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UNDER the late Rule (of November 4th, 1893), the question of costs is likely to be a material one in many classes of cases. The matter of costs is now entirely in the discretion of the judge, although the case is tried by a jury. The first instance of the radical change that has been effected was a libel case tried at the present Toronto Assizes before Street, J., and a jury. The plaintiff recovered a verdict of $5. As the Rules formerly stood, and as libel actions can only be brought in the High Court, any verdict, however small, carried full costs of suit. In this case, although the defendant was found liable and the plaintiff recovered $5 damages, the learned judge held that, in the exercise of the discretion given by the new Rules, it was not a case for costs. The result will likely be that in all libel and slander actions tried hereafter, unless there are some exceptional circumstances, the plaintiff will not get his costs where the verdict is a nominal one.

OUR namesake in England calls attention to a case in which an innocent man was placed in a very unfair position by not being allowed to testify on his own behalf. At the request of his counsel, however, he was allowed to make a statement to the jury, and the jury apparently believed his explanation and acquitted him. The tide is turning in the direction of similar legislation to that introduced by "*The Canada Evidence Act*, 1893," in which, as in some other matters, we have set an example, afterwards followed in England. We notice that Mr. Justice Hawkins, in a case recently tried at the Old Bailey, stated that he was strongly in favour of allowing a prisoner to give evidence on oath. We believe the first trial of importance in this Province under the new law was a murder case

tried at the Barrie Autumn Assizes early in September last. The general impression seemed to be that the testimony of the prisoner, a woman, helped to clear up some doubts, though the evidence was, on the whole, weak and insufficient, and she was acquitted. In the case of Luckey, who was recently tried at Belleville for murder, the result of his giving evidence on his own behalf was to confirm the suspicion that he was the guilty man. Very possibly, if he had not exercised the privilege he might have been acquitted.

We observe that Mr. Archer Martin, editor of that outspoken journal, the *Western Law Times*, has moved to Victoria, B.C., still, however, retaining the editorship, with the assistance of Mr. J. T. Huggard. The first number for this year, which comes out in its usual fearless style, makes reference to the latest batch of Queen's Counsel which the Dominion Government insists shall be imposed upon the Province of Manitoba. One of those included in the list is referred to as having been "rescued from obscurity and brought within that fierce light which beats upon Q.C.'s. We smile an appreciative and understanding smile, for we all know exactly the reason why each one of the above was appointed, nd each one knows that we know the reason." It seems strange that the Attorney-General should have been omitted from the list, but we have long ago given up trying to account for the appointment of Queen's Counsel in any Province of the Dominion on any theory of professional claim or fitness.

In view of the recent plebiscite vote on the subject of prohibition, and the promise of the Premier of Ontario to bring in legislation to give effect to it, if circumstances enable him so to do, it will be of interest to record the text of the case, originally submitted by the Ontario Government to the Court of Appeal, as to the power of local legislatures to prohibit the sale of intoxicating liquors within their borders. This case is now, by consent of the Minister of Justice, before the Supreme Court, and will soon be argued. It reads as follows:

(1) Has a provincial legislature jurisdiction to prohibit the sale, within the province, of spirituous, fermented, or other intoxicating liquors?

(2) Or has the legislature such jurisdiction regarding such portions of the province as to which The Canada Temperance Act is not in operation?

(3) Has a provincial legislature jurisdiction to prohibit the manufacture of such liquors within the province?

(4) Has a provincial legislature jurisdiction to prohibit the importation of such liquors into the province?

(5) If a provincial legislature has not jurisdiction to prohibit sales of such liquors, irrespective of quantity, has such legislature jurisdiction to prohibit the sale by retail, according to the definition of a sale by retail either in statutes in force in the province at the time of Confederation, or any other definition thereof?

(6) If a provincial legislature has a limited jurisdiction only as regards the prohibition of sales, has the legislature jurisdiction to prohibit sales subject to the limits provided by the several subsections of the 99th section of The Canada Temperance Act, or any of them?

(7) Had the Ontario Legislature jurisdiction to enact the 18th section of the Act passed by the Legislature of Ontario in the 53rd year of Her Majesty's reign, and entitled "An Act to improve the Liquor License Acts," as the said section is explained by the Act passed by the said legislature in the 54th year of Her Majesty's reign, and entitled "An Act respecting Local Option in the matter of Liquor Selling."

The judgment of the Supreme Court will, doubtless, in any event, be brought before the Privy Council for final adjudication. This case will probably settle incidentally other points of constitutional law, apart from those affecting the prohibition question alone, and the arguments and decisions will be watched with interest.

COUNTY JUDGES AND THE HIGH COURT BENCH.

A correspondent recently brought before us (*ante* p. 24) the subject of the appointment of County Court Judges to vacant seats in the Superior Courts Bench. He argued that the mere fact of accepting a judgeship in a local court should not be a bar to his subsequent appointment to a higher court. There has been, we believe, in England, a sort of tradition that men in judicial positions are not to look for promotion, and, to some extent, that

thought seems to prevail in this country. We hardly think, however, that it is correct to say that there is any rule on the subject.

It is difficult to see why those who distinguish themselves in one judicial capacity should not, when the opportunity offers, be moved into another more important and responsible position, of the same kind, where the public may have the benefit of their learning, ability, and experience; nor does it seem reasonable to say that they have no right to expect promotion. The lawyer who distinguishes himself in his profession very properly looks to a seat on the Bench as a laudable object of ambition. We see no reason why this should not apply to a County Court Judge as well as to a barrister.

In discussing the subject, it must be mentioned that the County Court Bench is recruited from the local Bar, and appointments have been very generally made in view of political expediency and influence; and whilst we may gladly admit that this has not resulted as disastrously as might have been expected, it is admittedly a fact. On the other hand, appointments to the Superior Court Bench have not been so much affected by this practice. Moreover, inferior men would naturally be selected for inferior positions, and the best men would not take the paltry salary paid to County Judges; in fact, it is impossible to tempt the leaders of the Bar to take seats even on the Superior Court Bench.

We should not, therefore, expect to find many of the County Court Judges who would be entitled to promotion, though some of them undoubtedly are and have been. We could also imagine that from a political and party standpoint there might be reasons why men should not be selected from the Bar direct to fill vacancies in the Superior Courts. The late Premier of the Dominion, we believe, did not favour taking men from the District or County Courts; though we do happen to know that he pressed upon the late distinguished Chairman of the Board of County Judges to accept a vacancy at Osgoode Hall. Judge Jones, of the District Court at Brockville, was made a Judge of the Queen's Bench, and Judge Burns was also promoted. We must say that if it became a question between two men equally fit for the position, one having the experience of a judicial training in the County Court, and the other practising at the Bar, we should feel very much disposed to favour the appointment of the former rather than the latter.

There is no rule on the subject, so far as we know, and there ought not to be. The best men should always be selected. There is no part of the duty of a government so responsible as this: it is a sacred trust which should be exercised without fear, or favour, and regardless of political necessities, old-fashioned prejudices, or far-fetched theories.

It may further be noted in this connection that the amount of Chamber work in High Court cases now done by the County Judges, as local judges of those courts, helps to familiarize them with those classes of cases with which they had ceased to have any connection after leaving the Bar—as not being cognizable by the County Courts. In other respects, the procedure in the trial of cases, whether in the High Court or County Courts, is the same, and a familiarity with the rules of evidence is equally required for both.

CURRENT ENGLISH CASES.

WILL—CONSTRUCTION—REVOCATION BY CODICIL OF GIFT OF A SHARE OF RESIDUE, AND DIRECTION THAT IT SHOULD FALL INTO RESIDUE.

In re Palmer, Palmer v. *Ainsworth*, (1893) 3 Ch. 369, the Court of Appeal (Lindley, Lopes, and Smith, L.JJ.) found it necessary to overrule the decision of Lord Cottenham in *Humble* v. *Shore*, 7 Ha. 247. A testator had, by his will, given a share of his residuary real and personal estate to his daughters, born in his lifetime, equally. By a codicil he declared that the share given to one of them should be for her life only, and that upon her death it should fall into and form part of his residuary estate. Stirling, J., following *Humble* v. *Shore*, held that the share which had been cut down to a life estate on the death of the life tenant was distributable as upon an intestacy; but the Court of Appeal was satisfied that the clear intention of the testator was that it should form part of the residuary estate, and the court was therefore bound to give effect to that intention in spite of the contrary decisions in *Humble* v. *Shore* and the cases which had followed it. As Lindley, L.J., said, *In re Morgan, Morgan* v. *Morgan* (see *ante* p. 20): "Many years ago the courts slid into the bad habit of deciding one will by the previous decisions upon other wills. Of course there are principles of law which are to be applied to all wills: but, if you once get at a man's intention, and there is no

law to prevent you from giving it effect, effect ought to be given to it," and that seems to be the principle on which the present case was decided.

PRACTICE—SALE, BY COURT, OF LAND SUBJECT TO MORTGAGES—CONVEYANCE, FORM OF—CONVEYANCING AND LAW OF PROPERTY ACT, 1881 (44 & 45 VICT., C. 41), S. 70—(R.S.O., C. 44, S. 53, S-S. 10)—PUISNE INCUMBRANCERS.

