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The BARRISTER

A. C. MACDONELL, D.C.L., Editor.

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The Barrister.

VOL. II. TORONTO, JULY, 1896. No. 7

EDITORIAL.

CONGESTED DOCKETS.

The matter of the blockade of business in the Court of Appeal and the lack of expedition in the determining of causes in Ontario still looms up prominently. Every now and again a murmur is heard, gradually subsides, and is then followed by the usual lull. But a reform like this, so much required and which can be easily effected, will spontaneously obtrude itself and nothing can keep it down.

Renewed interest has been aroused in the subject by the appearance of an open letter addressed to Sir Oliver Mowat which was published in the *Mail-Empire* on the 20th June. This communication, which is subscribed "Justitia," certainly makes out a good case for some sort of remedy, but in justice to all concerned we are not able to concur in some of the representations he makes, or in the strictures which he passes on the Attorney-General. We think the writer is astray from the facts and far wide of the mark in his conclusions. We never understood the Judicature Act, 1895, as being designed to inoculate expedition or despatch into the Court of Appeal. A careful examination of the Act fails to reveal a line that could be regarded as a spur to urge on their lordships to speed or activity. But though the anonymous correspondent of the *Mail-Empire* seems to bark up the wrong tree, still he is not so far astray but that the real evil is seen in the very next bush. The appointment of one more Superior Court Judge could be tried, and if that should not suffice further appointments should be made till efficient and speedy despatch of business has been attained. Though it has not been a reproach to our Provincial Legislature the fact has been obvious that the lead of the English Parliament has been often waited for and very generally followed. This was very well for the early times when Ontario's civilization was in the incipient state, and

when even in England the experiment, or the attempt, was just being made to throw off the cumbersome red tape and ridiculous anomalies of the mediæval system of law involved in the conflict between the Common Law and the Chancery side. But these conditions no longer obtain. The country has arrived at a mature age, and the requirement of the times is decisive and prompt action with a strong hand, regardless of what other legislative bodies do or don't do. As "Justitia" makes perfectly plain, the Court of Appeal will never catch up with the accumulation of cases set down for its hearing. Nothing but the creation of more judgeships will redress the wrong poor suitors suffer by "the law's delay." As to their lordships of the Divisional Courts we are far from agreeing with "Justitia," who says they are "now consigned to inaction." That their labours will be less is indisputable. That a large stream of litigious matter has been diverted to the Court of Appeal, and that the Court of Appeal is confronted with vastly larger dockets is all true. But none of these things spell inaction for their lordships of the old High Court Divisions. We believe it to be capable of ample proof that the ordinary duties of circuit and Chamber and single Court work together with the Toronto sittings for trial and the London and Ottawa weekly Courts, are sufficient to occupy the time of these Judges, if we we are to expect well-considered and carefully tried cases. The matter deserves better attention than it has received.

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Editorial Notes.

The sight of some of our American exchanges filled with thousands of reports of cases is enough to make us pity our poor cousins across the line. We have our own stock of reported cases to digest, and groan sometimes monthly at the sight of 20 or 30 of them in our Canadian law journals. But in one American exchange this month there are 400 reported cases. How industrious our neighbors are becoming. They must have to work day and night to read one fraction of these cases, and the Judges must work day and night to keep up orders. The rapidity with which decisions are turned out in the States surpasses human understanding. What becomes of all the reported cases? Are they ever read? The sight of 400 per month is enough to make one grow anxious as to the longevity of members of the profession in the States. We have been doing some multiplication, and find that one million such decisions are reported annually in the States. Justinian and Tribonian's labors are at last surpassed. What becomes of this vast heterogeneous mass of non-

sense with which some journals are flooded?

* * *

The lawyers in Canada evidently are leaders and guiders of public opinion; 2,150 lawyers we calculate were on the stump throughout Canada during the Dominion elections. The number of lawyers elected to the House on June 23rd last is enormous, being 95. It would appear that the bar is an avenue to political fame.

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We have always been found advocating the formation of provincial and Dominion Bar Associations. Had such associations been formed it might be that the Lord Chief Justice of England would be entertained at Montreal or Toronto instead of at Saratoga on his visit to America next month. We refer to the matter not in a spirit of jealousy but rather express a dissatisfaction that our own inertness should find us in such a position that the Bar of Canada have not a properly representative executive empowered to extend some courtesy to so distinguished a jurist as Lord Russell of Killowen on the present occasion. Far from jealousy, we find it a most agreeable sight to see such cordial relations existing between the English Bench and the American Bar. If a like cordiality were shared by all other elements in the two countries there would be no talk of war between them.

