Canada Law Journal.

VOL. XXI. AUGUST 1, 1885. No. 14.

DIARY FOR AUGUST.

2. Sun.....*9th Sunday after Trinity.* Bat. of the Nile, 1798.
6. Thur.....Prince Alfred born, 1844.
9. Sun .....*10th Sunday after Trinity*
11. Tues.....Primary Examinations begin.
13. Thur.....Sir Peregrine Maitland, Lieut.- Gov. U.C., 1818.
16. Sun .....*11th Sunday after Trinity.*
17. Mon.....Gen. Hunter, Lieut.-Gov. U.C., 1799.
18. Tues.....First Intermediate Examinations and Primary Examinations.
20. Thur.....Graduates seeking admission to Law Society to present papers.
23. Sun.....*12th Sunday after Trinity.*
24. Mon.....Francis Gore, Lieut.-Gov. U.C., 1806.
25. Tues.....Solicitors' Examination and First Intermediate.
26. Wed .....Barristers' Examination.
27. Thur.....Second Intermediate Examination.
30. Sun .....*13th Sunday after Trinity.*

TORONTO, AUGUST 1, 1885.

Too much rich food is not good this hot weather. We therefore refrain from publishing more than one number in July and one in August. We trust that our usual custom in this respect is not unsatisfactory to our readers. It is very satisfactory to us.

WE have received from the Secretary of the Board of County Judges a learned dissertation as to the jurisdiction of the General Sessions of the Peace for Ontario, read by His Honor Judge Senkler, of St. Catharines, at the last meeting of the county judges. It will appear in our next issue.

Pump Court gives its readers in a late number what it calls an endeavour, in a fragment, to suggest in Greek verse the power of the pregnant poem, "Humpty-Dumpty:"

"ὑψι μὲν ἑξεν Οὔμπτιος Δόυμτιος
Οὔμπτιος Δόυμπτιος φέλ δ'οὖν πλόυμπιος.

This is amusing, no doubt, but for our part we think the old lines beginning—

Humptius in muro consedit Dumptius alto
Humptius e muro Dumptius heu cecidit,

savour of much more scholarship and quite as much wit. Nevertheless, φελ δ'ὄυν πλουμπιος is good.

RECENT ENGLISH DECISIONS.

DISCOVERY.

The first case in the June number of the *Law Reports* of the Chancery Division to which we think it necessary to refer is that of *Bidder* v. *Bridges* (29 Chy. D. 29), which, however, is not a very satisfactory sort of case, and as to which we are inclined to wonder why it should have been reported. It contains an elaborate discussion by Kay, J., of the principles on which a defendant is entitled to obtain discovery from a plaintiff. The case was appealed, and upon the argument the Court of Appeal without giving any reasons, which are reported, intimated that the plaintiff was bound to answer some further part of the interrogatories than Kay, J., had allowed, and counsel for both parties then agreed that the Court of Appeal as arbitrators should settle the interrogatories to be answered, which they proceeded to do, allowing, with variations, some of the interrogatories which had been wholly disallowed by Kay, J.

TRIAL BY JURY—ACTION ASSIGNED TO CHANCERY DIVISION.

The next case, *Gardner* v. *Jay* (29 Chy. D. 50), is also upon a point of practice, which it may be useful to note in connection with the recent decisions in *Masse* v. *Masse*, *ante* p. 179; *Pawson* v. *Merchants' Bank*, and *Herring* v. *Brooks*, *ante* p. 222. The plaintiff commenced an action in the

Chancery Division for a cause of action which by the English Judicature Act is assigned to that Division, but added thereto a claim for the return of certain goods and chattels, and damages for their detention. The plaintiff, after the defence had been put in, applied to have the issues of fact tried by a jury. But Pearson, J., held, and the Court of Appeal affirmed his decision, that the action must be tried by a judge without a jury, unless it could be made out that it was better to have it tried by a jury, and that not being shown, trial by jury was refused.

Appeal for costs.

The case of *Stevens* v. *Metropolitan District Railway Co.* (29 Ch. D. 60) is deserving of a brief notice, as showing the circumstances under which an appeal on the subject of costs may be successfully maintained. The plaintiff had applied for a sequestration against the defendants for an alleged breach of an injunction. Chitty, J., on the return of the motion was of opinion that there had been a breach by the defendants of the injunction, but under the circumstances made no order except that the defendants should pay the costs of the motion, the order being prefaced with a declaration that the defendants had committed a breach of the injunction. From this order the defendants appealed. It was contended by the plaintiffs that the order being for costs only no appeal could be had; but the Court of Appeal being of opinion on the law that the defendants had not been guilty of a breach of the injunction discharged the order of Chitty, J., and gave costs to the appellants, both of the appeal and of the motion before Chitty, J.

Bowen, L.J., thus shortly states the point: "When the judge's discretion over costs depends upon the existence of some breach of an injunction or misconduct, it seems to me that an appeal lies against his finding that there has been a breach of the injunction or misconduct, even although he only inflicts costs. Such a case is not, I think, within Ord. 65, r. 1 (Ont. R. 428). It really is an appeal against the finding, by means of which the judge clothes himself with the jurisdiction to inflict costs."

Railway company—Nuisance.

We now come to the case of *Truman* v. *London, Brighton and South Coast Railway* (29 Ch. D. 89), another decision of the Court of Appeal. The defendants were by their Act authorized to purchase by agreement any lands not exceeding in all fifty acres, in such places as should be deemed eligible for the purpose of receiving cattle conveyed, or to be conveyed, by their railway. The company under this power bought a piece of land adjoining one of their stations, and used it as a cattle dock. The noise of the cattle and the drovers was a nuisance to the occupiers of houses near the station, and they brought an action to restrain the defendants from continuing the nuisance. Mr. Justice North decided that the plaintiffs were entitled to the relief prayed, and the Court of Appeal affirmed his decision.

This case is important as showing the distinction between the rights of a railway company over land which they may take compulsorily for the purpose of carrying on their undertaking, and lands which they are empowered to purchase by agreement, and which are not defined by the statute. As regards the latter they are not exempt from the ordinary common law obligation so to use the land thus acquired as not to create a nuisance to occupants of neighbouring lands, unless expressly exonerated therefrom by statute.

Nuisance—Underground water—Pollution of well.

The case which follows, viz., *Ballard* v. *Tomlinson* (29 Ch. D. 115), is also a case

of nuisance, in which the Court of Appeal reversed the judgment of Pearson, J. (26 Ch. D. 194). The plaintiff and defendant were owners of adjoining lands, and had each a deep well on his own land, the plaintiff's being at a lower level than the defendant's. The defendant turned sewage from his house into his well, and thus polluted the water which percolated underground into the plaintiff's well. The plaintiff claimed an injunction. Mr. Justice Pearson dismissed the action, but the Court of Appeal held that although the plaintiff had no property in the percolating water until he had appropriated it by pumping, and although he appropriated the water by the artificial means of pumping, he had, nevertheless, a right to restrain the defendant from polluting the source of supply. Lindley, L.J., very shortly states the principle on which the Court proceeded in the following passage: "*Prima facie* every man has a right to get from his own land water which is naturally found there, but it frequently happens that he cannot do this without diminishing his neighbour's supply. In such a case the neighbour must submit to the inconvenience. But *prima facie* no man has a right to use his own land in such a way as to be a nuisance to his neighbour, and whether the nuisance is effected by sending filth on to his neighbour's land, or by putting poisonous matter on his own land and allowing it to escape on to his neighbour's land, or whether the nuisance is effected by poisoning the air which the neighbour breathes, or the water which he drinks, appears to me wholly immaterial."

CHOSE IN ACTION—EQUITABLE ASSIGNMENT.

In the case of *Percival* v. *Dunn* (29 Ch. D. 128) we have a decision of Bacon, V.C,, holding that a mere order by a creditor to his debtor to pay a third party a certain sum of money without reference to any particular fund or debt due by the debtor, does not amount to an equitable assignment. The learned judge thus stated the ground of his decision: "In *ex parte Hall* (10 Ch. D. 615), there was an order to pay out of a particular fund, and so in *Burn* v. *Carvalho* (4 My. & Cr. 690, 702), and *Brice* v. *Bannister* (3 Q. B. D. 569); and if I found in this case similar words referring to a particular fund due, or belonging to the writer of these requests, I should be bound to follow those authorities; but I find nothing like such words in these documents. There is nothing in them to the effect that the sums mentioned were to be paid out of a fund for which Dunn was answerable, or which he was under any obligation to pay."

DISENTAILING DEED—MISTAKE—RECTIFICATION.

Hall-Dare v. *Hall-Dare* (29 Ch. D. 133) furnishes a useful illustration of the danger incurred in combining in a disentailing deed any other matters which may properly form the subject of a separate conveyance. In this case a disentailing deed was executed, and to it was added a re-settlement of the property which could have been effected by a separate deed. In this part of the deed a mistake occurred which the suit was brought to rectify. But the Court (Bacon, V.C.) held that although the mistake was one which, if it had occurred in any other conveyance, might have been properly rectified, yet forming as it did part of a disentailing deed, the ordinary jurisdiction of the Court was by 3 and 4 Wm. IV. c. 74, s. 47 (R. S. O. c. 100, s. 36), taken away in such cases, and therefore the relief claimed must be refused.

WILL—GIFT OF RESIDUE.

The following case, *In re Rhoades* (29 Ch. D. 142), is another decision of Bacon, V.C., and turns upon the construction of a will whereby the testator bequeathed the residue of his personal estate to his wife, and after her death to his sister and three brothers in equal shares; but directed that in the event of his sister dying un-

married in his wife's lifetime (which happened) her one-fourth should fall into the residue. This the learned judge held did not involve an intestacy as to the sister's one-fourth share, that the meaning of the will was that if the sister survived the testator's wife, the residue was to be divided into fourths, and if she predeceased her unmarried, it was to be divisible into thirds.

EXONERATION OF PERSONALTY FROM DEBTS—MORTMAIN ACT.

Kilford v. *Blainey* (29 Ch. D. 145) is another decision of "the last of the Vice-Chancellors," also upon the construction of a will whereby the testatrix bequeathed her personal estate to a charity, exonerating it from debts and legacies, which she charged on her real estate—part of the bequest failed as being void under the Statute of Mortmain—and the question was whether the exoneration extended to the portion of the personalty which was the subject of the void bequest, and it was held that it did not.

LIEN OF COMPANY ON SHARES—PRIORITY.

Bradford Banking Co. v. *Briggs* (29 Ch. D. 149) only requires a brief notice. The defendants were an incorporated company and by their articles of association it was provided that they should have a first and permanent lien and charge on every share, for all debts due from the shareholder to the company. A shareholder deposited the certificates of his shares with the plaintiffs, his bankers, as security for the balance then due from him to them on his current account, and notice of the deposit was given to the company. Field, J., held that, notwithstanding the terms of the articles of association, the company could not claim priority over the bankers in respect of moneys which became due to the company from the shareholder, after notice of the banker's advance.

LIGHT AND AIR—ANCIENT LIGHT—REBUILDING.

Bullers v. *Dickinson* (29 Ch. D. 155) is a decision of Kay, J., on a question of the right to an easement. The plaintiff had rebuilt his house which had an ancient light in the ground-floor front room, the front wall originally stood out beyond the general street line, four feet at one end and seven feet at the other; the strip, covered by this projection, had been purchased by the municipal corporation for the purpose of widening the street; and in rebuilding the front wall it was aligned with the general building line, and in the new front wall was placed a window, the position of which corresponded to a great extent with the position of the ancient light in the old front wall. The new room was about the same breadth, but owing to the alteration in the alignment of the front wall included little more than half the site of the original room. The question for determination was whether owing to the alteration in the premises the plaintiff had lost his ancient light, and it was held that he had not.

COMPANY—GENERAL MEETING—VOTING.

The case of *In re Chillington Iron Company* (29 Ch. D. 159) is a decision on a very simple question; but, inasmuch as in arriving at his conclusion Kay, J., felt compelled to go counter to the *dicta* of two such eminent judges as the late Sir Geo. Jessel and the present Master of the Rolls, it is worthy of note. The simple point was, when a poll was demanded at a general meeting of a joint stock company which, by the articles of association, was to be taken in such manner as the chairman should direct, whether the chairman could properly direct it to be taken then and there, or whether he was bound to direct it to be taken at an adjourned meeting. *In re Horbury Bridge Coal and Iron Company* (11 Ch. D. 109) Jessel, M.R., said, "We must import into the case our common knowledge that when a poll is demanded it never is taken there and then, and I am by no means of opinion that a chairman could direct it to be so taken,"

and Brett, L.J., in the same case said, "You will have some difficulty in persuading me that if a poll is demanded a chairman can appoint it to be held there and then without notice to anybody not present." But Kay, J., was of opinion that the decision of Lord Denman in *Reg.* v. *D'Oyly* (12 Ad. & E. 139) was an express decision the other way that the chairman might direct the poll to be taken without any adjournment, and he so ruled.

PATENT—INFRINGEMENT—USER FOR EXPERIMENT.

The case of *United Telephone Co.* v. *Sharples* (29 Ch. D. 164) shows the hazards the experimental philosopher has to run in these days of advanced civilization. The defendant who carried on business as a chemist, electrician, or telegraph engineer, in the innocency of his heart imported certain apparatus from abroad; this apparatus was much less expensive than the plaintiff's patented apparatus, and was an infringement on it. In his letters to the foreign firm the defendant alleged that he was buying for the purpose of exportation abroad, and the learned judge found that such was the fact; but at the trial the defendant claimed that his letters did not disclose the true purpose of the purchase, but that he had really purchased the foreign apparatus for the instruction of his pupils and for the purposes of experiment, as the cost of them was so small he could afford to allow them to be pulled to pieces. But Kay, J., held that whether the defendant had purchased the infringements for the purpose of exportation, or for the purpose of experiment, as alleged, in either case there was a violation of the plaintiffs' right under their patent, and a perpetual injunction was granted.

MARRIED WOMEN'S PROPERTY ACT, 1882 (45 AND 46 VICT. C. 75.)

In re Thompson v. *Curzon* (29 Ch. D. 177) was an application under the Vendors and Purchasers Act, and is a decision of Kay, J., in which he came to a similar conclusion as to the effect of the English Married Women's Property Act, 1882, to that arrived at by Ferguson, J., recently in *Re Coulter*, *ante* p. 198, as to the effect of our own Married Women's Property Act, viz., that property which a married woman becomes entitled to as her separate property under the Act of 1882, she is entitled to dispose of without her husband's concurrence. In this case, under the will of a testator who died in 1875, a lady became entitled to a reversionary interest in real estate; she married in 1878, and the estate vested in possession in 1884, and it was held that the estate was separate property under the Act following *Boynton* v. *Collins* (27 Ch. D. 604). From a note appended to the report, however, it appears that notice of appeal was given by the purchaser, and that thereupon the married woman and her husband by deed acknowledged conveyed her share.

VOLUNTARY SETTLEMENT—RECTIFICATION—REVOCATION.

The rectification of a voluntary settlement came up in *James* v. *Couchman* (29 Ch. D. 212.) The settlor had settled property in trust for the settlor for life, remainder to any wife he might marry for life, remainder to his issue, and in default or failure of issue, in trust for his paternal next of kin. And it was held by North, J., though the settlement was proper to be made, and though the settlor understood its terms, yet as his attention was not drawn to the fact that he might have had a power of disposition over the property in default or failure of issue, such a power ought to be given, and the settlement was rectified accordingly.

RENEWABLE LEASEHOLD—PURCHASE OF REVERSION BY MORTGAGOR.

The case of *Newman* v. *Burnett* (29 Ch. D. 231) is an important decision on the law of mortgage. One Newman being the owner of the equity of redemption of certain leasehold property as assignee of the mortgagor, applied to the owners

of the reversion as being *de facto* lessee to purchase the reversion, and while the negotiations were in progress borrowed of the plaintiff £300 and gave her a charge on the property which was to be conveyed to her so soon as the purchase of the reversion should be completed. Under these circumstances the plaintiff claimed priority over the mortgagees; but Pearson, J., decided that the purchase of the reversion enured to the benefit of the mortgagees, and therefore the plaintiff was not entitled to priority. At p. 234 he says, "The doctrine of this Court has always been that the mortgagor of a renewable lease can hold a renewed lease only subject to the mortgage. . . . If Newman himself were here he would be entitled to redeem the reversion on paying off the mortgages; but he would not be entitled to say to the mortgagees of the lease, I bought the property for your benefit, and you can only have it on paying me the purchase money which I gave for it. . . . It is impossible for the plaintiff to say that, in respect of the purchase money paid by Newman, she is entitled to priority over the mortgagees of the lease. I can conceive that she might be able to establish such a claim if she had advanced the money to buy the reversion; but that would be because she had no interest in the property through Newman, but was giving up a purchase on the terms of being repaid what she gave for it."

ADVANCEMENT—STATUTE OF DISTRIBUTION (22 AND 23 CAR. II. C. 10.)

The only remaining case in the June number of the Chancery Division to which we think reference necessary is that of *In re Blockley*, *Blockley* v. *Blockley* (29 Ch. D. 250) in which the point for adjudication was whether a gift by a father to his son to enable the latter to pay a debt was, on the death of the father intestate, "an advancement by portion" of the son within sec. 5 of the Statute of Distributions. Pearson, J., held that it was, and in doing so dissented from the opinion to the contrary expressed by the late Sir Geo. Jessel in *Taylor* v. *Taylor* (L. R. 20 Eq. 155).

ACTION FOR MALICIOUSLY PROCURING BANKRUPTCY—BANKRUPTCY NOT SET ASIDE—DISMISSAL OF ACTION AS FRIVOLOUS AND VEXATIOUS.

We now turn to the Appeal Cases, very few of which, however, seem to call for any notice. The first case to which we direct attention is that of *The Metropolitan Bank* v. *Pooley* (10 App. Cas. 210) in which the House of Lords reversed an order of the Court of Appeal. The action was brought by a bankrupt to recover damages for maliciously procuring his bankruptcy, the adjudication not having been set aside. The defendant applied to dismiss the action on the ground that the facts disclosed by the statement of claim and affidavits showed it to be frivolous and vexatious. The Court of Appeal had refused the motion, but their Lordships, approving of the law as laid down in *Whitworth* v. *Hall* (2 B. & Ad. 695), granted the order, holding that until the bankruptcy proceedings had been set aside, they must be assumed to have been taken with reasonable and probable cause, and that therefore the plaintiff had no cause of action.

LETTERS PATENT—ESTOPPEL—PATENTEE IMPUGNING VALIDITY OF PATENT IN THE HANDS OF HIS ASSIGNEE.

The case of *Williams* v. *Cropper* (10 App. Cas. 249) deserves a passing notice from the fact that in it the House of Lords ruled that when a patentee becomes bankrupt, and his trustee in bankruptcy sells the patent, the patentee is not estopped from disputing the validity of the patent in the hands of the vendee. In this respect the decision of the Court of Appeal (26 Ch. D. 700) was affirmed. The case is also remarkable for another point in it arising on the pleadings. The action was brought to restrain the infringement of

the patent. There were two defendants one of whom alone had set up and established the alleged invalidity, the Court of Appeal had held that this defence could not enure to the benefit of the other defendant who had not pleaded it, but in this respect their judgment was reversed by their Lordships. On this point the Lord-Chancellor observes at p. 256: "In those cases where the particulars have been given by a defendant who had a right to give them, and where, as I have said, the plaintiff's case throughout is not a separate case against each of the defendants, but a common case against them both, it would be strange indeed if the statute (15 & 16 Vict. c. 83, s. 41) had required a Court of law declaring the patent invalid upon evidence properly received on behalf of the person who put in the particulars, at the same time to treat it as valid against the other *in pari casu*. I do not think there is anything in the words of the statute which really requires so unreasonable a conclusion to be arrived at."

MARINE INSURANCE—INSURABLE INTEREST.

The next case, *Inglis* v. *Stock* (10 App. Cas. 263), is upon a point of insurance law, and affirms the decision of the Court of Appeal (12 Q. B. D. 564). The facts of the case were, that one D. sold to B. 200 tons of sugar "f.o.b. Hamburg." B. sold S. the same quantity at an increased price, but otherwise on similar terms. D. also sold S. 200 tons upon similar terms. To fulfil these contracts D. shipped 390 tons in bags. Bills of lading were sent to D. to be retained until payment was made according to the terms of the contracts. S. was insured in floating policies upon "any kind of goods and merchandise" between Hamburg and Bristol. The ship sailed from Hamburg to Bristol and was lost. On receipt of news of the loss D. allocated 2,000 bags or 250 tons to B.'s contract and 1,900 bags to S.'s contract. The action was brought by S. on his policies, and it was held that the sales being "f.o.b. Hamburg" the sugar was at the respondent's risk after shipment, and that he had an insurable interest in it, and that the underwriters were therefore liable.

EXECUTION OF DEED OF ASSIGNMENT FOR CREDITORS—EFFECT OF NOTE APPENDED TO SIGNATURE.

The case of the *Exchange Bank of Yarmouth* v. *Blethen* (10 App. Cas. 293) is a decision of the Judicial Committee of the Privy Council on an appeal from the Supreme Court of Nova Scotia. The plaintiffs as creditors of a firm of Dennis & Doane had executed a deed of assignment made for the benefit of the creditors of Dennis & Doane who should execute the deed; the deed contained a release of all claims due by Dennis & Doane to the plaintiffs, but the plaintiffs had attempted to qualify their execution of the deed by appending a note that they executed only in respect of certain claims scheduled to the deed which did not include the notes on which Blethen the defendant was indorser, and on which the action was brought. It appeared that the plaintiffs had received a considerable sum by virtue of the assignment, and the question was whether the plaintiffs were bound by the deed, and it was held by the Committee, affirming the judgment of the Court below, that the note appended by the plaintiffs to the deed did not amount to a refusal to execute, and that the plaintiffs having received payment under the deed could not be heard to repudiate it, and deny their execution.

AGREEMENT BY PARTNER—HIS SHARE EQUIVALENT TO SHARE OF FIRM.

The only remaining case necessary to be mentioned here is that of *Marshall* v. *Maclure* (10 App. Cas. 325) in which it was held by the Judicial Committee, affirming the judgment of the Supreme Court of Victoria, that according to the true construc-

tion of an agreement made between one Marshall with Maclure & Co., whereby Marshall agreed to surrender to Maclure & Co. "his share" in a certain mortgage held by him as trustee for the firm of which he was a member and certain other persons—having regard to the surrounding circumstances—passed the share of Marshall's firm, and not merely his own individual share as between himself and his partner.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

QUEEN'S BENCH DIVISION.

BECKET v. GRAND TRUNK RAILWAY CO.

Prosecution—Railway Co.—Track not fenced—Unlawful rate of speed—Accident—Contributory negligence—Common law liability—Life policy—Deduction from damages.

The plaintiff's husband was driving in his waggon along the highway in the town of Strathroy, where it crossed the defendants' line of railway which was then unfenced. As he approached the track he did not observe any stir among the railway employés or others there, or any other signs indicating the approach of an expected or coming train. There was a curve in the line about a mile to the west beyond which a train could not be seen; there was strong evidence that the view which he might have had for some distance westward was obstructed partly by cars placed by the railway employés on the side tracks, and partly by a baggage house and other obstructions, so that he could not see far enough to enable him to avoid a train running at the rate of thirty-five miles an hour, as the defendants' train was at—the train in question was a fast train, but recently established—when there was no direct evidence that he had ever seen passing through the town or that he knew of it. There was apparently credible evidence that after the locomotive came within hearing distance there was no sound of bell or whistle until it was so near the crossing that there was only time for two short, sharp whistles, when the collision with the waggon took place, which caused the death of the plaintiff's husband and the destruction of both horses and waggon. The alleged obstructions and the neglect to ring the bell or sound the whistle were strongly controverted by defendants' witnesses, though the evidence for the defence rather corroborated the plaintiff's witnesses in those respects.

Held, that it was altogether a case for the jury, and as it was fairly presented to them upon questions fairly put to them, which they had answered, finding in the plaintiff's favour, the Court would not interfere with their finding.

Held, also, that there was no contributory negligence on the part of the deceased.

Per O'CONNOR, J.—That the defendants, under the circumstances appearing in this case, were not only liable in damages but to a criminal prosecution as well.

Per WILSON, C.J.—That independent of any statutory enactment on the subject, the defendants were running their train too rapidly for the public safety at the place in question; and they must be governed by the same rules which govern ordinary vehicles and trains using roads which meet and cross each other, each while providing for its own safety also providing for that of others, and each having the same rights and privileges, but no higher than the other.

Held, also, WILSON, C.J., dissenting, that a policy of insurance on the life of the deceased for $3,000 had been improperly directed by the learned judge to be deducted from the damages assessed by the jury.

Per WILSON, C.J.—That the whole amount of such policy should be deducted, but in any event such deduction should be made as would represent the probable premium payable had the deceased lived, as also the interest upon such premium.

WILLCOCKS v. HOWELLS ET AL.

Libel—Recovery against several—Subsequent action against others—Estoppel.

A recovery in libel against some of several tort feasors and payment of the amount of verdict and all costs without judgment being entered, is a bar to an action against others for the same libel.

REGINA v. RICHARDSON.

Information — Conviction — Police magistrate — Reserving case for Superior Court—Removal by certiorari of proceedings—New trial—Constitutional law.

Held, that a police magistrate cannot reserve a case for the opinion of a Superior Court under Con. Stat. U. C. ch. 112, as he is not within the terms of that Act.

Held, also, that a defendant is not entitled to remove proceedings by *certiorari* to a Superior Court from a police magistrate or a justice of the peace after conviction, or at any time for the purpose of moving for a new trial for the rejection of evidence, or because the conviction is against evidence, the conviction not being before the Court and no motion made to quash it. But, *held*, that even had the conviction in this case been moved to be quashed, and an order *nisi* applied for upon the magistrate and prosecutor for a mandamus to the former to hear further evidence, which he had refused, both motions would have been discharged, the magistrate appearing to have acted to the best of his judgment and not wrongfully, and his decision as to the further evidence involving a matter of discretion with which the Court would not interfere.

The Court declined to hear discussed the question whether the police magistrate in this case, if appointed only by the Ontario Government, was legally and validly appointed, as his appointment should have been by the Dominion, the patent by the Ontario Government only being produced, and it not appearing that no commission by the Dominion had issued to him, nor that any search or inquiry had been made at the proper office is to the fact, the only other evidence as to the appointment besides the mere production of the Ontario patent, being the defendant's affidavit stating that the magistrate had no authority or appointment from the Crown or the Governor-General of the Dominion, and that he knew this "of common and notorious report."

Held, also, that the information in this case was not objectionable for not setting out the false pretences of which the defendant was convicted as it was in the form in which an indictment might have been framed, and moreover the objection was met by the 32-33 Vict. ch. 32, sec. 11, and by ch. 31, sec. 67.

IVRY v. KNOX ET AL.

Insolvency—Policy of insurance—Assignment to creditors—Reference—R. S. O. ch. 118, sec. 2.

F. being insolvent and unable to pay his debts in full, with the intent and for the purpose, as admitted by him, of giving them a preference over other preference, assigned to certain creditors two policies of insurance, the assignment having also been obtained by the said creditors to secure the debts due them in preference to the other creditors, and they being well aware of the insolvent state of J.

The jury also found that an alleged pressure brought to bear upon J. by the creditors in question, in order to induce him to make the assignment, was not real, but simulated for the purpose of giving a preference.

Held, that the assignment was null and void under R. S. O. ch. 118, sec. 2, as against the other creditors of J., and must therefore be set aside.

IBBOTSON v. HENRY ET AL.

Replevin—Poundkeeper—Constable—Notice of action.

Replevin will not lie against a poundkeeper. In this case the sheep which were impounded were being grazed with the consent of the owner thereof upon an open common, and were being herded by a boy in charge of them with a view to driving them home, when they were taken possession of by two constables, against the boy's remonstrance, and impounded.

Held, that the sheep were not "running at large" in contravention of a by-law of the

municipality on the subject, and that the constables were liable in replevin for impounding them; but that replevin would not lie against the poundkeeper.

Held, also, that the constables were not entitled to notice of action (*per* O'CONNOR, J.), because even though they were, as such, public officers to distrain and impound the sheep even if they were "running at large" contrary to the by-law, they were merely "other" persons who under the by-law were empowered to take and deliver to the poundkeeper.

Per WILSON, C.J.—They were not entitled to notice unless some facts existed which might give rise to an honest belief that the sheep were at large, and that such a state of things existed, when if they had in fact existed would have justified them in impounding the sheep, but that such a state of facts did not exist under the evidence in this case.

HILLYARD v. GRAND TRUNK RAILWAY CO.

Railways—Railway Cos.—Barbed wire fence—Injury therefrom—Non-liability for rejection of evidence.

Held, that 46 Vict. ch. 18, sec. 490, subsecs. 15, 16, seemed to sanction a barb wire fence and empower municipalities to provide against injury resulting from them. Such a fence constructed by the defendants upon an ordinary country road along the line of their railway could not be treated as a nuisance, no by-law of the locality in which the accident complained of in this case having been passed respecting fences of the kind; and that the defendants were not, therefore, liable for the loss of the plaintiff's colt, which while following its dam, as the latter was being led by the plaintiff's servant, ran against the fence and received injuries resulting in its death.

But, *held*, that if the doorways of shops and the boundaries of private residences, churches, and other buildings on the sidewalks of thoroughfares, and perhaps on all sidewalks, were so fenced such fencing would be a nuisance.

Held, also, that the colt in question, five weeks old following its dam, could not be said to be running at large, the universal custom of the country which ought to govern being for colts thus to follow the dam.

Semble, that if a top rail or capping would enable a fence of the kind to be better seen by men or animals it should be used.

Held, also, that evidence of the common use of fences of the kind in other townships, etc., should not have been rejected as showing that they were not considered dangerous or a nuisance.

COMMON PLEAS DIVISION.

Divisional Court.] [June 27.

GLASS v. CAMERON.

Judgment—Amendment—Setting aside at instance of third party—Locus standi.

An order was made by the Master in Chambers changing a judgment and execution against C. as executor into a judgment against him personally. The amendment was made *nunc pro tunc;* and because it was understood that it was at the desire and consent of all parties interested, it being stated that an execution issued by the M. Co. against C. personally had expired. It appeared, however, that the M. Co.'s writ had not expired, but was in full force, and that the effect of the above amendment was to cut it out. On these facts being brought to the notice of the Master on an application made by the M. Co., he made an order setting aside his previous order directing the amendment to be made.

Held, CAMERON, C.J., dissenting, that the M. Co., though strangers to the suit in which the amendment was made, had a *locus standi* to interfere to have the order directing the amendment set aside.

Osler, Q.C., for the appeal.

S. Richards, Q.C., contra.

GARLAND v. THOMPSON.

Promissory note—Sale of land—Fraud—Evidence—New trial.

To an action on a promissory note the defendant counter-claimed, setting up that the note was given in part payment of the purchase money of some land in Manitoba, which, he alleged, the plaintiff induced him to purchase by his fraud and misrepresentation as to its value and location. The jury found that the

amount of the note with interest was $1,590; but that the defendant had sustained damage on the purchase by reason of the plaintiff's fraudulent representations to the above amount; and judgment was entered for the defendant. On motion to set aside such judgment,

Held, that on the evidence the finding as to the fraudulent misrepresentations was not satisfactory, and therefore plaintiff should not be delayed in his recovery on the note, and a judgment was therefore directed to be entered thereon for the plaintiff; but the Court not desiring to take case arising on the counterclaim out of the jury's hands, and decide it on the material before them, they directed a new trial.

Guthrie, Q.C., for the plaintiff.
Osler, Q.C., for the defendant.

GORING v. LONDON MUTUAL FIRE INSURANCE COMPANY.

Insurance — Title—Incumbrance — Representation —Indemnity—New trial.

Action on two policies of insurance on dwelling house, barn, etc., and contents. On the face of the policies was a provision making the applications part of the policies. By the first statutory condition if the owner misrepresented or omitted to communicate any circumstance material to be made known to the company to enable them to judge of the risk, the insurance should be void so far as respects the property misrepresented. By the fourteenth statutory condition "all fraud or false swearing in relation to any of the above particulars" vitiated the claim. The insured property had been conveyed by the plaintiff's father to the plaintiff, the consideration being natural love and affection, and was made subject to a condition requiring the son to maintain and support the father and also a brother. In the application the property was stated to be held in fee simple, and to be unincumbered and this was sworn to in the proofs of loss.

Held, that the statement as to the property was a misrepresentation merely, and its materiality was a question for the jury; and in any case the misrepresentation would only apply to the building and not to the chattel property. The learned judge at the trial having directed a verdict to be entered for the defendants on the ground that the untrue statement of itself vitiated the policy, a new trial was ordered.

Held, also, that the fourteenth statutory condition did not apply as that only referred to the particulars contained in the twelfth condition, items *c* to *e*, which have no relation to statements as to title or encumbrances.

Osler, Q.C., for the plaintiff.
Moss, Q.C., for the defendant.

MCARTHUR v. COLLINGWOOD.

Municipal corporations—Liability for damages caused by the negligent construction of drain—Compensation under arbitration clauses.

The plaintiff sued for damages to her property because of improper and negligent construction of a drain whereby, it being of insufficient capacity to carry the water brought along it, plaintiff's land was flooded. The learned judge, before whom the case was tried, entered judgment for the defendants, holding that the case was one for arbitration under the Consolidated Municipal Act.

Held, that it was not a case within the Municipal Act, and the rule was made absolute for a new trial with costs to plaintiff in any event.

Lount, Q.C., for plaintiff.
McCarthy, Q.C., contra.

BAKER v. JACKSON.

Order to hold to bail—Judgment against bail—Amount of damages—Seduction.

An action of seduction having been brought against W., a judge's order to hold to bail was obtained for bail in the sum of $300, and a recognizance was taken in the statutory form. A judgment was obtained against W., the defendant, in the action of seduction, for $400 damages, and $125 costs. In an action against the bail judgment was entered against the bail for $525.27 and costs.

Held, CAMERON, C.J., dissenting, that the judgment must be reduced to $425.27 and the costs of this action.

Lash, Q.C., for plaintiff.
W. Douglass, contra.

WILKINS v. MCLEAN.

Foreclosure—Misrepresentation.

One H., the mortgagee of certain property, by representing that the property was not worth the amount of the mortgage induced the parties interested in the equity of redemption to part with their estate therein. H. subsequently sold the property for $5,000. In this suit he endeavoured to realize the amount of the mortgage on which he had advanced $400, and in default to foreclose.

Held, that H. having acquired the equity of redemption as a trustee he must under the circumstances account for the amount at which he sold it.

Moss, Q.C., for the plaintiff.

Cassels, Q.C., contra.

BRASSERT v. MCEWAN.

Sale of goods—Statute of Frauds—Rescission of contract.

After certain goods had been sold and delivered it was discovered that the consignee was in embarrassed circumstances. After negotiations between the consignor's agent and the consignee, the consignee offered in writing to hold the goods subject to the consignor's order which was not accepted in writing by the consignor. The consignor then demanded the goods from the trustee of the creditors and on his refusal to deliver them up brought trover.

Held, that there was no valid agreement to return the goods within the seventeenth section of the Statute of Frauds.

Eddis, for the plaintiff.

George Kerr, junior, contra.

Rose, J.]

ROBBINS v. COFFEE.

Replevin—Pleading.

In an action of replevin the first count of the statement of claim charged the defendant with taking certain goods on the premises known as the "Creemore Woollen Mills"; and the second count with taking certain goods on the premises known as the "N. & N.-W. Railway Station, at the said Village of Creemore."

The defendant for a third plea set up that one W. was tenant to the defendant of certain premises in said village known as "Block B," and certain other premises known as the "Langtry Block"; that rent was in arrear and because of such arrears of rent the defendant well avowed the taking of the said goods on the said premises, and justly so, as a distress for the said rent which still remained due and unpaid.

Held, on demurrer, third plea bad.

D. E. Thompson, for the demurrer.

H. H. Strathy, contra.

Rose, J.]

REGINA v. ARSCOTT.

Vagrant Act—Construction of.

The Vagrant Act, 32 & 33 Vict. ch. 28 D., declares certain persons or classes of persons to be vagrants, and subject to punishment on summary conviction, amongst others "All common prostitutes or night-walkers wandering in the fields, public streets or highways, lanes, or places of public meeting, or gathering of people, not giving a satisfactory account of themselves, all keepers of bawdy houses and houses of ill-fame, or houses for the resort of prostitutes, and persons in the habit of frequenting such houses not giving a satisfactory account of themselves."

Held, that the Act does not declare that being a prostitute, night-walker, keeper of a bawdy house, or frequenter thereof, makes a person a criminal liable to punishment as such; but only when such persons are found at such places under circumstances suggesting impropriety of purpose, and who, on request or demand, are unable to give a satisfactory account of themselves.

Osler, Q.C., and *R. M. Meredith*, for the applicant.

Aylesworth and *McKillop*, contra.

Rose, J.]

VANDEWATER v. HORTON,

Action—Form of—Mortgage suits—Costs.

In selecting the form of action regard must be had not only to the interests of the plaintiff but also to those of the defendant, and when a simple inexpensive mode of procedure is

open and a more expensive and burdensome course is adopted it must be at the peril of costs.

The practice of bringing an action for an amount due on a mortgage within the proper competence of the Division Court in the High Court by making a claim for possession of the land is one that must be carefully guarded; and except in cases clearly indicating the necessity for proceeding in the High Court no costs will be given to the plaintiff.

In this case where the amount claimed under a mortgage was within the proper competence of the Division Court but suit brought in the High Court, and there were no circumstances shewing the necessity for bringing it, no costs were allowed to the plaintiff.

Simpson, for the plaintiff.

Burdett, for the defendant.

Rose, J.]

DONELLY v. DONELLY.

Husband and wife—Separate business—Husband interfering in—Injunction.

The plaintiff, a married woman, owned an hotel business and chattels in the hotel. The defendant, the husband, interfered with the plaintiff in the prosecution of the business, taking the receipts, interfering with the servants and maltreating the plaintiff personally, inflicting painful injuries on her person.

An injunction was granted restraining the defendant from interfering with the plaintiff in the carrying on of the business, or with the servants or agents, or with the business itself; and also from removing any of the chattel property belonging to the plaintiff and used by her in the hotel.

Semble, that under the circumstances if it had been asked for the injunction would also have been for excluding the defendant from the hotel.

W. R. Riddel, for the plaintiff.

No one appeared for the defendant.

Rose, J.]

CHATTERTON v. CROTHERS.

Building contract—Liquidated damages for delay.

Action for balance due under a building contract. Defence: that by the contract the plaintiff was to build the house and have the same completely finished and ready for the defendant's occupation by a named date "under a penalty of $5 per day" to be paid by the plaintiff to the defendant for each and every day the work on said house remained unfinished after the said date, alleging that the work remained unfinished after the said date for some sixty days, making an amount of $300 which defendant was entitled to deduct from the contract price.

Held, in demurrer defence good: that the $5, though called a penalty, were in fact liquidated damages.

Lash, Q.C., for the demurrer.

McIntyre, Q.C., contra.

Rose, J.]

WILSON v. WOOD.

Slander—Justification—Pleading evidence in mitigation of damages

In an action of slander the statement of claim set out that the plaintiff was a solicitor, and as such was retained and instructed by one S. to let certain farming lands and collect the rents and profits thereof for and on behalf of said S., and the defendant falsely and maliciously spoke and published of the plaintiff, that "he," S., "could not get anything from plaintiff who has been collecting the rent for S.; he had never made any return to S., he has used the money himself; he has robbed him out of the whole affair, and the only thing he could do would be to send him to the penitentiary," meaning that the plaintiff was guilty of fraudulent and felonious conduct in his said business.

In the statement of defence the defendant denied all the allegations contained in the statement of claim, and in the second paragraph said that if the plaintiff established that the defendant spoke and published of the plaintiff the words charged in any of them, the defendant in mitigation of damages said that S., defendant's brother-in-law, about fifteen years ago left this Province and went to British Columbia, leaving plaintiff in full charge and control of all his real and personal estate herein; but never had been able to get any satisfactory statement of his affairs from him; that in July last defendant's sister,

wife of S., returned to this Province with instructions from S. to get such statement from plaintiff and effect a settlement with him; that for some eight weeks she endeavoured constantly to get such statement from the plaintiff, but without avail; and therefore S. for such purpose was compelled to return to this province; that he discovered that plaintiff had received a sum of $600 from a tenant of S.'s for which plaintiff was unable to account, and had also received other sums of money which he had converted to his own use, and that S. had never been able to obtain from the plaintiff payment of the said sums of money so received by him.

Held, on demurrer to the second paragraph of the statement of claim that it was good; that it set out facts which amounted to a justification, and if the defendant being so entitled to plead such facts as justification chooses to restrict their effect to the mitigation of damages he may do so.

Clement, for the demurrer.

Aylesworth, contra.

YOUNG V. NICHOL.

Malicious prosecution—Issuing search warrant—Reasonable and probable cause—Belief—Question for jury.

A robbery having been committed at the defendant's store a bill of an account due by the plaintiff to the defendant was found lying near by which from its crumpled appearance indicated that it had been carried about in some person's pocket; that from this fact the defendant suspected some one in plaintiff's house, and he caused a search warrant to be issued and plaintiff's house searched, but nothing was found therein. It appeared that this account was not sent but another similar one, and that on one occasion when a discussion had taken place as to the amount of the account the defendant produced the one in question. He said when he found the account in his store at the time of his robbery he had forgotten all about it not having been delivered to the plaintiff. The learned judge entered a verdict for defendant, holding that the plaintiff had failed to shew that the defendant acted without reasonable cause.

Held, that the question of the defendant's belief in the delivery of the account to the plaintiff should have been submitted to the jury, and therefore there must be a new trial.

Held, that an action of malicious prosecution will lie for issuing a search warrant without reasonable and probable cause.

Lount, Q.C., for the plaintiff.

McCarthy, Q.C., for the defendant.

JEFFERY V. HEWIS.

Sale of land for taxes—Invalid assessment.

In the year 1875 certain land, containing 200 acres and patented as one lot, was assessed on the resident roll as lot 114, 200 acres valued at $1,000. In 1876-8 it was similarly assessed. In 1879 it was also so assessed, and at the same rate as in the previous years except that the quantity of land was stated to be 100 instead of 200. The whole 200 acres was occupied by a tenant who duly paid the taxes for each year including 1879. On the non-resident roll for 1879 the east half of the lot appeared assessed as 100 acres valued at $800. By reason of the land so appearing on the non-resident roll it was returned to the county treasurer as in arrear for the taxes of the year 1879 and a sale made thereof.

Held, that the assessment was of the whole lot, and the taxes were paid on the whole lot, and the fact of it being stated that the whole lot was only 100 did not make the assessment less an assessment of the whole, and the error of putting the east half on the non-resident roll could not affect the plaintiff's rights; and therefore the tax sale was invalid.

H. H. Strathy, for the plaintiff.

O'Sullivan, for the defendant.

RE BELL TELEPHONE COMPANY.

Minister of Agriculture and Commissioner of Patents—Jurisdiction of—Ministerial functions—Examination of witnesses—Certiorari.

Held, that the Minister of Agriculture as commissioner of patents has jurisdiction, under sec. 28, Patent Act of 1872, to decide any disputes as to whether a patent has become void for the non-observance or violation of the provisions of that section; and *semble* a private

person has the right to question the validity of a patent, and that the intervention of the Attorney-General is not necessary.

Semble, also, that the minister's duties are ministerial and not judicial, and therefore his decision cannot be reviewed in a Court of law.

Held, also, that the minister is not required to examine witnesses under oath or to grant summons for the attendance of witnesses before him as the statute did not require it.

Quære, whether, if the minister act judicially, the Provincial Courts have jurisdiction to question his decision, it being that of a Court created by the Dominion Parliament.

An application for a *certiorari* to bring up all proceedings and papers before the minister for reviewal by this Court was therefore refused.

Lash, Q.C., and *S. J. Wood*, for the applicants.

F. Arnoldi and *J. R. Roof*, contra.

JACKSON v STALEY.

Libel—Publication—Evidence of

In an action of libel the alleged libel consisted of an account delivered by the defendant to the plaintiff. The account was headed "Mr. Joseph Jackson to Wm. Staley, Dr." A number of items were given with the dates, and amongst them the following: "Stole hay during winter, $4; and stole one hatchet hammer, $1.50." The plaintiff had been a servant of the defendant, and after a year's service, in consequence of a disagreement, left and asked for an account of amount due him for wages when the defendant sent the above account, which overbalanced the claim for wages, in an envelope by his (plaintiff's) then employer, M., who delivered it at the plaintiff's house, leaving it on the table between the plaintiff and his wife while at supper. The wife took it up and taking the account out of the envelope read it to the husband, who could neither read nor write. It did not appear that M. read the account or took it out of the envolope, and he was not called as a witness by plaintiff, or that the defendant knew that plaintiff could not read. The only evidence suggested of such knowledge was that defendant's wife had signed the contract for plaintiff's service with defendant, but it did not appear that defendant's attention had been called to the fact, or that he knew that the signature was in the wife's handwriting, or that plaintiff could not read. The plaintiff brought an action on his claim for wages and was successful, and then under his solicitor's instructions brought his action for libel.

Held, that there was no evidence of publication and the action failed.

McIntyre, Q.C., for the plaintiff.

Britton, Q.C., contra.

BLAGDEN v. BENNETT.

Slander — Privileged occasion — Malice — School trustee.

The plaintiff, in connection with another trustee acting under the authority of the Board, purchased a quantity of firewood for use in the school-house. In December, shortly before the municipal and school trustee elections, the defendant, a rate-payer, and another school trustee were discussing the taxes when defendant said that they had paid too much for the wood; that plaintiff had culled the wood and had sold the best of it, and had drawn the culled wood to the school-house; and, on H. remonstrating with him, he said, "Oh, but he did, and I can prove it:" that he could prove it by a person named N. Subsequently, on Christmas Eve, defendant and B., a rate-payer and auditor of the school accounts, were discussing municipal matters and related a conversation he had had with W., who was a municipal councillor, that while the municipal taxes were lower the school taxes were higher; that N. had said the wood was No. 2, and it must have been culled, as No. 1 had been bought. It appeared that plaintiff, at the time he purchased for the school board, had purchased wood from the same person from whom he purchased the school board wood, which he sold on his own account. In an action of slander,

Held, ROSE, J., dissenting, that the words were spoken on privileged occasions, and there was no evidence of malice, and therefore there could be no recovery.

Carscallen, for the plaintiff.

Osler, Q.C., for the defendant.

McNEELY ET AL. v. McWILLIAMS ET AL.

Contract in writing—Parol Evidence—Admission of.

The defendants wrote plaintiffs: "We will furnish scows and deliver all the stone required for the Omemee Bridge as fast as you require them, for the sum of 75 cents per cubic yard." To which plaintiffs replied: "We accept the above offer at the price and conditions named."

Held, CAMERON, C. J., dissenting, that parol evidence was admissible to show that the delivery was only to take place provided the water along the route was of sufficient height to enable defendants to use their steamer in towing the scows.

G. T. Blackstock, for the plaintiff.

Osler, Q.C., for the defendant.

BANK OF MONTREAL v. DAVIS.

Voluntary conveyance—Fraudulent preference—Evidence of—Finding of judge on weight of evidence.

In an action to set aside conveyances made by a father, a merchant, to his two sons, as with intent to delay or defraud his creditors, it was found as a fact that at the time in question the father was in solvent circumstances, and owed no debt now unpaid except a sum of $1,000 to his wife for rent, and even if there were such a debt, and enforceable against the father, it never was enforceable against the property in question, as the wife joined in the conveyances; and consequently it was not available to the plaintiffs for the purpose of setting aside such conveyances.

Held, under these circumstances, that the action must fail.

In this case the Court refused to interfere with the finding on the weight of evidence of the learned judge who tried the cause, and had seen and heard the witnesses, though they felt a difficulty in arriving at the same conclusion.

Bruce, of Hamilton, for the plaintiffs.

Robertson, Q.C., for the defendant.

ILER v. ILER.

Board—Claim by relatives—Express agreement.

When brothers or sisters or near relatives live together as a family no promise arises by implication to pay for services rendered or benefits conferred, which, as between strangers, would afford evidence of such a promise; and so, in an action between relatives so living together for board or wages or the like, an express promise or agreement must be proved by the party urging the claim.

In this case, which was an action against a brother for board, no such promise or agreement was proved; and also for the greater portion of the time the house in which they lived was the mother's, and not that of the brother claiming the board, as by the father's will she was entitled to the use of the dwelling house during her life, and of the farm, cows and poultry, and the defendant being required to provide for her all that she should require.

Held, therefore, that the claim was not maintainable.

Aylesworth, for the claimant.

Pegley, contra.

DYMENT v. THOMPSON.

Sale of goods—Place of inspection—Acceptance of part.

The plaintiff, a lumber dealer and mill owner, agreed with the defendant to supply him with certain grades of lumber to be shipped on board cars at the stations nearest plaintiff's mills, and to be sent to the defendant at Hamilton; payment to be made by acceptance at three months from delivery. The lumber was shipped in car loads to the defendant from time to time, some of which the plaintiff accepted and others he rejected.

Held, that the plaintiff had the right of inspection at Hamilton, but having accepted certain of the car loads he had no right to reject the others because part did not answer the contract, unless the lumber they contained was so inferior in quality as to destroy the distinctive character of the whole of such loads; but that defendant must rely upon his action for damages, or give the inferiority in answer *pro tanto* to the claim.

McCarthy, Q.C., and *Pepler*, for the plaintiff.

Lount, Q.C., and *Kappele*, for the defendants.

CHANCERY DIVISION.

IN RE CHAPMAN AND MCLAUGHLIN.

Will—Construction of—Devise upon attaining twenty-one—Dying without children—Restraint on alienation.

A testator made his will in 1850 as follows:—"I give to my grandsons Felix and John, upon their arrival at twenty-one respectively, or to the survivors of them, should either die without lawful children, the said lot as follows: To Felix and his heirs the west half, and to John and his heirs the east half, with power to either of the said devisees or their heirs to assign to the other or his heirs but not otherwise, as I wish the said land to remain in the family." Felix attained twenty-one, and died a year afterwards without issue, never having been married, leaving a sister and John, his heirs-at-law. John attained twenty-one.

Held, that upon Felix and John attaining twenty-one, they each took a fee in the land devised to him, the dying without children meaning so dying before twenty-one.

Held, also, that the restraint on alienation was void.

PRACTICE.

Mr. Dalton, Q.C.] [June 2.
Osler, J. A.] [June 25.

HEWITT V. HEISE.

Adding parties—Rules 103 (a) and 108 O. J. A.

The plaintiff and one Pegg both claimed to be entitled to the principal and interest due upon a mortgage made by the defendant. The defendant paid Pegg one gale of interest, and received indemnity for the amount paid against any claim on the part of the plaintiff. The plaintiff sued claiming the gale of interest which the defendant had paid to Pegg, and the principal as upon default of payment of interest. The defendant applied to have Pegg added as a co-defendant.

Held, not a proper case for adding Pegg as a party under Rule 103 (a) O. J. A., but rather one in which a notice might be served upon Pegg by the defendant under Rule 108 O. J. A.

Quære, per the Master in Chambers, whether the defendant might not have a remedy by interpleader.

E. B. Brown, for the motion.

Aylesworth, contra.

Proudfoot, J.] [June 3.

SMITH ET AL. V. GOLDIE ET AL.

Patent action—Measure of damages—Form of judgment—Pleadings.

In a patent action the judgment of the Supreme Court of Canada declared that the plaintiffs were entitled to an inquiry, and to be paid the amount found due upon such inquiry, for damages sustained from the making, constructing, using, selling, or vending to others to be used, by the defendants, and by the persons to whom they have sold, given or let the same of any of the machines, etc.

The judgment gave relief beyond what the plaintiffs asked by their bill of complaint.

Held, that where the language of the decree is unambiguous, the allegations in the pleadings should not be taken into account in the inquiry as to damages, and therefore the Master was wrong in excluding evidence of damages to the plaintiffs by the use of infringing machines by persons who have bought them from the defendants.

Howland, for the plaintiffs.

Cassels, Q.C., for the defendants.

Proudfoot, J.] [June 8.

CLAXTON V. SHIBLEY.

Tax sale—Sale for more taxes than really due—Owner present at tax sale—Estoppel—Laches—De minimis.

Action to set aside a tax sale of certain land, worth from $600 to $800, to meet $6.06 taxes. It appeared that this sale was for one-quarter more taxes than were really due.

Held, that this vitiated the sale, and R.S.O. c. 180, s. 155, did not cure the error.

The maxim *de minimis non curat lex* did not apply. The subject in question was the land, not the assessment; besides, if the maxim applied at all, it was the proportion,

in this case one-quarter, which should be looked to rather than the actual amount.

It was proved that the plaintiff was himself present at the sale in question and purchased one lot, which was ten or eleven ahead of the lot in question, and also another lot three below it on the list; but it was not shown that he was present when the actual lot in question was sold.

Held, that he was not estopped by conduct from complaining of it.

Held, also, that the fact that the plaintiff was informed within three months after the sale of the lot having been sold, when he might have redeemed it, if such was the fact, did not deprive him of his right of action.

Walkem, Q.C., and *Machar*, for the plaintiff.

G. Macdonald, for the defendant, H. T. Shibley.

Britton, Q.C., for the defendant, S. Shibley.

Ferguson, J.] [June 27.

CANADIAN LAND AND EMIGRATION CO. v. THE TOWNSHIP OF DYSART ET AL.

Payment out of court—Appeal to Supreme Court of Canada—Discretion of court.

The plaintiffs were appealing to the Supreme Court of Canada from a judgment of the Court of Appeal. The defendants applied for payment out of Court to them, as the successful parties in the action, of a sum of $5,000 paid in by the plaintiffs and representing the whole subject-matter of the litigation.

Held, that the application was in the discretion of the Court; that that discretion should be exercised in the same way as upon an appeal to the Court of Appeal, and that the application should therefore be refused, following *King* v. *Duncan*, 9 P. R. 61.

Lockhart Gordon, for the plaintiffs.

W. H. P. Clement, for the defendants.

Rose, J.] [July 2.

COPELAND v. THE CORPORATION OF THE TOWNSHIP OF BLENHEIM.

Costs of trial where jury disagree—Rule 428, O. J. A.

The action was tried twice. At the first trial the jury disagreed, but at the second there was a verdict for the plaintiff, which was sustained by a Divisional Court.

Held, that the costs of the first trial were properly taxable to the plaintiff, as part of the costs which should follow the event mentioned in Rule 428, O. J. A.

Langton, for the plaintiff.

Holman, for the defendants.

Rose, J.] [July 3.

MCGARVEY v. THE CORPORATION OF THE TOWN OF STRATHROY.

Costs—Scale of.

An order in Chambers referred the action, which was in the High Court, to the Master at London to assess the damages and to tax the costs to whichever party was successful in a certain appeal. There was no trial of the action and no judgment was entered. The Master assessed the damages at $60, and taxed to the plaintiff who succeeded in the appeal his costs on the High Court scale.

Held, on appeal, that the Master had no power under the order to determine upon what scale the costs should be taxed, and therefore he was right in taxing upon the scale of the Court in which the action was brought.

Aylesworth, for the appeal.

Folinsbee, contra.

Mr. Dalton, Q.C.] [July 4.

TAYLOR v. COOK ET AL.

Judgment against partnership—Admission by one partner—Rule 322, O. J. A.

The statement of one partner on his examination in a suit against the firm, as to transactions which occurred during the partnership, binds all the partners, unless they seek by an examination of some of themselves to contradict or qualify the statements of the partner whose evidence they object to.

Leave was given under Rule 322, O. J. A., to sign judgment against the defendant partnership upon admissions in the examination of one partner.

Watson, for the plaintiff.

Ogden, for the defendants.

Ferguson, J.] [July 4.

WESTGATE v. WESTGATE ET AL.

Costs of official guardian—Fraud by infant.

The official guardian's costs of defending this action on behalf of an infant defendant were ordered to be paid by the plaintiff, notwithstanding that judgment was pronounced in favour of the plaintiff against the infant defendant, and that the latter had been found to be a party to the fraud which occasioned the action.

Meredith, Q.C., for the plaintiff.
R. Meredith, for the adult defendant.
Lash, Q.C., for the official guardians.

Rose, J.] [July 11.

DUNCAN ET AL. v. LEES.

Interpleader—Material upon which order granted —Who should be plaintiff in issue.

Interpleader orders should be granted with extreme caution, and only after strong presumptive evidence of the goods being the debtor's, which should ordinarily appear by his being in possession, by an affidavit of the belief of the sheriff if he has such belief, and by a similar affidavit of the execution creditor.

A sheriff, instructed by the execution creditor, went to the store which had been the defendant's, found the claimants in possession and their name over the door, and notwithstanding this and without further inquiry made a seizure. Upon a claim to the goods being made, the sheriff applied for an interpleader order, swearing positively that the seizure was of goods and chattels belonging to the defendant. It was admitted that the defendant had made an assignment of all his property before the seizure.

Held, that an interpleader order should not have been granted, and an order was made barring the execution creditors.

Semble, that if the claimant be in possession at the time of the seizure, the execution creditor should be plaintiff in the interpleader issue.

Shepley, for the claimants.
Akers, for the execution creditors.
Aylesworth, for the sheriff.

BOOK REVIEWS.

SUPPLEMENT TO O'BRIEN'S DIVISION COURT MANUAL. By Henry O'Brien, Barrister-at-Law, Toronto. Carswell & Co., Law Publishers, 1885.

THIS little volume comes opportunely to bring down to date all matters affecting Division Court law and practice. It contains the amendments to the Division Courts Acts passed in 1882, 1884 and 1885, together with the New Rules and Tariff of Fees, which came into force on January 1, 1885, to which is added a complete digest of all the Ontario cases decided since the publication of the previous parts of the Manual. This is a new feature and a very useful one. There is also a list of the Division Court clerks and bailiffs corrected to date. The Index we are glad to notice covers not only the new material, but also the matter contained in the Manual of 1880; the annoyance of a third Index is thus obviated. The present supplement is printed so as to bind up with the Manuals of 1879 and 1880, and with them forms a compact volume giving the information contained in a very accessible form.

Instead of giving any remarks of our own as to the manner in which the editor has done his work we quote the following extract from a letter received by him from the learned Chairman of the Board of County Judges, than whom no one could be found more competent to give an opinion: "It is very nicely got up and with the digest of cases will be a valuable aid to the judges, practitioners and to the general public who have to resort to the Courts. You are entitled to much credit for the careful way in which you have prepared the work."

These Courts are now, with their increased jurisdiction and extended powers, much more important forums than they formerly were; and a handy volume giving easy access to their practice and procedure will be very useful as well to the officers as to the large number of the legal profession, who, especially in country places, have the conduct of cases passing through them.

CORRESPONDENCE.

OUR OTTAWA LETTER.

To the Editor of the LAW JOURNAL.

The long agony is over ; the guns are firing, the troops drawn up and his Excellency ready to tell us how good and useful our legislation has been, and how Canada will flourish in consequence of it; including of course the Franchise Bill—so *conservative* when brought in and so very *liberal* now, as to give all but manhood suffrage, and that too in certain places and to certain people who had it before. The cry of the innocents doomed to slaughter has gone up unregarded ; some forty of them, whom their fathers and godfathers held to be masterpieces of legislation are doomed to "carry their beauties to the grave and leave the world no copies"—by the Queen's Printer. The ten thousand questions have been asked, and answered in forms which the questioners by no means accepted as to be noted Q. E. D. like those put and answered in Euclid. The voice of the great querist is silent, and ministers who have been subjected to that inquisitorial mode of torture enjoy the quiet of a silence which they admit to be golden, though the speech of the querist was by no means silvern to their ears. The expectant Commissioners of Railways, Judges of the Court of Claims, Commissioners in Bankruptcy, and Registrars in the N.-W.T. feel now like Tantalus when the water fled from his lips; but hope like Tantalus that another session may give them the prizes that have now eluded them. The 200 expectant Revising Officers are enjoying that delight which attends the prospect of enjoyment of the sweets of office; and albeit the amount and value of those sweets have not yet taken positive form and substance, yet the anticipation of the unknown quantity thereof is perhaps not less delightful than the reality will be. Sir John will see that they are good and sufficient.

But what more need I tell? Are not all those things written in 3,700 pages of the Chronicles of Hansard, where the eloquence of the 211 Commoners of Canada is recorded in letters of light for future generations to admire and compare with the works of Demosthenes and Cicero, or Chatham and Gladstone. They differ mainly from those of the great orators of old in not declaring what they believe ought to be the policy of the future, contenting themselves with attacking or defending what has been done, according as it was done by Tory or by Grit, and seeming to be convinced beyond a doubt that they must be right if they can show that their opponents have gone astray.

"Each tries by others' faults his own to smother;
And the great argument is,—'You're another.'"

But on one subject all agreed ; Tory and Grit stood up together, and praised as they ought our citizen soldiers and the excellent soldiers who led them: Middleton and Strange, Otter and Williams, received the praises they so well merited. Nor were the men forgotten; and it was told in eloquent words how, when rebellion reared its head in the North-West, and their country called its citizen soldiers to arms :

"The loyal then at once arose
As one brave man,—and to their foes,
Soldier and soldier citizen,
Their faces turned, and struck,—and then
Beneath the blow the rebels quailed,
And sympathizing brigands failed."

And then, when the mortal remains of Osgoode and Rogers were committed to the grave, their fellow citizens of the Canadian Metropolis turned out in sorrowing crowds, and honoured the heroic dead as patriots should honour those who die for their country. Young and old, rich and poor, Tory and Grit, French and English, formed one long procession of mourners sorrowing for the dead, but proud that the dead were their countrymen.—

"Such honours Canada to valour paid,
And peaceful slept each gallant soldier's shade."

Yours most truly,

A PROUD MOURNER.

Ottawa, July, 1885.