In *Mostyn* v. *Mostyn*, (1893) 3 Ch. 376, which was an administration suit, the trustees of the will of the testator were directed to sell, with the approbation of the court, certain lands, which were subject to several mortgages, and the first mortgagees were authorized to retain the purchase money in reduction of their charge. The puisne incumbrancers were not parties to the proceedings. The conditions of sale stated that the first mortgagees would join in the conveyance to the purchasers and release the property from their debt, and, as their debt exceeded the probable amount of the purchase money, no subsequent incumbrance would be abstracted or released, and that the purchasers should not be entitled to require the conveyance of any person having only an equitable interest bound by the order for sale, other than the trustees who were the vendors. The first mortgagees agreed to join in the conveyance, but wished to insert, after the granting words in the deed, the words, "according to their estate and interest in the premises, and not further or otherwise," and the words, "subject to such right or equity of redemption, if any, as is subsisting in the said hereditaments, and is not by these presents conveyed or released." The purchasers objected to these words, and Kekewich, J., overruled their objection; but the Court of Appeal (Lopes and Smith, L.JJ.) were of opinion that the purchasers were protected against the equitable interests of the puisne incumbrancers by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict., c. 41), s. 70 (R.S.O., c. 44, s. 53, s-s. 10), and that they were entitled to an absolute conveyance in fee simple; and if the first mortgagees, who were not parties to the proceedings, declined to forego the objectionable clauses, the purchasers were entitled to be relieved from the contract. The Court of Appeal also held that, under s. 70, the puisne incumbrancers were bound by the order for sale, although they were not parties.

WILL—REMOTENESS—INVALID TRUST FOR SALE—CONVERSION—REAL OR PERSONAL ESTATE—ELECTION.

In re Daveron, Bowen v. *Churchill*, (1893) 3 Ch. 421, a somewhat curious question arose upon the construction of a will, and one that does not seem to have been covered by any previous authority. A testator, being entitled to a freehold estate which was subject to an unexpired term of forty-nine years, devised it to trustees upon trust to pay the rent to certain persons so long as the lease should run; and "upon the expiration of the lease" he directed the freehold to be sold, and the proceeds equally distributed among three other named persons, ascertainable, as the court found, within the limits of the rule against perpetuities. It was, however, admitted that the trust for sale was void, because directed to be made beyond the time allowed by the perpetuity rule; and the question, therefore, was whether, nevertheless, the legatees to whom the proceeds of the sale were bequeathed were entitled to the land. Chitty, J., held that inasmuch as the legatees would have been entitled, even if the power of sale had been valid, to elect to take the land instead of the proceeds, so, though the power of sale was invalid, the testator's intention might nevertheless be carried out, and that the beneficiaries were entitled to take the property as real estate. See *Goodier* v. *Edmunds*, (1893) 3 Ch. 455, *post* p. 86.

BANKERS—DEPOSIT NOTE—NOVATION—DECEASED PARTNER'S ESTATE, LIABILITY OF.

In re Head, Head v. *Head*, (1893) 3 Ch. 426, there was simply a question whether or not there had been a novation under the following circumstances. A customer of a bank carried on by a firm made a deposit in the bank and received a deposit receipt. The custom of the bank was, when any depositor drew any part of his deposit, to cancel the previous receipt, and issue a new receipt for the balance remaining. A partner having died, a depositor, knowing of the death of the deceased partner, subsequently drew out part of his deposit, and received a new receipt from the surviving partner, who continued the business, for the balance remaining at his credit. It was contended that this amounted to a novation, and that the deceased partner's estate was released. But Chitty, J., held that what had taken place was not sufficient evidence of novation so as to discharge the original debtor from liability. In connection with this case, it may be well to consider the recent case of *Allison* v. *McDonald*, 20 A.R. 695.

PRACTICE—SERVICE OUT OF THE JURISDICTION—NOTICE OF MOTION—WITH WRIT—ORD. XI., R. 1; ORD. LII., R. 9—(ONT. RULES 271, 533).

Manitoba & N.W. Land Corporation v. *Allan*, (1893) 3 Ch. 432, was an application to set aside an order allowing service of a writ out of the jurisdiction, part of the claim indorsed not being within Ord. xi., r. 1 (Ont. Rule 271). The defendant had entered an unconditional appearance and it was held by North, J., that this amounted to a submission to the jurisdiction of the court as to the whole claim, and the order was allowed to stand; but it was ordered that the plaintiffs should not be entitled to any relief as to that part of the claim outside Ord. xi., r. 1. Leave was also granted to serve a notice of motion for an injunction with the writ. North, J., intimated the opinion that this was done *per incuriam*, and that Ord. lii., r. 9, was not intended to authorize such a service on a party out of the jurisdiction before appearance. Under Ont. Rule 533, notice of motion for injunction may be served with the writ without leave, but it may be that that also applies only as regards defendants within the jurisdiction, although there is no such limitation in the Rule.

PUBLIC UNDERTAKING—ACTION TO ENFORCE MORTGAGE DEBENTURES—RECEIVER AND MANAGER.

In *Bartlett* v. *West Metropolitan Tramways Co.*, (1893) 3 Ch. 437, North, J., appointed a receiver and manager of a tramway company at the instance of holders of mortgage debentures, on the ground that the court had jurisdiction to wind up the defendant company, in which respect he distinguished the case from *Gardner* v. *The London, Chatham & Dover Ry*, 2 Ch. 201, where the court had not that power.

LIGHT—PRESCRIPTION—RESERVATION IN LEASE OF RIGHT TO OBSTRUCT LIGHT—ADJOINING OR CONTIGUOUS—"ASSIGN."

Haynes v. *King*, (1893) 3 Ch. 439, although relating to an easement of light, is, we think, deserving of notice, notwithstanding the provisions of R.S.O., c. 111, s. 36, whereby the acquisition of such easements by prescription is abolished, because it may possibly be held that such easements may still be acquired by implied grant. The facts of the case were as follows: In a lease of premises made to the plaintiffs, the lessors had expressly stipulated that they or their assigns should be at liberty to build on any adjoining or contiguous property of the

lessors as they might see fit, notwithstanding such building might interfere with the light or air then, or at any time thereafter, enjoyed by the lessees or occupiers of the demised premises. The lessors owned some property on the opposite side of the street, and for more than twenty years past no alteration had been made in the buildings thereon, but after the plaintiffs' lease had run over twenty years the defendant, in pursuance of an agreement with the lessors, pulled down the premises on the opposite side of the street and erected new buildings, which admittedly interfered with the plaintiffs' light. It was contended that the premises on which the buildings were erected were not "adjoining or contiguous" to the demised premises, and that the clause in the lease above referred to only prevented the erection of the new buildings being termed a derogation from the lessor's grant, but did not prevent the lessees acquiring a prescriptive right to the light; but North, J., was of opinion that it amounted to an express agreement that the lessees should only be entitled to the enjoyment of the light until the lessors should see fit to obstruct it. He, moreover, held that the opposite premises were "adjoining or contiguous" to the demised premises, on the ground that, according to English law, the plaintiffs' lease and the defendant's agreement passed by implication the subsoil of the street, *usque ad medium filium viæ* (subject to the rights of the local authority in the surface of the street); but it is open to doubt how far that reasoning would be applicable in Ontario, having regard to the provisions of the Municipal Act respecting highways. See 55 Vict., c. 42, ss. 524, 525, 527 (O.).

WINDING UP—ENFORCEMENT OF CALLS—POWERS OF DIRECTORS OF COMPANY IN LIQUIDATION—COMPANIES ACT, 1862 (25 & 26 VICT., C. 89), S. 123, S-S. 5; S. 139 (R.S.O., C. 183, S. 8, S-S. 6; S. 22, S-S. 2; R.S.C., C. 129, S-S. 34, 49).

In re Fairbairn Engineering Co., (1893) 3 Ch. 450, an application was made to North, J., by the liquidators of a company in liquidation in order to obtain the opinion of the court whether a general meeting of the company could be called under the Companies Act, 1862, with the sanction of the liquidator, for the purpose of electing directors and sanctioning the exercise by them of the powers vested in the directors by the articles of association for enforcing the payment of calls. North, J., held that such meetings might be called, and directors elected and empowered

to act. The Ontario Winding-up Act, R.S.O., c. 183, is similar in terms to the English Act, but in the Dominion Winding-up Act the provision as to holding general meetings of the company seems to be omitted; and while this case would appear to be an authority for the construction of the Ontario Act, it would seem not to be applicable to the Dominion Act, which appears to vest in the court the power to make calls. See R.S.C., c. 129, s. 49.

WILL—REMOTENESS—INVALID TRUST FOR SALE—CONVERSION—REAL OR PERSONAL ESTATE.

Goodier v. *Edmunds*, (1893) 3 Ch. 455, presents some features in common with *In re Daveron* (noted *ante* p. 83). In this case also a testator had devised lands in trust for sale, and to divide the income until sale, and the proceeds of the sale, among certain named persons. The trust for sale was held void, as offending against the rule against perpetuities, but the gift of the income until sale, being valid, was held to carry with it the right to the land itself, notwithstanding the invalidity of the trust for sale, and the share of a deceased beneficiary was held to pass as realty; the invalid trust to sell being held by Stirling, J., to be inoperative as a conversion of the estate into personalty.

WILL—LEGACY—TRUST TO SELL AND PAY LEGACY OUT OF PROCEEDS—POWER TO POSTPONE SALE—TRUSTEE ENTITLED TO SHARE OF RESIDUE—INCREASED INCOME FROM TRUST FUND, RIGHT OF THE LEGATEE TO SHARE IN INCREASE.

In re Campbell, Campbell v. *Campbell*, (1893) 3 Ch. 468, was an application by legatees in an administration suit, claiming to recover more than the ordinary rate of interest on their legacy under the following circumstances: The testator had given his residuary real and personal estate upon trust for sale and conversion, and as to £20,000, part of the proceeds, in trust for a son for life, with remainder to his children; and the residue was divisible between two other sons, one of whom was the sole surviving trustee of the will. By the will a discretionary power was given to the trustees to postpone the sale and conversion of the estate so long as to them might seem expedient. The trustee neither paid nor appropriated funds to meet the legacy of £20,000, but retained the trust estate in its original condition, meanwhile paying the legatee for life interest at four per cent. on the legacy. The investments of the estate having arisen consid-

erably in value, the legatee and his children, more than ten years after the testator's death, claimed to participate in the increased value on the ground that the trustee, being a residuary legatee, ought not to be allowed to retain profits caused by his own default. Stirling, J., however, was of opinion that the claim could not be successfully maintained, although he admitted that if the trustee had applied the trust estate to his own purposes—as if, for example, he had embarked it in trade—he might have been accountable for profits so made; yet, as he had merely left the property in the same condition as it had been left by the testator, he thought no such right arose in favour of the legatees. The true position of the parties he considered to be, that the residuary legatees were to be deemed the owners of the estate, subject to the charge in favour of the legatees, who, until payment of their legacy, were entitled only to the ordinary interest.

DOMICIL—INFANT—FATHERLESS INFANT—CHANGE OF MOTHER'S DOMICIL.

In re Beaumont, (1893) 3 Ch. 490, Stirling, J., had to determine a question of domicil. One Catharine Beaumont was one of several infant children, all of whom had a Scotch domicil. Her father having died in 1821, her mother married again, and in 1835 went permanently to reside in England, leaving Catharine in Scotland with an aunt, with whom she continued to reside until her death in 1841, she being then in her twenty-second year. Under these circumstances, it was decided that the mother had abstained from exercising the power of changing Catharine's domicil when she changed her own, and that therefore Catharine's domicil at the time of her death was Scotch.

ADMINISTRATION—EXECUTION AGAINST LANDS OF DECEASED DEBTOR—EXONERATION OF PERSONAL ESTATE—ESTATE TAIL—LOCKE-KING'S ACTS (17 & 18 VICT., C. 113; 30 & 31 VICT., C. 69)—(R.S.O., C. 109, S. 37).

In re Anthony, Anthony v. *Anthony*, (1893) 3 Ch. 498, demands attention, because by the express terms of the Devolution of Estates Act estates tail are expressly excepted from the operation of that Act. In that case an execution against the lands of a tenant in tail had been issued, and the simple question was whether, on the death of the execution debtor, the existence of this execution had the effect of exonerating his personal estate from the payment of the debt, as between the present tenant

in tail and the executor of the deceased tenant. Kekewich, J., held that it had not, and that Locke-King's Acts had no application, as they only operate between persons taking through the debtor his real and personal estate.

HUSBAND AND WIFE—SETTLEMENT—ELECTION OF WIFE TO CONFIRM SETTLEMENT NOT ACTUALLY EXECUTED BY HER.

In *Greenhill* v. *North British & Mercantile Ins. Co.*, (1893) 3 Ch. 474, the question was whether a married woman was bound by a marriage settlement executed by her husband, but not by herself, on the ground that she had elected to confirm it. The settlement was a post-nuptial settlement made in pursuance of an ante-nuptial agreement to settle the wife's property, including a policy of insurance on the life of another, to which she was entitled. The memorandum of this agreement had been signed by the husband alone, and the settlement therein referred to was, after the marriage, executed by the husband alone. By a subsequent deed the wife assigned the policy to the trustees of the settlement, and subsequently, in pursuance of the power in the settlement on that behalf, mortgaged it. The policy having become payable, the wife claimed the money, and so did the mortgagees. Stirling, J., was clearly of opinion that the acts of the wife in assigning the policy, and subsequently mortgaging it under the power of the settlement, amounted to an election to confirm the settlement, and that she was as fully bound by it as if she had actually executed it; and that the mortgagees were, therefore, entitled to the money.

WILL—LIFE INTEREST—FORFEITURE ON ALIENATION—ASSIGNMENT OR ATTEMPTED ASSIGNMENT—DOCUMENT NOT IN CONFORMITY WITH REAL INTENTION OF PARTIES.

In re Sheward, Sheward v. *Brown*, (1893) 3 Ch. 502, the estate of a tenant for life in a sum of £30,000 was, under a will, made subject to a condition that his interest should be forfeited if he should alienate or incumber, or attempt to alienate or incumber, it. He executed a document which in terms amounted to an equitable assignment of his interest as security for a loan, but the document, though addressed to the trustees, was never actually communicated to them, and it was subsequently cancelled and returned to the tenant for life. There was evidence that the

document was not intended to operate as a charge, and that it would have been a fraud on the bargain to have used it as such. Under these circumstances, Kekewich, J., decided that it did not have the effect of working a forfeiture. The learned judge arrived at the conclusion that the tenant for life had imprudently signed the document, acting on an incomplete and unsatisfactory explanation of its effect.

JURISDICTION—INJUNCTION IN AID OF LEGAL RIGHT.

In *Richardson* v. *Methely School Board*, (1893) 3 Ch. 510, Kekewich, J., following *Aslatt* v. *Southampton*, 16 Ch.D. 143, granted an injunction restraining a school board from proceeding to elect a new member in the place of the plaintiff, on the alleged ground that he had forfeited his seat by absence from the sittings of the board, notwithstanding that the plaintiff had a remedy by *quo warranto* proceedings. In considering the case, he discusses the question which has been so repeatedly raised before, as to whether the jurisdiction to grant injunctions has been extended by the Judicature Act, and adheres to the rule laid down by Cotton, L.J., in *The North London Ry. Co.* v. *Great Northern Ry. Co.*, 11 Q.B.D. 40, 41, that where, independently of the Judicature Act, a party had a legal or equitable right, under the Judicature Act an injunction may now be granted where it is necessary in order to do effectual justice. On the merits of the case, he held that the plaintiff's seat could not be declared vacant by the board on the ground of absence without first giving him an opportunity to explain or excuse his absence.

WILL—LEGACY—DISTRIBUTION—INTEREST—RESIDUARY LEGATEE.

In re Inman, Inman v. *Rolls*, (1893) 3 Ch. 518, a testator gave his residuary estate upon trust to pay the income to his wife for life, and, from and after her decease, to pay to each of his sons, John and Francis, who should be living at his decease and attain twenty-one, £5,000, and, subject to such payment, the residue was distributable among his four children equally. Francis attained twenty-one after the death of his mother, and the question was as to who was entitled to the interest which accrued on his £5,000 between his mother's death and his attaining twenty-one. Kekewich, J., decided that it belonged to the residuary legatees, and that Francis was only entitled to interest from the period of vesting.

COMPANY—LIQUIDATION—COSTS OF SUCCESSFUL APPLICATION AGAINST LIQUIDATOR —COSTS, PRIORITY OF.

In re Staffordshire Gas Co., (1893) 3 Ch. 523, certain persons having succeeded in an application to be struck off the list of contributories, the liquidator, who had opposed their application, was ordered to pay their costs out of the assets of the company. The assets proved insufficient to pay both these costs and those of the liquidator. Kekewich, J., held that, except as regards the liquidator's costs of realizing the assets, the costs of the successful litigants were entitled to be first paid, and he expressed the opinion that an unsuccessful liquidator should be ordered to pay the costs of an unsuccessful litigation, irrespective of the question whether the assets were sufficient or not to recoup him.

MORTGAGE—SALE BY MORTGAGEE—MORTGAGEE, LIABILITY OF, FOR SURPLUS PROCEEDS OF SALE—FRAUD—PAYMENT OF INTEREST—STATUTE OF LIMITATIONS (21 JAC. I, C. 16)—TRUSTEE ACT, 1888 (51 & 52 VICT., C. 59), S. 8 (54 VICT., C. 19, S. 13 (O.)).

Thorne v. *Heal*, (1893) 3 Ch. 530, was an action by a subsequent mortgagee against prior mortgagees to recover the surplus proceeds of a sale of the mortgaged property made by the first mortgagees under a power of sale. The sale took place in 1878 one Searle acting as the first mortgagees' solicitor. After the sale, Searle paid over to the first mortgagees the amount of their mortgage, and retained the balance of the proceeds by falsely representing that he was authorized to receive the same from the second mortgagee, on whose behalf he gave a receipt for the money to the first mortgagee. He continued to pay the second mortgagee interest on his mortgage from 1878 to 1891, as though it were still existing; then, having become bankrupt, it was found that he had misappropriated the surplus proceeds. The defendants claimed that under 51 & 52 Vict., c. 59, the action was barred by the Statute of Limitations, and Romer, J., so held, as the payments of interest had not kept alive the claim, because Searle could not be deemed to have made them as the agent of the first mortgagees, who were no parties or privies to his fraud, and ignorant of the payments being made, and the defendants were therefore no longer liable, notwithstanding their negligence in not seeing to the due application of the surplus proceeds.

CORPORATION—COMMON SEAL—EXECUTORY CONTRACT—RATIFICATION.

Mayor of Oxford v. *Crow*, (1893) 3 Ch. 535, was an action by a municipal corporation. The defendant had made certain proposals to surrender a lease, pull down existing buildings, and erect new ones on condition of getting a new lease on certain specified terms. These proposals were made to a committee of the corporation—which had not been appointed under seal. On May 13th, 1892, the town clerk, on behalf of the committee, wrote accepting the proposals, subject to the approval of the council. On May 27th, 1892, the defendant wrote to the town clerk modifying his proposals. On June 1st, 1892, the council approved, but not under seal, the committee's acceptance of the original proposals, which acceptance was communicated to the defendant by letter. On July 21st, 1892, the defendant withdrew his proposals altogether. The action was brought to enforce the contract, but failed because it was not under the seal of the corporation, nor had it been ratified under seal.

JURISDICTION—TRESPASS TO LAND IN FOREIGN COUNTRY.

In *The British South African Co.* v. *The Companhia de Mocambique*, (1893) A.C. 602, the House of Lords have decided that, notwithstanding the abolition of local venues, an action for trespass to land in a foreign country cannot be brought in an English court, even though the defendant be resident within the jurisdiction. The decision of the court below reported, (1892) 2 Q.B. 358, was referred to in the recent case of *Henderson* v. *Bank of Hamilton*, 20 A.R 646, and we are glad to see that the learned reporter has, with commendable diligence, noted the decision of their lordships in his footnote on p. 648.

PRACTICE—SECURITY FOR COSTS—APPEAL DISMISSED FOR WANT OF PROSECUTION—CORRECTION OF ACCIDENTAL ERROR IN ORDER OF COURT.

Wilson v. *Carter*, (1893) A.C. 638, disposes of a question of practice. An appellant having obtained leave to appeal, on giving security for costs, subsequently suffered his appeal to be dismissed under Rule 5 of the Orders of the P.C. of 1853. The order provided that the costs of the application for leave to appeal and of the transcript should abide the judgment of Her Majesty in Council, but omitted to add the words, " Or the result

of the appeal, in case the appeal shall be dismissed for want of prosecution." The respondent applied to the Privy Council for payment of the costs out of the money deposited as security, but their lordships held that the proper course was to apply to the court below to amend the order, and, if it refused, to appeal from their decision.

Notes and Selections.

NOVEL TEXT-BOOK.—Books have been written, as we had supposed, on all branches of the law, but still they come. The title of one recently announced is thus happily expressed: "The Rise and Growth of Elevated Railroad Law." What next? How long before we have a learned essay on the law affecting the rise and fall of balloons, etc.? Coke and Blackstone, if they could come back to earth, would gaze with every hair on end at the wonder of legal literature in these days.

BARBED WIRE FENCES.—We notice an elaborate judgment on the subject of wire fences in the *Cape Law Journal*, decided in the case of *Melt Marais* v. *Eloff*, in the High Court of South Africa. The decision was that any one placing a barbed wire fence or other object on or near, or making any excavation in or near, any thoroughfare habitually used by the public, without giving sufficient warning thereof, is liable for any damages caused on account of such fence or other object or excavation to any person lawfully using such thoroughfare. And any owner or occupier of land or buildings adjoining any thoroughfare is bound to keep his property in such a condition that it is not dangerous to the safety of those lawfully using such thoroughfare. If, however, a person is aware of the danger, he must use reasonable care to avoid such danger, but the onus of proving such knowledge rests with the defendant.

THE *Law Quarterly* for January contains a valuable article on insurance of limited interests, especially referring to the case of mortgagor and mortgagee. The learned writer thus sums up the conclusions he arrives at: "The final result of the case would

seem to be to establish the following propositions: (1) That a mortgagee or other incumbrancer has an insurable interest in the security notwithstanding the existence of prior incumbrances, provided the aggregate amount of the incumbrances is not greater than the value of the security. (2) A subsequent incumbrancer insuring his interest will have a right to recover in the event of a loss where the security is so reduced in value by the fire as to leave his debt uncovered. (3) This reduced value is the market value of the site and salvage of buildings, and not the value for the purposes of reinstatement, which is, in general, much greater. (4) Insurance, by creditors, of their independent interests is not to be treated as double insurance by the owner, in respect that he is made a party to each of the creditors' policies for his reversionary interest."

THE LUXURY OF APPEALS.—We gather from the *Indian Jurist* that litigants in the Madras courts are great on appeals; in fact, the legal profession must be largely supported by a praiseworthy desire to "see it through." The writer puts the question as to whether a judge of an inferior court is a sound lawyer into the form of a syllogism, thus:

"Many suitors filed appeals against his decisions,
Therefore he is a bad judge.
Many of these appeals were unsuccessful,
Therefore he is a good judge."

And points his moral by the following anecdotes from the Madras High Court: "The Rani of Bobbili had a suit with Messrs. Arbuthnot & Co. about some indigo, and a decree was given against her by the District Court of Vizagapatam. She appealed because she was called the third defendant, and not Sri Rama something or other. The appeal came on before the High Court, and Sir Walter Morgan, looking down from the bench, said: 'You don't seem to have much of a case!' 'Well, my lord,' said Willie Grant, 'I suppose my client can appeal if she likes.' The judges grinned, and dismissed the appeal with costs. Mr. Tarrant told us that he received by post the papers in a hopeless appeal, and he wrote to advise his up-country client not to waste his money. The answer came: 'I did not ask for your opinion. I do not want your opinion. God only knows what is in the minds of the judges.' So the appeal was filed."

SAGE REFLECTIONS.—The case of *Laidlaw* v. *Sage*, which was recently decided by the Supreme Court of New York, involves a very extraordinary state of facts. In that case the plaintiff was a clerk who had called to transact business with Mr. Russell Sage. He was standing in Mr. Sage's office, waiting until the latter should finish talking with another caller who was then engaging his attention. This man, whose name was Norcross, had just handed Mr. Sage a letter in which he threatened to drop a satchel full of dynamite, which he carried, on the floor, and so blow up the building, unless Mr. Sage would immediately give him $1,200,000. Mr. Sage, after reading the letter, answered Norcross evasively, and at the same time, according to the plaintiff's story, approached the plaintiff, and, gently laying hold of him in such a manner as not to excite his suspicion, drew him into a position between himself and the dangerous visitor. Thereupon Norcross dropped his satchel. An explosion followed, by which the plaintiff was very seriously injured. This suit was brought to recover for these injuries, which the plaintiff claimed had been sustained in consequence of Mr. Sage's wrongful act.

A motion to dismiss was granted by the Circuit Court, on the ground that there was no evidence to support the action. The Supreme Court reversed this judgment, and ordered a new trial. The language of the opinion of the Supreme Court is not very precise, but the result reached seems clearly right. It would have been at least possible for a jury, acting within the bounds of reason, to find that the defendant, fearing that Norcross would execute his threat, deliberately pulled the plaintiff in front of him in order to protect his body. If this was the truth, the defendant's act was wrongful; and certainly it could not be said, as matter of law, not to be a proximate cause of the plaintiff's injury. And this is apparently what the court means in saying that "there is no question of proximate cause." On the ground, therefore, that the evidence raised a question for the jury, the Supreme Court did only common justice to the plaintiff in reversing the decision of the court below.

The court, however, is not content to let the matter rest here. There follows a discussion of the "burden of proof" in such cases as the present which seems not wholly satisfactory. Under the circumstances of the case, the court says, "The burden is thrown upon the defendant of establishing that his wrongful act

did not, in the slightest degree, contribute to any part of the injury which the plaintiff sustained by reason of the explosion." —*Central Law Journal.*

EARL CAIRNS—A CHARACTER SKETCH.—The external facts in Lord Cairns' career may be summarily disposed of. Most educated men are familiar with his story. Hugh McCalmont Cairns was the son of a captain in the Irish army, (?) and was born at Cultva, County Down, in 1819. He was carefully educated, first at Belfast Academy, and afterwards at Trinity College, Dublin, where he graduated with first-class honours in 1838. His father originally designed him for the church, but by the wise advice of his college tutor, and in accordance with his own wishes, he was sent to England, to prepare for the Irish bar. He was called to the Bar of the Middle Temple in January, 1844, but migrated to Lincoln's Inn. Cairns at first intended to return to Ireland, but on the suggestion of Mr. Richard Malins, afterwards a vice-chancellor, in whose chambers he had read, he determined to remain in London and fight his way through the crowd of junior barristers who were struggling to impress their personality on the legal life of the metropolis. Although without influence other than that of his own transcendent ability, Cairns rose rapidly through the customary grades of distinction to the highest legal and political eminence.

In July, 1852, he entered Parliament as member for Belfast. Four years later he was raised to the dignity of one of "Her Majesty's Counsel, learned in the law." In 1858 he became Solicitor-General, and delivered his memorable speech in the House of Commons upon Mr. Cardwell's motion to censure the conduct of Lord Ellenborough in India, which Disraeli characterized in his official letter to the Queen as one of the greatest orations ever made in Parliament. In 1886 Cairns was raised to the Attorney-Generalship, and on the retirement of Sir I. Knight Bruce he became a Lord Justice of Appeal. In February, 1867, he was created a Privy Councillor, and entered the House of Lords as Baron Cairns of Garmoyle. In February, 1868, Mr. Disraeli became Prime Minister, and passing over Lord Chelmsford, in the words of the latter, "with less courtesy than if he had been a butler," he promoted Cairns to the Lord

Chancellorship. From that date till the defeat of the Beaconsfield government in 1880, Cairns (on whom, by the way, an earldom was conferred in 1878) was, after the Prime Minister, the leader of the Conservative party in the House of Lords, and his speeches on the Triple Alliance, the unconstitutional appointment of Sir Robert Collier to a seat in the Judicial Committee of the Privy Council, and the autocratic suppression of the rebellion of Langalibalele by the late Sir Benjamin Pine, deserve and will repay perusal as models of nervous eloquence and critical ability. On the death of Lord Beaconsfield, Cairns' accession to the vacant leadership was fervently desired by a section of the Conservative party, which, while fully admitting the great intellectual power of the Marquis of Salisbury, feared his rashness and distrusted his statesmanship. But years and health were on Lord Salisbury's side, and Cairns retired definitely from public life. He died at Bournemouth on April 2nd, 1885.

Earl Cairns was the most distinguished, and not the least earnest, of our great religious chancellors. A stern Protestant in his views of ecclesiastical polity, he disliked, with all the strength of his upright, austere nature, the excessive tolerance of modern politico-Protestant thought. He laboured faithfully to spread the growth of religious teaching, lent the aid of his voice and his purse to Dr. Barnardo's Homes, frequently presided at religious meetings at Exeter Hall, and was a Sunday-school teacher up to, practically, the end of his long career. Mr. Gladstone is believed to have expressed the opinion that Sir George Jessel, the late Master of the Rolls, was "the greatest legal genius of the century." But there are few lawyers who would endorse this verdict. Sir George Jessel undoubtedly possessed a legal intellect of the highest order. He disposed of the most complex legal problems with the ease and vigour, although not without some of the coarseness, of a huge mastiff worrying an insignificant terrier. But he lacked what Cairns possessed—the cultured imagination and the vein of poetry which are essential to the exercise of the highest genius in the juridical art. In Cairns' best judgments Burke's idea, that "all human law is properly declaratory," is realized. They are not so much ratiocinations as illuminations. Disregarding the slow, syllogistic processes by which ordinary judges arrive at their decisions, he goes straight to his mark, with the swift, strong, subtle instinct of a woman for truth, and

when the conclusion is reached one feels as if the last word on the subject had been spoken. And yet Cairns' mind was severely logical—he had attained that perfect mental discipline which enables a man to "follow without reflecting upon the rule." In spite of these great intellectual gifts, it is practically certain that the circumstances which prevented Cairns from succeeding to the authority of Lord Beaconsfield were of good omen for the Conservative party. His austerity, his stern self-repression, would have been fatal obstacles to his success, and he never displayed either the faculty for evoking popular enthusiasm or the capacity for leadership which the responsibilities of office have developed in his successor. By his professional brethren Cairns was, and still is, regarded with almost superstitious veneration, but without any of the perfect love which was poured, without measure, on the erring head of Cockburn. Lord Coleridge has told us that he had a strong, rich vein of humour. But its pulsations were carefully concealed, and, according to the traditions of the Temple, a curious fancy for immaculate bands and tie in court, and for a flower in his coat at evening parties, was the only human weakness that the great Lord Chancellor displayed.—*Green Bag.*

COL. FOLK, of the Mountain circuit in N.C., is a very learned lawyer, but, it seems, is not one of those who think all judges absorb learning *ex officio*. On one occasion, in arguing a point before Judge —— of the Superior Court, he laid down a very doubtful proposition of law. The judge eyed him a moment, and queried, "Col. Folk, do you think that is law?" The colonel gracefully bowed, and replied, "Candour compels me to say that *I* do not, but I did not know how it would strike your honour?" The judge deliberated a few moments, and gravely said, "That may not be contempt of court, but it is a close shave."—*Green Bag.*

Proceedings of Law Societies.

COUNTY OF YORK LAW ASSOCIATION.

ANNUAL REPORT OF THE BOARD OF TRUSTEES FOR 1893

GENTLEMEN,—In presenting the eighth annual Report to the shareholders of the association, the Trustees take much satisfaction in stating that the affairs of the association continue to be in a prosperous condition.

There are now 392 members, and 364 paid their fees for the year 1893. During the year eight members died, twenty members severed their connection with the association, by removal from the county, or by resignation, and twenty-seven practitioners became members. There are now 2,402 volumes in the library. One hundred and seventy-four volumes were added during the year, the most important addition being a complete set of Moore's Privy Council Cases.

The following are the principal donations of books to the library during the year: The Statutes of Prince Edward Island (1773-1893), presented by the Provincial Secretary of Prince Edward Island; The Weekly Notes (1874-1893), presented by Mr. T. D. Delamere, Q.C.; O'Brien's Division Court Manual, presented by Mr. A. H. O'Brien; The Constable's Manual, presented by Mr. J. T. Jones; The Canadian Patent Reports, presented by Mr. J. G. Ridout; The City of Toronto Consolidated By-Laws, presented by the City Solicitor; The Revised Statutes of Manitoba, The Statutes of Quebec, Nova Scotia, and Ontario, presented by the Provincial Secretaries of the several provinces; The Supreme Court Reports, and the Dominion Statutes for the year, presented by the Minister of Justice. A portrait of Mr. Nicol Kingsmill, Q.C., president of the association during 1892, has been presented by Mr. Lash, Q.C., the retiring president, and now hangs in the library.

The condition of the library is highly satisfactory. A continuing digest of all current Ontario cases is kept by the librarian, the amendments to the Ontario and Dominion Statutes are noted to date, and the work of noting the English and Canadian Reports is unremittingly continued. The librarian reports that the attendance at the library has been greater than in any previous year. No books have been lost during the year. Nothing has as yet resulted from the presentation to the judges of the report of the joint committee of the Law Associations, embodying suggested changes in the rules, a summary of which is printed in the *Law Times*, 1892, at page 296. Nor has anything resulted from the presentation of a further report of the Committee on Legislation, prepared with great care during the past year. These reports embody suggestions made by the

late Master in Chambers, Mr. R. G. Dalton, Q.C., and others, the result of experience and much consideration. The Trustees suggest that Convocation be requested to use its influence to obtain, if possible, the consideration of these reports, and the adoption of the suggestions therein contained.

The request to abolish the separate sittings of the Chancery Division for the trial of actions, and its separate weekly sittings, which has been continually urged during the last six years, has happily resulted in the adoption of a series of rules which fix the sittings of the High Court of Justice in the several county towns or places for the trial of criminal cases and of civil cases, with and without a jury, according to a published schedule, whereby each sitting is to take place during the week, beginning with a fixed date. Rules 210, 211, and 212 have also been repealed, the separate weekly sittings of the Chancery Division have been abolished, and further and important steps have been thus taken to bring about the complete fusion which the Judicature Act contemplated.

Steps have also been taken by the judges to do away with the block of business in this county, and non-jury actions to be tried at Toronto can now be brought on for trial at any time after giving the prescribed notice of trial. The question of determining the method of trial of an action is also engaging the attention of the judges. The consideration of the proposed rule has been postponed at the request of Convocation, in order that time may be given for consideration of so important a change. The following is the rule proposed by the judges: "Unless otherwise ordered by the court or a judge thereof, or the judge presiding at the trial, in addition to the actions named in section 76 of the Judicature Act, the following causes, matters, and issues, and the assessment or enquiry of damages therein, shall be tried, heard, and assessed by the jury, namely, actions in R.S.O., c. 135; under the Workmen's Compensation for Injuries Act; breach of promise of marriage; for assault and battery; for injuries caused by any collision; for injuries caused by reason of a defective highway; actions charging a physician or surgeon with negligence; and actions upon policies of insurance. No cause, matters, or issues other than the aforesaid, and no assessment or enquiry of damages therein, shall be heard, tried, or assessed by the jury, unless so ordered by the court or a judge thereof, after the close of the pleadings, and before setting the same down for trial."

The question of judicial salaries has also been advanced by the Ontario Legislature passing an Act providing that there shall be paid to each judge of the Supreme Court of Judicature the annual sum of $1,000 until an addition to that sum is made to their present salaries by the Parliament of Canada, or, in case of an addition being so made of a less

sum than $1,000, there is to be paid to each judge an annual sum equal to the difference between the sum so added and such sum of $1,000. This allowance is intended to include the judges' services as members of the heir and devisee commission, their travelling expenses at election trials, and all other services which, under provincial legislation, the judges may be called on to render in addition to their ordinary duties. The judges appointed before March 7th, 1879, had, prior to the Act mentioned, received from the province an annual allowance of $1,000 as heir and devisee commissioners. While the Act increases the salaries of judges appointed subsequent to March 7th, 1879, it, in fact, diminishes the salaries of the judges appointed prior to that date, and it ought not to be deemed as a settlement of this serious question. The Trustees suggest that Convocation be requested to continue to press upon the Government the necessity for dealing with this question, which is admittedly of the very greatest importance.

No action has been taken upon the suggestion made in the last annual report regarding the delay in publishing the Provincial Statutes. If these Statutes were printed in the form adopted in printing the Dominion statutes, the subject of complaint could be easily removed. The Trustees suggest that Convocation be requested to invite the attention of the Attorney-General again to this matter, in the hope that it will be remedied.

The Trustees record the deaths, during the year, of the following members: G. H. Douglas, Richard Snelling, Q.C., J. H. Ferguson, Q.C., John Bain, Q.C., Marcellus Crombie, Richard Caddick, Alexander Cameron, Frederick Wright.

The particulars required by the By-laws accompany this Report as follows:

(1) The names of members admitted during the year.
(2) The names of members at the date of this Report.
(3) A list of books added to the library during the year.
(4) A detailed statement of the assets and liabilities at the date of this Report, and of the receipts and disbursements during the year.

The Treasurer's accounts have been duly audited, and the Report of the Auditors will be submitted for your approval. The Librarian's Report on the work of the year is also submitted.

(Sd.) Z. A. LASH, President.
December 31st, 1893. WALTER BARWICK, Treasurer.

The following officers were elected for the year 1894: President, J. J. Foy, Q.C.; Vice-President, J. A. Worrell, Q.C.; Treasurer, Walter Barwick; Secretary, A. H. O'Brien; Curator, E. D. Armour, Q.C.; Historian, D. B. Read, Q.C.; Auditors, Messrs. W. P. Torrance and R. J. Maclennan; Trustees, Messrs. A. MacMurchy, W. H. Blake, W. N. Miller, Q.C., C. J. Holman, and E. B. Brown; Committee on Legislation, Dr. Hoskin, Q.C., Charles Moss, Q.C., E. D. Armour, Q.C., A. H. Marsh, Q.C., Beverley Jones, W. H. Blake, Dyce Saunders.

DIARY FOR FEBRUARY.

1. Thursday....Sir Edward Coke born, 1552.
4. Sunday.....*Quinquagesima Sunday.*
5. Monday.....Hilary Term begins. County Court Non-Jury sittings in York begin.
6. Tuesday.....W. H. Draper, 2nd C.J. of C.P., 1856. Convocation meets.
7. Wednesday...Ash Wednesday.
9. Friday.....Convocation meets. Union of Upper and Lower Canada, 1841.
10. Saturday.....Canada ceded to Great Britain, 1763.
11. Sunday.....*1st Sunday in Lent.* T. Robertson, J. Chancery Division, 1887.
14. Wednesday...Toronto University burned, 1890.
16. Friday .....Convocation meets.
17. Saturday.....Hilary Term ends.
18. Sunday.....*2nd Sunday in Lent.* Robert Sedgewick, J. of S.C., 1893.
20. Tuesday.....Supreme Court of Canada sits.
24. Saturday.....St. Matthias.
25. Sunday.....*3rd Sunday in Lent.*
27. Tuesday.....Sir John Colborne, Administrator, 1838.
28. Wednesday...Indian Mutiny began, 1857.

Notes of Canadian Cases.

EXCHEQUER COURT OF CANADA.

BURBIDGE, J.] [Jan. 9.

THE QUEEN AND PERMELIE LA FORCE.

Sci. fa. to repeal a Canadian patent—Prior foreign invention unknown to Canadian inventor.

The pneumatic tire, as applied to bicycles, came into use in 1890. It consisted of an inflatable rubber tube with an outer covering or sheath, which was cemented to the under surface of a U-shaped rim similar to that which had been used for the solid and cushion rubber tires which preceded it. This tube was liable, in use, to be punctured, and as the sheath was cemented to the rim of the wheel it was not readily removable for the purpose of being repaired. La Force's invention met that difficulty by providing for the use of a rim with the edges turned inward so as to form on each side a lip or flange, and of an outer covering or sheath, to the edges of which were attached strips made of rubber or other suitable material, which fitted under such lips or flanges and filled up the recess between them. When the rubber tube is not inflated, this tire may readily be attached to or removed from the rim of the wheel; but when inflated the covering or sheath is expanded, and the outer edges of the strips attached thereto are forced under the flanges of the rim, and the whole securely held in position by the pressure of the inflated tube upon such strips.

The defendant's assignor hit upon this idea in April, 1891, and in company

with his brother made a section of a rim and tire on this principle in May following. On the 3rd of August in the same year he applied for a patent therefor in Canada, and on the 2nd December following obtained it. In March, 1891, Jeffery, at Chicago, in the United States, conceived substantially the same device, and confidentially communicated the nature thereof to his partner and patent solicitor. On the 27th of July, he applied for a United States patent, and on the 12th day of January, 1892, such patent was granted to him. On the 5th of February, 1892, he applied for a Canadian patent, which was granted to him on the 1st of June in the same year.

When in May, 1891, LaForce's conception of the invention was well defined there had been no use of the invention anywhere, and the public had not anywhere any knowledge or means of knowledge thereof.

Held, (1) that the fact that prior to the invention of anything by an independent Canadian inventor, to whom a patent therefor is subsequently granted in Canada, a foreign inventor had conceived the same thing, but had not used it or in any way disclosed it to the public, is not sufficient, under the patent laws of Canada, to defeat the Canadian patent.

Barter v. *Howland*, 26 Grant 135; and *Smith* v. *Goldie*, 9 S.C.R. 46, followed.

(2) That the drawings annexed to a patent may be looked at by the court to explain or illustrate the specification.

Smith v. *Ball*, 21 U.C.R. 122, followed.

W. Cassels, Q.C., and *Gormully*, Q.C., for relators.

Ritchie, Q.C., and *Ross* for respondents.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE.

Queen's Bench Division.

Div'l Court.] [Dec. 29, 1893.

IN RE PARKE *v.* CLARKE.

Prohibition—Division Court—Notice disputing jurisdiction—Payment of clerk's fee.

It is provided by s. 176 of the Division Courts Act, R.S.O., c. 51, that in all cases where a defendant intends to dispute the jurisdiction of the court to hear and determine a case, he shall, within the time named, leave with the clerk a notice to the effect that he disputes the jurisdiction of the court, and that the clerk shall give notice to the plaintiff, and that, in default of such notice, prohibition shall not lie.

In the tariff of fees to be taken by clerks of Division Courts, to be found in Sinclair's Division Courts Act, ed. of 1888, p. 395, a fee of fifteen cents is made

payable to the clerk upon "every notice required to be given by the clerk to any party to a cause or proceeding, and mailing."

By s. 54 of the Act, the clerk is entitled to his fees before being required to take any proceeding.

Where, therefore, the defendants wrote a letter to the clerk of the Division Court in which they were sued, disputing the jurisdiction, but did not accompany it by the necessary fees, and the clerk took no notice of it;

Held, that there was no notice disputing the jurisdiction, and prohibition could not be granted.

Langton, Q.C., for the plaintiff.

W. H. P. Clement for the defendants.

Chancery Division.

Div'l Court.] [Jan. 22.

MISENER *v.* THE MICHIGAN CENTRAL RAILWAY CO.

Railways—Railway frogs—Filling with packing—Keeping same filled—51 Vict., c. 29, s. 262, s-s. 3 (D.).

It is the duty of a railway company under s-s. 3 of s. 262, 51 Vict., (D.), not only to fill with packing the spaces behind and in front of every railway frog, but to keep the same filled.

In an action by a widow and administratrix of a railway employee, who had been run over by a train and killed by reason of his foot being caught in a frog, which had been filled, but the packing had worn away, in which act on the railway company contended that having once filled the frog they were not bound to keep it filled;

Held, that the plaintiff was entitled to recover.

German for the plaintiff.

Saunders for the defendants.

FERGUSON, J.] [Jan. 26.

PIERCE *v.* THE CANADA PERMANENT LOAN & SAVINGS CO. ET AL.

Mortgage—Priorities—Registry Act—Building loan—Further advances.

One Wilson entered into an agreement for the purchase of certain lands, which provided that $2000 of the purchase money was to be secured by a mortgage on the land, which was to be subsequent to a building loan not exceeding $12,000. The plaintiff succeeded to the rights of the vendor under the above agreement. After the agreement Wilson executed the mortgage to a loan company for $11,500, to be advanced, as the building progressed, in the manner of a building loan. The company at once registered its mortgage, and advanced a certain portion of the $11,500 to remove prior encumbrances. The mortgage for $11,500 contained a clause that neither the execution nor the registration of it, nor the advance of part of the money, should bind the mort-

gagees to advance any further portion of it. After the registration of the above mortgage for $11,500, and before all the money thereby purported to be secured had been advanced, the plaintiff registered her mortgage of $2000, and claimed priority over any subsequent advances made by the loan company after that date. The loan company had no actual notice of the plaintiff's mortgage, nor of the terms of the agreement of sale to Wilson.

Held, that the plaintiff was entitled to priority as claimed.

In such cases each new advance, whether in pursuance of a previous agreement or not, is a new dealing with the land, the acquisition of a new interest therein, and so comes within the provisions of the Registry Act, and under that Act the loan company were affected with notice of the registration of the plaintiff's mortgage.

Geo. Bell for the plaintiff.

Beverley Jones for the Canada Permanent Loan & Savings Company.

Hunter for the defendant Parsons.

BOYD, C.] [Jan. 27.

NOXON *v.* NOXON.

Patent for invention—License—Part owner—Right to revoke agreement of license.