* * *

It seems that the rascal element in the legal profession will never grow less. Our contemporary, *The American Lawyer*, which is, by the way, one of the most complete of our exchanges, has a column under the caption "Lawyers in Trouble," in which are recorded the cases of lawyers who fall from grace. The June number tells the story of no less than nine instances where the guilt has been brought home to such gentlemen.

LAW AND POETRY.

Richard Cranston, a young English barrister, who had attained eminence in his profession, while spending a few days in the city of New York, was the guest of Ogden Hoffman one evening. The conversation turned on lawyers and Judges who wrote poetry. "I sometimes think, Mr. Hoffman," said Cranston, "that law and poetry are entirely opposite elements and cannot unite harmoniously in one character—that the lawyer who writes poetry and the poet who undertakes to practice law are both widely out of their spheres. Have you ever known a lawyer or a Judge who wrote poetry, or a poet whose themes were law, and ever succeeded?"

"Most certainly," said Hoff-

man. "I have known many lawyers and Judges of the highest standing, and legal history tells me of many more, who wrote some of the most elegant and classically finished effusions in our language.

"Your own Lord Tenterden, for instance, whose opinions so richly adorn the judicial history of your country, was as proud of iambics and hexameters as he was of his triumphs at the Bar and his exalted reputation. Then there was Telford, who divided his time between law and poetry, achieving brilliant success in both. Many of our American lawyers and Judges have been equally successful in the spheres of law and poetry.

"Our great jurist Joseph Storey, who divided the honours of our Federal Court with Marshall, and whose legal commentaries rank next to those of Kent, wrote most charming poetry. Very many of his prose productions are of the highest grade of poetry. This reminds me of a reply which Storey made in poetry to a young lawyer who put about the same question to him that you have to me concerning lawyers and poetry. It has always been one of my favourite poems. It is in poetic measures and rhyme, but at the same time it is what all poetry ought to be—infused with the very essence of reason, induction, and common sense. My admiration of the poem fixed it so strongly on my mind that I can repeat it, which, by your leave, I will."

Mr. Hoffman recited Judge Storey's advice to the young lawyer:

"Whene'er you speak, remember, every cause
Stands not on eloquence, but stands on laws:
Pregnant in matter, in expression brief,
Let every sentence stand in bold relief;
On trifling points nor time nor talents waste—
A sad offence to learning and to taste;
Nor deal with pompous phrase; nor e'en suppose
Poetic flights belong to reasoning prose."

Loose declamation may deceive the Court,
And seem more striking as it grows more loud;
But sober sense rejects it with disdain,
As naught but empty noise, as weak as vain.
The froth of words, the schoolboy's vain parade
Of books and cases—all his stock-in-trade—
The pert conceit, the cunning tricks and play
Of low attorneys, strung in long array,
The unseemly jest, the petulant reply,
That chatter on, and cares not how or why,
Studious — avoid — unworthy themes to scan—
They sink the speaker and disgrace the man,
Like the false lights by flying shadows cast,
Scarce seen when present and forgot when past.

Begin with dignity; expound with grace
Each ground of reasoning in its time and place;
Let order reign throughout; each topic touch,

Nor urge the power too little.
Give each strong thought its most attractive view,
In diction clear, and yet severely true.

—From *The American Lawyer.*

MEETING OF THE BENCHERS.

Notes on Their Proceedings.

There was quite a large gathering of Benchers at the meeting held on Tuesday, June 30th. There were but three absentees, and they were in England. The reason of so large an attendance soon became apparent; the meeting was called to discuss the question of who should lecture in the Law School during the next three years, who should set the papers, what the lecturers should lecture on, and the course of legal study to be prescribed in the school. After some discussion the old staff of lecturers was reappointed as follows: E. D. Armour, Q.C.; A. H. Marsh, Q.C.; J. McG. Young, B.A., and John King, Q.C.

*

The lecturers receive a fair salary, amounting to $1,500 per year. The appointments have met with general approval. The course of study was somewhat altered. Smith on Contracts has been taken off the first year. This is a wise change, as Anson is a much better book, and first year students on reading both these texts are apt to get confused. Holland's Jurisprudence has been added to the first year. The third year is reduced by two books, Smith's Mercantile Law and Kellegher on Specific Performance being struck off third year work and added to the second.

It is the opinion of all who know that other changes should follow with regard to the third year. Last year there were 22 books in the final year work (averaging 550 pages each), this made about 12,000 pages of law to read. Surely this is too much to expect the students in the final year to digest in the short space of seven months. Nearly all the students are in offices from 10 a.m. to 5 p.m. and some until 6.30 p.m.; the students attend two lectures of one hour each daily, and have but a few hours left in the evening to read the 12,000 pages aforesaid. The result is cram! cram! cram! follows. This year is all cram! and the digestion is slow. There is an absence of thoroughness. The staff are attemptng too much at once. There are half-a-dozen other works on the final year that might well have been struck off. Such wretched cramming ought to cease; it is a relic of the educational system of the last century, and is unsuited to Osgoode Hall. The Law School course is second to none in the world, and is certainly the best in America. We are convinced of this, firstly, judging from results and the equipment graduates of the school go forth with, and, secondly, from a close examination and perusal of the course, text books, and examination papers found in our American and English exchanges. It ought not to be tinkered with.

We are surprised to learn that the Osgoode examinations are 20 years behind the times in some respects. In the examination halls of the early sixties and seventies candidates were instructed to write thier name on the paper. This system has been superseded by pseudonyms, numbers, etc., in every university, college, public and separate school in Ontario. But the Osgoode examination still totters on the very verge of old fogyism, and candidates still place their own name on the paper. And as the instructions read: "Write your name, Christian and surname, on each page of your answers." Surely the examiners know that numbers and pseudonyms should in all justice to themselves and the candidates be used, otherwise there is apt and there is the cry of favoritism. We know that such is not the case—as we do not believe the Law Society has ever been served more faithfully than by Messrs. Ludwig, Gwynne, Moss and Galt. These examiners have done their work well, and have worked hard. But in justice to the students, the examiners and the staff of the Law School, the system should be changed.

AUTUMN CIRCUITS.

The schedule for the Fall Assizes has been given out, and we give the full list hereunder. As in the past, it is expected that there will be changes from time to time, upon which we will keep the readers of *The Barrister* posted as they may occur.

Boyd, C. — Cobourg (jury), Tuesday, 8th September; London (jury), Monday, 28th September; Barrie (jury), Monday, 26th October; Goderich (non-jury), Monday, 16th November; Lindsay (jury), Monday, 7th December; Milton (jury and non-jury), Thursday, 10th December.

Armour, C.J.—St. Catherines (jury), Monday, 14th September; Brockville (jury), Monday 21st September; St. Thomas (non-jury), Monday, 5th October; Sandwich (non-jury), Tuesday, 13th October; Berlin (jury and non-jury), Monday, 16th November; Napanee (jury and non-jury), Monday, 14th December.

Meredith, C.J.—Toronto (non-jury), first week, Tuesday, 8th September (and to continue nine weeks if necessary); Woodstock (jury), 21st September; Cornwall (non-jury), Tuesday, 29th September; Sarnia (non-jury), Tuesday, 13th October; St. Catherines (non-jury), Monday, 19th October; Peterborough (jury), Monday, 9th November; Pictou (jury and non-jury), Tuesday, 24th November.

Ferguson, J.—L'Orignal (jury and non-jury), Tuesday, 8th September; Ottawa (jury), Thursday, 10th September; Simcoe (non-jury), Monday, 5th October; Kingston (jury), Monday, 19th October; Cornwall (jury), Tuesday, 27th October; Stratford (non-jury), Monday, 9th November.

Rose, J. — Barrie (non-jury), Tuesday, 8th September; Cobourg (non-jury), Monday, 19th October; Belleville (jury), Monday, 2nd November; Cayuga (jury and non-jury), Monday, 9th November; Kingston (non-jury), Monday, 23rd November; Rat Portage (jury and non-jury), Wednesday, 2nd December; Port Arthur (jury and non-jury), Monday, 7th December; Sault Ste.

Marie (jury and non-jury), Friday, 11th December.

Robertson, J.—Sandwich (jury), Tuesday, 8th September; Goderich (jury), Monday, 14th September; Stratford (jury), Monday, 28th September; Walkerton (jury), Monday, 19th October; Guelph (jury), Monday, 9th November; London (non-jury), Monday, 16th November; Belleville (non-jury), Monday, 30th November.

Falconbridge, J. — Welland (jury and non-jury), Tuesday, 1st September; Toronto (civil jury), first week, Monday, 14th September (and to continue six weeks, if necessary); Hamilton (jury), Monday, 12th October; St. Thomas (jury), Monday, 2nd November; Whitby (jury), Monday, 16th November; Guelph (non-jury), Monday, 14th December; