies Act, which is similar in terms to the English Companies Act, 1862, a company could validly create a first charge on its uncalled capital. Their lordships were of opinion that it could, approving of *Re Pyle*, 44 Ch.D. 434, and observe in so doing that even if they did not approve of that case they would have been extremely reluctant to introduce into a colony which had adopted the English Act a different rule from that established by judicial decisions in England in reference to the English Act, as they declare " here is no case in which uniformity of practice is more important or more desirable."

PARTNERSHIP BUSINESS SITUATE IN A COLONY—INTEREST OF PARTNER DOMICILED IN ENGLAND IN COLONIAL BUSINESS—PROBATE DUTY.

Beaver v. *The Master in Equity*, (1895) A.C. 251; 11 R. May 62, was an appeal from the Supreme Court of Victoria. Partners domiciled in England carried on businesses in London, Melbourne, and Adelaide, which were severally treated as distinct in the partnership agreement. One of the partners having died, the question arose whether his interest in the Melbourne business was liable to the probate duty under the Act of that colony. The Judicial Committee agreed with the colonial court that the interest of the deceased in the business in Melbourne was locally situate in the Colony of Victoria so as to be subject to probate duty.

CANADIAN RAILWAY ACT, 1888 (51 VICT., C. 29 (D.)), S. 161—AWARD—APPEAL FROM AWARD—REVIEW OF AWARD BY COURT.

Atlantic & N.W. Ry. Co. v. *Wood*, (1895) A.C. 257; 11 R. May 26, was an appeal from the Queen's Bench of Quebec. An award was made under the expropriation clauses of the Canadian Railway Act, from which an appeal was had; the court appealed from had affirmed the award, treating the award as the judgment of a subordinate court, and deciding whether a reasonable estimate of the evidence had been made by the arbitrators. The railway company contended that in thus proceeding the court had acted on a wrong principle, and that it should either itself examine and weigh the evidence, and decide upon it as in a case of original jurisdiction; or, in the alternative, remit the cause to the court of first instance for its decision. The Judicial Committee (the Lord Chancellor, and Lords Watson, Macnaghten, Shand, and Davey), however, overruled this contention, and affirmed the principle on which the court had proceeded as correct, holding that on such appeals, under s. 161, the court is not at liberty to disregard the award and deal with the evidence *de novo* as a court of first instance. The effect of this decision is, therefore, to put an award of this kind on a level with the verdict of a jury in a civil action.

WILL—RESIDUARY CLAUSE—CONSTRUCTION—COSTS.

Trew v. *The Perpetual Trustee Co.*, (1895) A.C. 264; 11 R. May 41, was an appeal from New South Wales. The action was brought for the construction of a residuary clause in a will. By the will the testator had given to his wife, as long as she remained unmarried, the income of £20,000, which, on her re-marriage, was to be reduced to £10,000. On her death the income of the £20,000 was to be applied to the maintenance and advancement of his children, and, on her re-marrying, the income of £10,000 was to be so applied, and the testator further declared that, upon his children attaining majority, or marrying, they were to be paid one-half of the capital sum. As to the residue of his estate, he gave thereout £10,000, and the rest upon the trusts thereinbefore declared concerning the £20,000. This residue amounted to £34,000, and the widow, having married again, claimed that, in addition to the income of £10,000, she was also entitled, either to a moiety of the £34,000, or, which was the contention chiefly

insisted on, that she was entitled to the income on a further sum of £10,000 out of the £34,000. The Judicial Committee (the Lord Chancellor Herschell, and Lords Watson, Hobhouse, Macnaghten, Shand, and Davey, and Sir R. Couch) affirmed the judgment of the court below, that the widow was only entitled to the income of one sum of £10,000, and that the reference in the gift of the residue to the trusts declared of the £20,000 had not the effect of enlarging the gift to the widow. The costs in the court below were, as is usual in cases for the construction of wills, ordered to be paid out of the estate, but the Committee refused to burthen the estate with the costs of another fruitless appeal, and ordered the appellant to pay the costs.

BANK ACT (18 VICT., C. 202, CANADA)—53 VICT., C. 31, S. 43 (D.)—BANK NOT BOUND TO SEE TO EXECUTION OF TRUST—TRANSFER OF SHARES—TRUST—NOTICE OF TRUST.

Simpson v. *Molsons Bank*, (1895) A.C. 270; 11 R. May 45, was an appeal from the Supreme Court of the Province of Quebec. The question was whether the Molsons Bank, which was incorporated under the Canadian Act, 18 Vict., c. 202, and which contained a provision which restrained the bank from seeing to the execution of trusts of shares, similar to that contained in the present Bank Act (53 Vict., c. 31, s. 43 (D.)), was liable for the misapplication by a trustee of the proceeds of shares which he had improperly transferred to the prejudice of his *cestui que trust*, on the ground that the bank had a copy of the will, and that the president of the bank was also an executor of the will, and the law agent of the bank was also a law agent of one of the executors, and had thus actual notice of the trusts on which the shares in question were held. The Judicial Committee (the Lord Chancellor, and Lords Watson, Hobhouse, Macnaghten, Shand, and Davey, and Sir R. Couch) agreed with the court appealed from in exonerating the bank from liability. The Committee did not consider it necessary to consider what might be the legal effect of the bank having actual knowledge that the transfer was a breach of trust, because they thought that on the facts established it had no such knowledge; the knowledge of the president and law agent not being a knowledge by which the bank could be affected, or be led to believe that any breach of trust was being committed by the transfer complained of.

VERDICT AGAINST WEIGHT OF EVIDENCE—NEW TRIAL—ISSUE AS TO TESTATOR'S CAPACITY—EVIDENCE, WEIGHT OF.

In *Aitken* v. *McMeckan*, (1895) A.C. 310, the Judicial Committee of the Privy Council (Lords Watson, Hobhouse, Macnaghten, and Morris, and Sir R. Couch) have, on appeal from Victoria, done a somewhat unusual thing, inasmuch as they have reversed the judgment of the court below on a question of evidence, and set aside a verdict as contrary to the weight of evidence, and granted a new trial. The question at issue was the testamentary capacity of a testator, and the medical evidence was considered insufficient to support the verdict, while the other evidence of incapacity related to irrelevant circumstances, and was contradicted by witnesses who deposed to actual transactions with the testator, and to his conduct and condition when the will was executed. The verdict, we observe, was not unanimous, but that of a three-fourths majority of the jury, but this circumstance is not made a ground for interference; but the fact that the judge who tried the case was dissatisfied with the verdict, and thought it was wrong, was considered to be material.

Correspondence.

To the Editor of THE CANADA LAW JOURNAL:

SIR,—I would like your opinion on a matter of professional etiquette upon which I may be in error. I have had only three contentious matters with a legal firm, who are also university graduates, as their letter-heads proclaim, and in each case, after the matters were in the hands of his solicitors, they have approached and influenced my client behind my back. They appear to consider this conduct quite proper and correct. I do not. During the twenty-five years I have been in practice such methods were never adopted to my knowledge.

W. H. BARTRAM.

London, August 8th.

[It seems hardly necessary to say that the conduct complained of would be most objectionable, and would merit and receive the disapproval of the Discipline Committee of the Law Society.—ED. C.L.J.]

DIARY FOR AUGUST.

1. Thursday......Slavery abolished in British Empire, 1834.
3. Saturday.......Battle of Fort William Henry, 1757.
4. Sunday........*8th Sunday after Trinity.*
6. Tuesday.......Thos. Scott, 4th C.J. of Q.B., 1804.
7. Wednesday.....Duquesne, Governor of Canada, 1752. [1814.
11. Sunday....... *9th Sunday after Trinity.* Battle of Lake Champlain,
12. Monday.......Call, last day for notice, for Trinity Term.
13. Tuesday.......Sir Peregrine Maitland, Lieut.-Gov., 1818.
15. Thursday......Battle of Fort Erie, 1814.
16. Friday.........Battle of Detroit, 1812.
17. Saturday.......Gen. Hunter, Lieut.-Gov., 1799.
18. Sunday........*10th Sunday after Trinity.*
19. Monday......River St. Lawrence discovered, 1535.
24. Saturday.......St. Bartholomew. [1806.
25. Sunday........*11th Sunday after Trinity.* Francis Gore, Lieut.-Gov.,
31. Saturday......Long Vacation ends.

Notes of Canadian Cases.

SUPREME COURT OF CANADA.

Nova Scotia.] [March 11.

MCDONALD *v.* CUMMINGS.

Chattel mortgage—Preference—Hindering and delaying creditors—Statute of Elizabeth.

In an assignment for benefit of creditors, one preferred creditor was to receive nearly $300 more than was due him from the assignor, on an understanding that he would pay certain debts due from the assignor to other persons, amounting in the aggregate to the sum by which his debt was exceeded. The persons so to be paid were not parties to, nor named in, the deed of assignment.

Held, reversing the decision of the Supreme Court of Nova Scotia, TASCHEREAU, J., dissenting, that as the creditors to be paid by the preferred creditor could not enforce payment from him or from the assignee, and would be unable to recover from the assignor, who had parted with all his property, they would be hindered and delayed in the recovery of their debts, and the deed was therefore void under the statute of Elizabeth.

Appeal allowed with costs.

Ross, Q.C., and *McNail* for the appellant.

Harrington, Q.C., for the respondent.

Nova Scotia.] [May 6.

CHATHAM NATIONAL BANK *v.* MCKEEN.

Winding-up Act—Directors of insolvent company—Powers and duties of—Sale by liquidator to director—R.S.C., c. 129, s. 34.

As soon as a winding-up order against a company is made under the Dominion Winding-up Act the relations between the directors and the com-

New Brunswick.] [May 6.

BRADSHAW *v.* THE FOREIGN MISSION BOARD.

Practice—Equity suit—Application for new trial—Construction of statute—53 Vict., c. 4, s. 85 (N.B.).

By 53 Vict., c. 4, s. 85 (N.B.), relating to proceedings in equity, it is provided that in a suit in equity "either party may apply for a new trial to the judge who tried the case."

Held, reversing the decision of the Supreme Court of New Brunswick, TASCHEREAU, J., dissenting, that the Act does not mean that the application must be made to the individual who had tried the case, but to a judge exercising the same jurisdiction. Therefore, when the judge in equity who tried the case had resigned his office, his successor could hear the application.

Appeal allowed with costs.

C. A. Stockton for the appellant.

Palmer, Q.C., for the respondent.

New Brunswick.] [May 6.

TOWN OF ST. STEPHEN *v.* COUNTY OF CHARLOTTE.

Canada Temperance Act—Application of penalties—Incorporated town—Separated from county for municipal purposes.

By an Order in Council made in September, 1886, "all fines, penalties, or forfeitures recovered or enforced under the Canada Temperance Act, 1878, and amendments thereto, within any city, or county, or any incorporated town separated for municipal purposes from the county, which would otherwise belong to the Crown for the public uses of Canada, shall be paid to the treasurer of the city, incorporated town, or county, as the case may be, for the purposes of the said Act.

St. Stephen is an incorporated town in the county of Charlotte, N.B., having its own mayor and governing body, police magistrate, and other officials. It contributes, jointly with the county, to the support of the county gaol, registry office, sheriff's office, and other institutions. A number of convictions for offences against the Canada Temperance Act having taken place in the town, a special case was stated for the opinion of the Supreme Court of the Province as to whether the town treasurer or that of the municipal council of the county was entitled to the fines therefor. The Supreme Court decided in favour of the county.

Held, reversing such decision, KING, J., dissenting, that an incorporated town separated from the county for municipal purposes in the Order in Council did not mean a town separated for all purposes, but included any town that was self-governing and practically free from control by the county. St. Stephen, therefore, notwithstanding that it was joined to the county for the purposes mentioned, was a town "separated from the county for municipal purposes" within the meaning of the Order in Council.

Appeal allowed with costs.

Blair, Q.C., Attorney-General of New Brunswick, for the appellants.

Pugsley, Q.C., and *Grimmer* for the respondents.

New Brunswick.] [May 6.

BRADSHAW *v.* THE FOREIGN MISSION BOARD.

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Held, reversing the decision of the Supreme Court of New Brunswick, TASCHEREAU, J., dissenting, that the Act does not mean that the application must be made to the individual who had tried the case, but to a judge exercising the same jurisdiction. Therefore, when the judge in equity who tried the case had resigned his office, his successor could hear the application.

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Held, reversing such decision, KING, J., dissenting, that an incorporated town separated from the county for municipal purposes in the Order in Council did not mean a town separated for all purposes, but included any town that was self-governing and practically free from control by the county. St. Stephen, therefore, notwithstanding that it was joined to the county for the purposes mentioned, was a town "separated from the county for municipal purposes" within the meaning of the Order in Council.

Appeal allowed with costs.

Blair, Q.C., Attorney-General of New Brunswick, for the appellants.

Pugsley, Q.C., and *Grimmer* for the respondents.

ONTARIO.

SUPREME COURT OF JUDICATURE.

HIGH COURT OF JUSTICE.

Queen's Bench Division.

Div'l Court.] [May 27.

RE MCFARLANE *v.* MILLER.

Statutes—Interpretation of—Prohibition—57 Vict., c. 55, s. 22, s-s. 6 (O.)—R.S.O., c. 220, s. 2, s-s. 5.

On an application for prohibition to restrain proceedings on an appeal under the Ditches and Watercourses Act, 1894, on the ground that the appeal had not been heard and determined within two months, under 57 Vict., c. 55, s. 22, s-s. 6 (O.);

Held, that the provisions of that subsection are merely directory, and not imperative.

Held, also, that there is no sufficient declaration in that statute of an intention to change the law from what it was, apart from the declaration in R.S.O., c. 220, s. 2, s-s. 5, and prohibition was refused.

Decision of ROBERTSON, J., affirmed.

F. R. Ball, Q.C., for the appeal.

A. Bicknell, *contra.*

Div'l Court.] [June 12.

MOLSONS BANK *v.* COOPER ET AL.

Banks and banking—Collateral securities—Credits for.

The plaintiffs gave the defendants a line of credit "to be secured by collections (meaning customers' notes) deposited." Customers' notes were taken by defendants from time to time, and deposited with the bank as collateral security for the line of credit under the terms of the agreement. The practice was for the defendants to withdraw these for collection at maturity, the proceeds, when collected, going to their credit in their bank account, or being otherwise independently dealt with by defendants, other notes being deposited from time to time, so that while the total amount of notes was supposed to be kept at or near the amount of the credit, yet the notes actually under deposit were constantly changing.

When the defendants failed and stopped payment, the bank claimed to be entitled (1) to collect the deposited customers' notes then in their hands, so held as collateral security, and carry the proceeds into a suspense account ; and (2) to recover judgment against the defendants, notwithstanding such realization of the collateral paper for the full amount of the direct paper representing their indebtedness, without giving any credit for the proceeds of the collateral

security, so long as the total amount received by the bank under their judgments and upon the collateral paper did not exceed in the whole the total indebtedness.

Held, that they were bound to give credit for the amounts realized on the collateral security, and could only recover judgment for the balance.

Commercial Bank of Australia v. *Wilson*, (1893) A.C. 181, distinguished.

Decision of ROSE, J., reversed.

Foy, Q.C., for the appeal.

Shepley, Q.C., *contra*.

BOYD, C.] [June 8.

HOBSON *v.* SHANNON.

Division Court—Garnishee proceedings—Judgment against garnishee—Motion for new trial after fourteen days—R.S O., c. 51, ss. 173-199.

Where a garnishee more than two months after judgment obtained against him was notified for the first time that the debt due from him to the primary debtor had been assigned by the latter to a third party prior to the garnishee proceedings,

Held, that the Division Court judge had jurisdiction to open up the matter for further investigation.

Raney for the primary creditor.

Chisholm for the garnishees.

Common Pleas Division.

MEREDITH, C.J., and ROSE, J.] [July 13.

REGINA *v.* STEELE.

Justice of the peace—Summary conviction—Interest—Bias—Relationship to complainant—Costs.

Where the convicting justice was the son of the complainant, and the latter was entitled to one-half of the penalty imposed, a summary conviction was quashed, on the ground that the justice had such an interest as made the existence of real bias likely, or gave ground for a reasonable apprehension of bias, although there was no conflict of testimony.

The Queen v. *Huggins*, (1895) 1 Q.B. 563, followed.

Dictum of ROSE, J., in *Regina* v. *Langford*, 15 O.R. 52, approved.

Costs of quashing conviction withheld from successful defendant, where he filed no affidavit denying his guilt, or casting doubt upon the correctness of the magistrate's conclusion upon the facts.

R. D. Gunn for the defendant.

F. E. Hodgins, *contra*.

MANITOBA.

COURT OF QUEEN'S BENCH.

Full Court.] [July 13.

IN RE HAMILTON TRUSTS.

Principal and surety—Rights of surety to securities held by creditor—Further advance by creditor.

Judgment of TAYLOR, C.J., noted *ante* p. 351, reversed with costs; and *Held*, that the petitioner James Hamilton was entitled to the benefit of the security held by the respondent Drewry for the loan guaranteed by him, and now paid off out of his property, in priority to a subsequent advance made by Drewry to the debtor on property of the latter. *Duncan, Fox & Co.* v. *North and South Wales Bank*, 6 App. Cas. 1, distinguished on the ground that in the present case the surety had joined in a mortgage to the creditor of his own and the debtor's property, and would have had a right to a conveyance of all on payment of the debt.

Howell, Q.C., and *Monkman* for the petitioner.

Perdue for the respondent.

BAIN, J.] [July 23.

TRUST AND LOAN COMPANY *v.* WRIGHT.

Sale of goods—Immediate delivery—Change of possession—Bills of Sale Act.

This was an appeal from the decision of the judge of the County Court of Virden in an interpleader issue as to the ownership of some horses seized under execution against the defendant, and claimed by his mother.

The facts, as found by the learned judge, were as follows: On the 2nd of October, 1894, a verbal sale of the horses in question was made to the claimant, and part of the purchase money was then paid, and the claimant stated in her evidence that the horses were "hers from the 2nd of October." For the convenience of the claimant, however, the defendant continued in actual possession of the horses until the 12th of November following, when he called upon the claimant and told her that he was going away, but had left everything all right, and that a boy in the claimant's employment could take care of everything, and thereafter the claimant, by her servants, remained in actual possession of the horses.

The judge at the trial found that the sale was *bona fide*, but the plaintiffs contended that it was void as against their execution, although not placed in the bailiff's hands until the following January, because there was no immediate delivery as required by the Bills of Sale Act, R.S.M., c.10, s. 2, and relied upon *Jackson* v. *Bank of Nova Scotia*, 9 M.R. 75.

Held, that the sale was good as against the plaintiffs, and that that case might be distinguished on the ground that here there was a delivery on the 12th of November, which might amount to a fresh agreement of sale, whereas in the *Jackson* case there was no subsequent act or assent of the vendor to the taking

possession of the animal by the vendee, and the vendee had nothing to rely upon except the original verbal sale made four days previously.

Ewart, Q.C., for the plaintiffs.

Macdonald for the defendant.

BAIN, J.] [July 26.

GILES *v.* HAMILTON PROVIDENT, ETC., SOCIETY.

Costs—Suit for account in equity—Trustees—Mortgage.

In this case the plaintiff, being second mortgagee on certain property on which the defendants had a first mortgage, filed a bill to compel them to account for the surplus proceeds of the sale of the property under their mortgage. Defendants admitted a surplus of $28, and offered to pay it, but the plaintiff, contending that the solicitor's costs charged were excessive, was not willing to accept this. At the hearing of the cause, a decree was made with a reference to the Master to take an account, and the Master reported that the surplus payable by the society was $64.16, having taxed down the bill of solicitor's costs. The matter now came before the Court for the determination of the costs of the present suit.

Held, that the plaintiff was liable for defendant's costs up to and including the hearing and decree, and that no subsequent costs should be allowed to either party. *Charles* v. *Jones*, 35 Ch.D. 544, followed.

Bradshaw for the plaintiff.

O. H. Clark for the defendants.

Law Students' Department

LAW SCHOOL EXAMINATIONS.

THIRD YEAR PASS: MAY, 1895.

EVIDENCE.

Examiner: W. D. Gwynne.

1. How does Best distinguish evidence *ab intra* and evidence *ab extra*?

2. Explain and illustrate by examples the following divisions of evidence: original, casual, real.

3. State fully the functions of judge and jury respectively in matters of evidence.

4. Sketch briefly the growth of the law admitting the evidence of children.

5. On an indictment for obtaining money by false pretences, evidence is offered to show that the prisoner subsequently obtained money in a like manner from another person: is this evidence admissible? Explain.

6. Give an instance of the rule that special presumptions take precedence of general.

7. Give instances in which self-serving evidence will be admitted.

8. A witness is called to prove that he heard the defendant say that he had written a letter to a third person admitting that he owed the debt sued for. The letter is not produced. Is this evidence admissible?

9. When may affidavits and depositions be used as evidence at a trial, and when not?

10. How may the opposite party be compelled to give evidence at the trial? What are the consequences of his failing to appear?

CONSTITUTIONAL HISTORY AND LAW.

Examiner: A. C. Galt.

1. When were the Provinces of Upper and Lower Canada united, and what was the form of government adopted for the united Provinces?

2. What is the position of Canada as a political entity with relation to British sovereignty, the Provinces of Canada, the Northwest Territories?

3. What are the powers of a Colonial Legislature with respect to its own privileges, and over its own members, and what are the powers of the House of Commons of Canada with respect to privileges and immunities?

4. What are the primary rules laid down in *The Citizens Insurance Co.* v. *Parsons* as to the interpretation of the B.N.A. Act for the purpose of ascertaining whether an Act fall within Dominion or Provincial jurisdiction?

5. A corporation was formed by the Parliament of the Province of Canada, having its head office in Toronto, with power to hold land in Upper and Lower Canada, and to carry on business therein. After the B.N.A. Act it was desired to modify its charter as to the holding of property in Ontario. What Legislature has jurisdiction?

6. A., being a British subject, married, residing in Canada, leaves Canada with intent to marry, and does marry, a woman in Michigan. On his return to Canada he is indicted for bigamy under the Criminal Code, section 275, which is as follows: "Bigamy is the act of a person who, being married, goes through a form of marriage with any other person in any part of the world." "No person shall be liable to be convicted of bigamy in respect to having gone through a form of marriage in a place not in Canada unless such person, being a British subject resident in Canada, leave Canada with intent to go through such form of marriage."

Can he be convicted? Why?

7. What jurisdiction, if any, has the Dominion Parliament got over the constitution, maintenance, and organization of courts, and over procedure therein?

COMMERCIAL LAW.

Examiner: M. H. Ludwig.

1. On a sale of goods by public auction, when will the signature of the auctioneer bind the purchaser, and when will it not? Answer fully.

2. "An assignee of a chose in action takes it subject to all equities."

Explain clearly the above quotation, and point out to what extent it does not correctly state the law, and illustrate your answer by examples.

3. Does the maxim *caveat emptor* apply if the buyer has inspected the goods, and there is no fraud on the part of the seller, but the defect is latent and not discoverable on examination? Answer fully.

4. (*a*) What was necessary at common law to give validity to a sale of personal property? Answer fully, and illustrate your answer by an example.

(*b*) Point out the distinction between a bargain and sale of goods, and an executory agreement.

5. A. found a watch and sold it to B. for $100, stating that he bought it in Switzerland. B., not knowing that A. was not the owner, sold it to C. for $130. Has B. made himself liable to the owner of the watch, and, if so, in what amount of damages? Give reasons.

6. "By the law of England, there are certain exceptions to the rule that a man cannot make a valid sale of a chattel that does not belong to him." What are these exceptions?

7. A. on Monday afternoon gave B. a cheque for $500 in payment of an account. B. presented the cheque on Wednesday at eleven o'clock, when he learned that the bank had suspended payment at half-past ten of that day.

Is A. liable to B. for the amount of the che ue? Answer fully, giving reasons.

8. A. drew a bill of exchange on B., who was acting as agent for C., although B. was not aware of this fact. B. accepted the bill as agent for C. Is either B. or C., or are both, liable on the bill? Give reasons.

9. On a contract for the sale of goods does the title in goods date from the date the offer was made, or from the date the offer is accepted?

10. What are the requirements of a valid assignment of a chattel mortgage, and what steps must the assignee of the mortgage take to protect his claim to the goods covered by the mortgage against creditors of the mortgagor?

11. (*a*) Can a purchaser defeat the right of *stoppage in transitu* by intercepting the goods at an intermediate point?

(*b*) If a carrier wrongfully refuses to deliver the goods to the purchaser, can the vendor subsequently exercise the right of *stoppage in transitu?*

12. Mention the priorities or preferred claims which must be recognized by an assignee in distributing an estate under the Assignment and Preference Act (R.S.O., cap. 124).

13. Explain fully what is meant by the Doctrine of Pressure, and discuss its application to a conveyance impeached under the Assignment and Preference Act, as amended by the Act of 1891 (54 Vict., cap. 20).

14. What was the effect at common law of a transfer of a warehouse receipt, and state in general terms how it has been modified by statute in Canada?

15. "The impairment of the policy of the Chattel Mortgage Act by the warehouse receipt clauses of the Provincial Act (R.S.O., cap. 122) is apparent rather than real.'

Explain the above quotation fully, and show why it does not apply to the analogous clauses of the Bank Act.

CONSTRUCTION OF STATUTES.

Examiner: A. C. Galt.

1. Distinguish between rules of law and rules of construction, as applied (1) to deeds, (2) to statutes.

2. Explain the meaning of the statement that "a court of law cannot interfere to prevent a mere evasion of an Act of Parliament."

3. A statute passed by the Legislature of Ontario contains certain words which (owing to local idiom) bear a different meaning in Ontario from that which they would bear in England; and the statute comes before the Privy Council for construction.

What is the rule applicable in such a case?

4. Under what circumstances may omissions from a statute be supplied by implication?

5. What is a *penal* Act, and what are the rules for deciding whether an Act is or is not penal?

6. A private Act is passed which purports to affect the rights and liabilities of A., B., and C. A. and B. concurred in having the Act passed, but C. did not, nor was he notified of it. Is C. bound by the Act?

7. What consequences follow the presumption that the Legislature knows the law? Illustrate answer

PRIVATE INTERNATIONAL LAW.

Examiner: W. D. Gwynne.

1. Explain the maxim *nemo potest exuere patriam.* What war was brought about by the assertion of this maxim?

2. By what law are the rights of husband and wife governed as regards the property of either of them?

3. What is the general rule adopted in private international law for the interpretation of contracts?

4. What must be shown to give the English courts jurisdiction to grant a divorce?

5. A resident of Toronto is the maker of a promissory note, and has in his possession some of the payee's goods. The payee dies domiciled at Montreal, and his executor under a Quebec grant having possession of the note brings action in Ontario for payment of the note and delivery of the goods. Can he succeed?

6. A testator makes a will of personal estate in New York and dies domiciled in Quebec. By what law will the will be construed in Ontario?

7. Give two instances in which the English courts will refuse to entertain an action to enforce a contract notwithstanding that it is valid by its proper law.

TORTS.

Examiner: John H. Moss.

1. A. contracts to make certain alterations in B.'s house. A carpenter in A.'s employ, who is engaged upon the alterations, lights his pipe, and carelessly

throws the match upon a pile of shavings, thereby causing a fire, which destroys the house. B. sues A. for damages in respect of this loss. Can he recover? Explain.

2. What degree of common employment is it necessary to show at common law as a defence to an action by a servant against his employer for the negligence of a fellow-servant? Upon what reasoning is this defence upheld?

3. In what classes of cases is slander actionable without proof of special damage?

4. Define the meaning of publication as used in the law of libel.

5. Explain what is meant by the phrase "*Res ipsa loquitur*," as used in the law of negligence. Illustrate by two examples.

6. What is the nature and extent of the liability at common law of a railway company for the loss of a trunk left in their baggage room for safe keeping?

7. What rights, if any, has a landowner in regard to trees on his neighbour's land, the boughs of which overhang his own land, and have done so for twenty years?

8. Can an action for malicious prosecution ever be brought in respect of civil proceedings?

9. What is the difference, if any, between the liability of the owner of a dog for injury to (*a*) a human being, (*b*) a sheep? Explain fully.

10. A. has a poisonous yew tree growing on his land, some boughs of which project over into B.'s adjacent field. B. has two horses in the adjacent field, one of which eats from the projecting branches, while the other puts his head over the boundary fence and eats from the part of the tree upon A.'s land. Has B. any remedy against A.? Explain fully.

11. When will a person employing a contractor be liable for his wrongful acts?

12. A., the holder of a life insurance policy for $2,000, and an accident policy for $1,500, is killed in a railway accident. An action is brought by his personal representative under Lord Campbell's Act. What effect, if any, has the insurance upon the damages to which A. is entitled?

PRACTICE.

Examiner: M. H. Ludwig.

1. If a defendant has in a proper case taken out the usual order for security for costs, can the plaintiff, under any circumstances, take a step in the action without fully complying with the order?

2. Do the Rules make any provision respecting the right of a defendant to amend his (*a*) defence, (*b*) counterclaim without leave. If so, what are they?

3. (*a*) If a defendant claims to be entitled to contribution or indemnity over against A., who is not a party to the action, how should he proceed, and what must he show to have A. brought before the court?

(*b*) If A. does not appear and the plaintiff recovers a judgment in the action, how will A. be affected by it?

4. (*a*) Point out clearly the distinction between a set-off and a counter-claim, and illustrate your answer by an example.

(*b*) Will the discontinuance of an action by the plaintiff put an end to a counterclaim delivered by the defendant in the action? Why?

5. When must a defendant in an action for the recovery of land plead his title, and when need he not do so?

6. What exception is there to the Rule that the statement of claim must be served with the writ when serving a defendant out of the jurisdiction?

7. What must a defendant show to be entitled to an order for security for costs in an action brought against him for a libel contained in a public newspaper. Answer fully.

8. A question arising in an action has been referred to an official referee. State briefly what steps the plaintiff must take from the date of the order of reference until he will be in a position to place executions for the amount found due him by the referee in the sheriff's hands.

9. In what proceedings in an action should Long Vacation and Christmas Vacation not be reckoned in computing the time allowed by the Rules?

10. The pleadings in an action were closed upwards of six weeks. The plaintiff gave notice of trial, but did not proceed to trial. Is he liable to have his action dismissed for want of prosecution?

11. How must (*a*) a lunatic not so found by judicial declaration, (*b*) an infant, sue and be sued.

12. How should a plaintiff proceed to recover judgment against several defendants where he makes a claim for detention of goods and pecuniary damages, and some defendants appear in the action and others do not.

CONTRACTS.

Examiner: M. H. Ludwig.

1. A. made a verbal promise to B. to pay him $500 two days after the death of C. If the promise is given for valuable consideration, is it binding on A? Why?

2. What is the law relating to the right of a solicitor to make an agreement with his client respecting costs, or to take from him a mortgage to secure costs (*a*) in conveyance matters (*b*) incurred and to be incurred in a lawsuit?

3. A. sent a telegram making an offer, addressed to John Fox, and verbally notified the company that Fox resided at a certain number on Yonge street. The company delivered the message to a John Fox residing on Queen street, and the latter, believing that the offer was intended for him, acted on it and suffered damage. Has he any remedy against the company? Give reasons.

4. Why does it sometimes become necessary to determine the place at which a binding contract has been made? Give three reasons.

5. A. sued B. and recovered judgment. B. appealed to the Divisional Court, and his appeal was dismissed. After A. issued execution on his judgment, B. paid the judgment. Six months afterwards, in an action between C. and D., the Court of Appeal declared the judgment in the action between A. and B. to be erroneous.

Can B. recover back the money paid to satisfy A.'s judgment? Give reasons.

6. A merchant shipped goods by a carrier from Toronto to Liverpool, and paid the freight in advance. The goods were lost by perils of the sea. Is the merchant entitled to be paid back the freight paid by him? Reasons.

7. A. entered into a verbal contract with B.

(*a*) Giving B. the right to enter A.'s land and take 1,000 yards of soil.

(*b*) Giving B. a license to enter and use A.'s land.

(*c*) For the sale of building materials of a house to be taken down by B. and removed from A.'s land.

Is the contract binding on A. in any of the above cases, and why?

8. A husband and wife agreed to separate. The husband verbally agreed to pay his wife a weekly sum of $50 for the maintenance of herself and children. Is the agreement binding on the husband? Give reasons.

9. Point out clearly what power an executor has to pay debts of a testator, barred by the Statute of Limitations.

10. What is meant by an equitable assignment of a chose in action? Illustrate your answer by an example.

11. A., residing in Toronto, gave B. a promissory note payable three months after date. Before the note became due A. left Ontario. One year after the note was given, A., unknown to B., went back to Toronto and remained there one day, when he again left Ontario, and did not return for seven years. On his return, B. sued on the note, and A. pleaded the Statute of Limitations as a defence. Who should succeed? Why?

12. (*a*) What was the common law rule relating to contracts in restraint of trade?

(*b*) What tests must now be made to determine whether a contract in restraint of trade is valid or invalid? Answer fully, and mention any recent case on the subject.

EQUITY.

Examiner: John H. Moss.

1. Can an infant successfully maintain an action for specific performance?

2. If a trustee dies, or becomes incapable of acting, in what way may a successor be appointed, and by whom?

3. If a testator, by his will, gives a power to mortgage his real estate, and names no one to execute the power, and no executors are appointed by the will, by whom may the power be exercised?

4. A. is lessee of certain premises for a term of ten years, under a lease which contains a covenant by himself to lay out $100 a year in improvements. A. dies before the expiry of the term. What steps must his executor take in reference to the lease before distributing the estate of the deceased, in order to protect himself from personal liability thereon?

5. What is the extent of the authority of the guardian of an infant appointed or constituted under or by virtue of the Act respecting infants?

6. A. makes a promissory note in favour of B., and C. gives B. a collateral guaranty that the note will be paid. The note falls due, but is not presented for payment for several weeks thereafter, and no notice of dishonour is sent to

C. B. sues C. upon his guaranty, and C. raises the defence of want of presentation of the note, and of failure to give him notice of dishonour. Can B. succeed?

7. Upon what principle is the rule based that the release by a creditor of the principal debtor operates as a release of the surety for the indebtedness? What exceptions are there to the rule?

8. A. held a mortgage in fee of lands, made by B. to secure repayment to A. of $1,000. A., in the presence of a witness, said to his son: "I declare that I hold the mortgage for $1,000, made to me by B., in trust for you." No consideration was paid by the son for such declaration. A. retained the mortgage until the time of his death, and his son thereupon claimed to be beneficially entitled to the said mortgage, but his claim was resisted by the personal representatives of A. Should the son succeed in his contention or not, and why?

9. Blackacre is worth $1,000, and A. (the owner thereof), for an expressed consideration of five shillings, conveys the same to B., a stranger. In fact, no consideration was paid. In whom is the *legal* estate vested, and why?

10. A testator devised his farm to trustees in trust for the testator's son, with a provision in the will that the trustees should lease the farm to a tenant until the son attained the age of twenty-five years, and that the rents and profits, in the meantime, should be applied by the trustees for the maintenance, education, and advancement in life of the son, and that when the son attained the age of twenty-five years, but not before that time, the trustees should convey the farm to him. Upon the son attaining the age of twenty-one years, he forbade the trustees to make a further lease of the land, and he demanded an immediate conveyance thereof to himself. The trustees refused to comply with his demand, whereupon he brought action against them to enforce his claim. Who should succeed, and why?

CRIMINAL LAW.

Examiner: W. D. Gwynne.

1. State and explain shortly the several methods of bringing a person to trial before the code. How has the code altered the law?

2. What disposal may be made of a person arrested on an endorsed warrant?

3. How may a witness for the accused, who resides at Ottawa, be compelled to appear before a justice in Hamilton on a preliminary enquiry?

4. What course is adopted when a prisoner wilfully refuses to plead? What was the former practice?

5. What are the provisions of the code with regard to the form and contents of counts?

6. How may the accused avail himself of defects in an indictment?

7. In what cases may a person indicted for one offence be found guilty of another?

8. What is meant by entering a *nolle prosequi*, and what is the substitute under the present practice?

9. In what cases may a criminal court award compensation?

10. If during the trial the prisoner is taken so ill as not to be able to remain in court, what course may be adopted, and what was the former practice?

11. State the proceedings to be taken where a previous offence is charged.

12. At a coroner's inquest in regard to a fire of supposed incendiary origin, a witness' deposition is duly taken and signed. This witness is subsequently indicted, and tried as the incendiary and for perjury before the coroner.

(*a*) State fully the procedure necessary to put the accused on his trial before and since the code.

(*b*) To what extent may his deposition be used against him at his trial on both charges?

REAL PROPERTY.

Examiner: A. C. Galt.

1. How may a purchaser's right to a clear title be re[illegible]ted? Give illustrations.

2. Explain the liability of a vendor, in an open contract of sale, with respect to furnishing an abstract, showing when he need not cover 60 years, and when he must exceed that period.

3. What is a *perfect* abstract, and how far (if at all) is it impaired by the existence of an unregistered instrument essential to the title, but disclosed by the abstract?

4. Distinguish between matters of title and matters of conveyance.

5. A solicitor's abstract shows an unregistered deed 59 years old. Could it have been registered at the time of its date?

6. A plaintiff relies upon a registered title and offers in evidence the Registrar's abstract. Is the abstract evidence

(1) Of the title generally;

(2) Of any particular instrument mentioned in it?

7. A purchaser in the course of his investigation of the title acquires actual notice of an equitable interest in favour of a third party, outstanding, but unregistered.

Explain whether the purchaser is or is not affected by this equitable interest

8. Explain the advisability of a man's making a will, even when he desires to make the same distribution as regards beneficiaries as would follow an intestacy.

9. A clause in a will contains marks of punctuation which materially affect the meaning of the clause, but which are omitted in the probate.

Is it open to the court to look at the original will, and to adopt the construction thereby indicated?

10. Equal legacies are given to several executors, and there is a residue of personalty undisposed of by the will. The executors claim the residue for themselves.

What is the presumption of law applicable to such a case?

11. Explain whether a verbal agreement to purchase lands can or cannot be enforced against a purchaser:

(1) Where the sale is by auction as directed by the court;

(2) Where the sale is conducted by the Master in Ordinary himself.

12. A. enters into a verbal agreement for a lease for two years, to commence ten days from date at a fixed rent.

Is the agreement enforceable against him?

13. After an abortive auction sale of lands the auctioneer finds a purchaser who is willing to buy at an advance of $100 beyond the reserve bid, and the auctioneer thereupon agrees to sell the lands to him, and receives a deposit of $100.

The owner objects to carry out the sale. What are the purchaser's rights?

14. To what extent are Local Judges of the High Court empowered to deal with applications for an injunction?

15. A devise to M. and his children. How is this interpreted? Is the interpretation affected by the circumstances of M.'s having or not having any children when the devise takes eff[illegible]?

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Annual Register, The, for 1894, London, 1895.

Blewitt, R. J., The Court of Chancery, London, 1827.

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Bourinot, J. G., Cape Breton, Historical and Descriptive Account of the Island of, Toronto, 1895.

Brunner, A., Circuit Court Reports, San Francisco, 1884.

Cambridge, University Commission, Report with Evidence, etc., London, 1852.

Canada, Year Book of, 1867-70, Montreal.

Cecil, Evelyn, Primogeniture, London, 1895.

Chase, Chief Justice, Decisions of, New York, 1876.

Clementson, G. B., Road Rights and Liabilities of Wheelmen, Chicago, 1895.

Frazer, P., Manual of the Study of Documents, Philadelphia, 1894.

Gagnon, P., Essai de Bibliographic Canadienne, Quebec, 1895.

Georgia, Acts and Resolutions of, 1894.

Grant, U. S., Personal Memoirs, 2 vols., Montreal, 1886.

Hall, T. B., Infringements of Patents for Inventions, Cincinnati, 1893.

Howell, A., Probate, Administration, and Guardianship, 2nd ed., Toronto, 1895.

Justice of the Peace Reports, vols. 1-46, London, 1837-82 (completing set in Library).

Kirby, E., Connecticut Reports, 1785-1788, Litchfield, 1789.

Maine, Acts and Resolves of, 1895.

National Biography, Dictionary of, O'Duinn-Owen, vol. 42, London, 1895.

New York Civil Procedure Reports, Consolidated Index, vols. 1-22, New York, 1895.

Oxford University Commission Report, with Evidence and Appendix, London, 1852.

Palgrave, Sir R. F. D., Chairman's Handbook, 10th ed., London, 1894.

Pitt-Lewis, G., Smith, R. P., and Hawke, J. A., The Insane and the Law, London, 1895.

Pollock, Sir Frederick, and Maitland, F. W., History of English Law before the time of Edward I., 2 vols., Cambridge, 1895.

Pownall, Thomas, Administration of the British Colonies, 5th ed., 2 vols., London, 1774.

Reilly, F. S., Lord Cairn's Decisions, Albert Arbitration, London, 1872-5.

——— Lord Westbury's Decisions, European Arbitration, London, 1873.

Ruling Cases, The, vol. 3, London, 1895.

White, A. M., Solicitors, Their Rights and Duties, London, 1894.

Williams, Sir E. V., Executors and Administrators, 7th Am. ed., by J. F. Randolph and W. Talcott, 3 vols., Jersey City, 1895.

Wilson, A. J., Stock Exchange Glossary, London, 1895.