The defendants were licensees of a patent under an agreement whereby they had to pay certain royalties to the patentee, and in consideration thereof were empowered to manufacture the patented machine in question to the end of the term of the letters patent. Subsequently, the defendants became possessed of an undivided one-fourth interest in the patent, and they thereupon gave notice to the plaintiff, who was the holder of the patent and entitled to the benefit of the above agreement, that they would, after a day named, terminate the agreement and make no further payments for royalties, but would manufacture the machine in question as owners of an undivided one-fourth in the patent.

Held, that the defendants were entitled so to do.

If an interest is transferred in a patent, then it requires the consent of both parties to put an end to the transfer; but if the transaction is merely permission on certain terms to invade the monopoly, then the licensee may, at his option renounce the license, and make the machine patented at his peril.

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

B. B. Osler, Q.C., and *Arnoldi*, Q.C., for the defendants.

Common Pleas Division.

MACMAHON, J.] [Dec. 30, 1893.

RE STAVELY, ATTORNEY-GENERAL *v.* BRUNSDEN.

Illegitimacy—Evidence of sufficiency.

In answer to a claim of heirship of one S., a witness, who had known S. in England as a boy, before he came to Canada, said that S. had always been

reputed to be illegitimate, and had been left by his mother on the parish, and that he had also known his reputed father, whose name was H., not S. Another witness said that S. had told him that one H. was his father, and that S., on his return from a visit to England, said that he had seen the place where his mother met with her misfortune.

Held, sufficient evidence of illegitimacy to displace the claim of heirship.

Scott for the plaintiff.

Garrow, Q.C., for the defendant.

Holt for the alleged heirs and heiresses.

BOYD, C.] [Dec. 30, 1893.

MCNAMEE *v.* CITY OF TORONTO.

Work and labour—Contract—Superintendent of work named as arbitrator in case of dispute—Validity.

By a contract between plaintiff and the city of Toronto for laying a conduit pipe across the Toronto bay, it was provided that all the differences, etc., should be referred to the award, order, arbitrament, and final determination of H., the superintendent in charge of the said work.

Held, that the fact of H. being such superintendent did disqualify him from acting as arbitrator.

Bain, Q.C., for the plaintiff.

Biggar, Q.C., for the defendants.

Div'l Court.] [Dec. 30, 1893.

REGINA *v.* JUSTIN.

Bicycle—Riding on sidewalk—Conviction—S. 496, s-s. 27, of Municipal Act.

Subsection 27 of s. 496 of the Consolidated Municipal Act, 1892, enables a municipal council to pass by-laws for regulating or preventing the incumbering by animals, vehicles, vessels, or other means, of any road, street, alley, lane, bridge, or other communication.

Held, that a bicycle is a vehicle within the meaning of the subsection, and of a by-law of the municipality passed under it so as to support a conviction for riding a bicycle on the sidewalk.

Regina v. *Plummer*, 30 U.C.R. 41, approved.

Justin for the applicant.

No one showed cause.

Div'l Court.] [Dec. 30, 1893.

DAGENAIS *v.* CORPORATION OF TRENTON.

Ditches and Watercourses Act, R.S.O., c. 220, s. 5, as amended by 52 Vict., c. 49, s. 2(O.)—Default of officer under—Mandamus against municipal corporation—Right of.

An owner of lands in the town of Trenton, desiring to construct a drain on his land and continue it through an adjoining owner's, served him with the

notice provided by the Ditches and Watercourses Act, R.S.O., c. 220, s. 5, as amended by 52 Vict., c. 49, s. 2 (O.), to settle the proportions to be constructed by each, and, on their failing to agree, served the municipal clerk with the notice provided for by such Act for the engineer to appoint a day to attend and make his award. The clerk immediately forwarded the notice to the engineer, who was absent, and who failed to attend.

Held, that a mandamus would not lie against the municipal corporation to compel their engineer to act in the premises.

Clute, Q.C., and *O'Rourke* for the plaintiff.

Marsh, Q.C., for the defendants.

Practice.

C.P. Div'l Court.] [Jan. 6, 1894.

ISLAND *v.* TOWNSHIP OF AMARANTH.

Costs—Order of trial judge as to, under Rule 1170—Amending rule, application of, to cases already tried—Discretion of court.

The Rule of the Supreme Court of Judicature for Ontario passed on 4th November, 1893, amending Rule 1170 by providing that where an action is tried by a jury the costs shall follow the event, unless, upon application made at the trial, the trial judge, in his discretion, otherwise orders, does not apply to actions tried before it was passed.

And where the jury in an action of tort, tried before the passing of the new Rule, assessed the plaintiff's damages at $100, and the trial judge did not give judgment till after the passing of the new Rule, and then ordered that the plaintiff should have costs on the High Court scale:

Held, that he had no power to so order unless "for good cause shown," within the meaning of Rule 1170, as it stood at the date of the trial.

The right to costs, or to set off costs, is a substantial right, and not a mere matter of procedure.

But, under Rule 1170, the court has the power to make such order as to costs as may seem just, irrespective of good cause; and as in this case the awarding of so small a sum as $100, assuming the plaintiff's right to recover, was almost perverse, and the plaintiff had a right to expect an award well beyond the jurisdiction of the County Court, the Divisional Court affirmed the trial judge's disposition of the costs.

Stratford v. *Sherwood*, 5 O.S. 169, at pp. 570-571, followed.

Aylesworth, Q.C., and *W. L. Walsh* for the plaintiff.

E. Myers for the defendants.

Chy. Div'l Court.] [Jan. 22.

MCGILLIVRAY *v.* TOWN OF LINDSAY.

Costs—Order of trial judge as to, under Rule 1170—Amending rule, application of, as to cases already tried—Discretion of court.

In an action of tort, tried before the passing of the Rule of 4th November, 1893, amending Rule 1170, the jury assessed the plaintiff's damages at $200,

and the trial judge did not give judgment till after the passing of the new Rule, and then ordered that the plaintiff should have costs on the High Court scale.

An appeal from this order was dismissed by a Divisional Court.

Per BOYD, C.: The amendment of the Rule was to be regarded by the trial judge while the application of the plaintiff for full costs was before him, and while the action was still pending. Changes in the law as to costs since the Judicature Act are matters of procedure, and, as such, act retrospectively, or with reference to current and uncompleted proceedings. But even if Rule 1170 in its unamended form applied, the Divisional Court had under it an alternative power over the costs, not limited by the condition as to good cause; and, as this was not a case in which the costs of the plaintiff should be diminished by taxation on a lower scale, or by the allowance of a set-off, the jurisdiction should be exercised in accordance with the view of the trial judge.

MEREDITH, J., *dubitante*, considered himself bound by the decision of the Common Pleas Division in *Island* v. *Township of Amaranth*, *ante*, to arrive at the same conclusion.

D. R. Anderson for the plaintiff.

G. H. Hopkins for the defendants.

Chy. Div'l Court.] [Jan. 22.

NOXON *v.* PATTERSON.

Particulars — Statement of defence—Patent action -Excision of pleading—Exclusion of evidence—Discretion.

In making an order for particulars of the defence in a patent action, the better practice is to provide merely for exclusion of evidence in case of no particulars or insufficient particulars being delivered, and not to order the excision of the defence, if good *per se*.

And where both excision of the pleading and exclusion of evidence were provided for in an order,

Held, that the discretion of a Judge in Chambers in striking out the provision for excision was rightly exercised.

Arnoldi, Q.C., for the plaintiffs.

W. H. Blake for the defendants.

Chy. Div'l Court.] [Jan. 22.

BUNTIN *v.* WILLIAMS.

Attachment—Absconding debtor—Property in hands of third person—Delivery to sheriff—Order for.

Where an attachment has issued against the property of an absconding debtor, an order may be made upon a third person for delivery to the sheriff of property of the debtor in the hands of such person.

And where the debtor's solicitor was shown by an applicant of the plaintiff to have in his hands for collection certain promissory notes, the property of the debtor, and the solicitor did not deny the fact, such an order was affirmed.

R. McKay for the plaintiff.

Shilton for the defendant.

Chy. Div'l Court.] [Jan. 22.

KNICKERBOCKER CO. *v.* RATZ.

Costs—Settlement of action—Motion for costs—Power of master or judge in chambers to dispose of costs—Principle of decision—Circumstances of case —Appeal to Divisional Court—Jurisdiction.

The plaintiffs were manufacturers of a machine for which they had a patent of invention. The defendants were millers, and had in their possession a machine which the plaintiffs deemed to be an infringement of their patent. This action was brought to restrain the defendants from infringing and for damages. Before action the plaintiffs sent the defendants a letter of warning. The answer to this was simply a denial of infringement. After service of the writ of summons, the solicitor for the defendants wrote a letter to the plaintiffs, stating that his clients had a machine which might be, though it was not admitted to be, an infringement; that it had not been used for two years; that the defendants did not intend to make any further use of it; and asking for discontinuance of the action. The plaintiffs delivered their statement of claim, and the defendants their defence, in which they offered a covenant not to use any machine in contravention of the plaintiffs' patent, and with which they brought $10 into court. The plaintiffs accepted this in settlement of the action, but, not being able to agree with the defendants as to who should pay the costs, made a motion for an order for payment by the defendants.

Upon this motion the Master in Chambers ordered that the defendants should pay the costs; but ROBERTSON, J., upon appeal, ordered that each party should pay their own costs up to the time of the motion (which the defendants had offered before the motion), and that the plaintiffs should pay the costs of the motion and appeal.

Upon further appeal to a Divisional Court, composed of BOYD, C., and MEREDITH, J., there was a division of opinion, and the appeal was dismissed without costs.

Per BOYD, C.: The plaintiffs, believing the machine to be an invasion of their rights, were not obliged to rest upon the mere intentions of the defendants not to use it. All that the plaintiffs claimed before action was conceded by the settlement after action, and the litigation was provoked by the response of the defendants to the letter before action. The plaintiffs having given notice of their demand before action, there was nothing to take the case out of the ordinary rule that the person in the wrong should answer in costs. If the main question in dispute is settled, leaving only costs to be determined, the proper course is for the parties to agree to leave them on affidavits to the Judge or Master in Chambers, whose judgment is subject to appeal to the same extent as in other cases of costs.

Per MEREDITH, J.: The Master in Chambers had no power to try to determine the question of costs, unless as an arbitrator, chosen by the parties; nor had the Judge in Chambers any such power; and the court could not properly entertain the appeal.

Mabee for the plaintiffs.

W. H. P. Clement for the defendants.

MACLENNAN, J.A.] [Jan. 22.

MCMASTER *v.* RADFORD.

Appeal to Privy Council—R.S.O., c. 41—Security, effect of—Stay of proceedings—Execution—Payment out of court—Jurisdiction of judge of Court of Appeal—Correction of order—Mistake of inadvertence—Settlement of order—Consent order.

A judge may always correct anything in an order which has been inserted by mistake or inadvertence; and an order may be corrected even after the lapse of a year.

And where the plaintiffs were appealing to the Privy Council from a judgment of the Court of Appeal dismissing with costs an appeal from the judgment of the Queen's Bench Division in favour of the defendants with costs, and had given security in $2,000, as required by s. 2 of R.S.O., c. 41;

Held, that the order of a judge of the Court of Appeal under s. 5, allowing the security, should not have stayed the proceedings in the action, and so much of the order as related to the stay should be rescinded.

Held, also, that the plaintiffs not having given security to stay execution for the costs in the courts below, and the stay being removed, if they now desired to have execution for such costs stayed, they should give security therefor as provided by Rule 804, which is made applicable by s. 4 of the Act.

Held, also, that if an order for payment out of the High Court of money therein, awaiting the result of the litigation, was "execution" within the meaning of s. 3, it was stayed by the allowance of the security, and required no order; if it was not "execution," a judge of the Court of Appeal had no jurisdiction to stay proceedings in the court below; and it was for the High Court to determine whether such an order was "execution," and, if not, whether the money should be paid out.

Held, lastly, that after an order has been pronounced, the initialling of it as drawn up by the solicitor for the party opposed to the party having the carriage of it does not make it a consent order, but merely assents to it as being the understanding of the party of what was ordered by the judge.

George Bell for the plaintiffs.

George Kerr for the defendants.

[GUSON, J.] [Jan. 23.

FORD *v.* MASON.

Solicitor and client—Taxation of costs—Retaining fee—R.S.O., c. 147, s. 51—Appeal—Report—Confirmation—Rules 848, 849, 1226 (D.).

The report or certificate of an officer upon the taxation of the costs of a solicitor as against his client falls under the provision of the Rule 1226 (D.) as to its confirmation, and is, for the purposes of an appeal, a report within the meaning of Rules 848 and 849.

The solicitor, during the progress of the action in respect of which the costs in question were incurred, made a contract in writing with his clients for the payment to him of a retaining fee of $100, explaining fully to them the effect of

the bargain, and that, in case of their success in the action and costs being awarded them, they would not be able to tax against or claim from the opposite party the amount of this fee. The officer allowed the retaining fee on taxation, and reported that the contract was a fair and reasonable one.

Held, on appeal, that the contract could not be enforced against the clients.

Section 31 of the Act respecting Solicitors, R.S.O., c. 147, relates to matters of conveyancing, etc., and not to the conduct of an action in the ordinary way.

C. J. Holman for the plaintiffs.

W. H. P. Clement for the solicitor.

Appointments to Office.

SUPREME COURT JUDGES (NEW BRUNSWICK).

Frederick Eustace Barker, of the City of St. John, in the Province of New Brunswick, Esquire, one of Her Majesty's Counsel learned in the Law, to be a Puisne Judge of the Supreme Court of the Province of New Brunswick, *vice* James Fraser, Esquire, resigned.

CORONERS.

County of Bruce.

Duncan McDonald Gordon, of the Village of Lucknow, in the County of Bruce, Esquire, M.D., to be an Associate-Coroner within and for the said County of Bruce.

County of Carleton.

John James Danby, of the Village of Richmond, in the County of Carleton, Esquire, M.D., to be an Associate-Coroner within and for the said County of Carleton.

County of Kent.

Daniel Mitchell, of the Town of Blenheim, in the County of Kent, Esq., M.D., to be an Associate-Coroner within and for the said County of Kent, in the room and stead of George E. Richardson, Esq., M.D., removed from the county.

District of Rainy River.

William Wallace Birdsall, of the Village of Fort Francis, in the District of Rainy River, Esquire, M.D., to be an Associate Coroner within and for the said District of Rainy River.

DIVISION COURT CLERKS.

United Counties of Leeds and Grenville.

Linneaus N. Phelps, of the Village of Phillipsville, in the County of Leeds, Gentleman, to be Clerk of the Sixth Division Court of the United Counties of Leeds and Grenville, in the room and stead of M. S. Denant, resigned.

United Counties of Leeds and renville.

James Bartholomew White, of the Town of Prescott, in the County of Grenville, one of the United Counties of Leeds and Grenville, Gentleman, to be Clerk of the Second Division Court of the said United Counties of Leeds and Grenville, in the room and stead of B. White, resigned.

DIVISION COURT BAILIFFS.

County of Essex.

Frederick Alexander Mailloux, of the Township of Sandwich West, in the County of Essex, to be Bailiff of the Seventh Division Court of the said County of Essex, in the room and stead of Aurele Pacaud, resigned.

County of Haldimand.

Eli Piper, of the Township of Canborough, in the County of Haldimand, to be Bailiff of the Fifth Division Court of the said County of Haldimand, in the room and stead of George Brooks, resigned.

County of Hastings.

Jones Phillips, of the Village of Foxboro', in the County of Hastings, to be a Bailiff of the First Division Court of the said County of Hastings, for that portion of the territory of the said Division Court which formerly constituted the limits of the Eighth Division Court of the said County, now abolished.

County of Northumberland.

Jay Chapin, of the Town of Brighton, in the County of Northumberland, to be Bailiff of the Eighth Division Court of the United Counties of Northmuberland and Durham, in the room and stead of William Martin, resigned.

County of Peterborough.

Thomas McIlmoyle, of the Village of Burleigh, in the County of Peterborough, to be Bailiff of the Fifth Division Court of the said County of Peterborough, in the room and stead of Charles B. Hawkes, resigned.

Obituary.

THE LATE J. D. BUELL, COUNTY ATTORNEY, BROCKVILLE.

The following resolutions, referring to the death of the late Col. Buell, were passed at a special meeting of the Leeds and Grenville Law Association, held for that purpose, on the 3rd inst. :

Moved by Judge Reynolds, seconded by Joseph Deacon, Q C. :

That this association deeply regrets the sudden death, on the 2nd of February instant, of Colonel Jacob Dockstader Buell, County Crown Attorney, Clerk of the Peace, Local Master, and Deputy-Registrar of the High Court of Justice, which offices he ably and satisfactorily filled for many years. The deceased gentleman having been sworn in as an attorney on the 30th of August, 1852, and called to the Bar in Michaelmas Term, 1854, was the senior practi-

tioner in these counties, and possessed the confidence and esteem of the community. Loyal and patriotic, he had early in life become a volunteer, and, serving as an efficient and zealous officer, was rapidly promoted till, as Colonel of the 43nd Battalion, he did good service, as well in times of threatened invasion as in times of peace. Elected to the House of Commons as member for his native town, he served during two parliaments. A gentleman by nature, kind, affable, and genial in manner, he was a true friend, a generous opponent, and a Christian man, being, at the time of his decease, a churchwarden of Trinity Church. In all the relations of life he held a high place, and his memory will long be cherished lovingly and kindly. To his widow and his family this association desires to offer the sincerest expressions of sympathy and condolence.

Moved by Mr. Brown, seconded by Mr. Marshall:

That a copy of the foregoing resolution, signed by the president and secretary of this association, be transmitted to the widow of our deceased brother.

Moved by Mr. Hutcheson, seconded by Mr. Everetts:

That the members of the Bar do attend, in their robes, the funeral of their deceased brother on Monday next, and do wear the usual badge of mourning for thirty days.

Flotsam and Jetsam.

THE LAWYER'S LAMENT.

The realm infernal is, we know,
With good intentions paved,
And Osgoode Hall from such a fate
Can hardly now be saved.
But lawyers, though an upright class,
As everybody knows,
May find it hard to walk at ease
In such a paved close.
The present pavement, we behold,
Is vanishing away,
As fade the mists of early morn
Before the opening day.
Oh, what avails a surplus large
Roll'd up in stately piles,
When not a cent of it is spent
In mending of our tiles!
Too soon the beauty of the floor
Will perish in decay;
Our understanding will be gone,
To our supreme dismay.
One thing there will remain to do,
Upon that fatal day,
From our opinions "o" we'll drop,
And heavenward soar away.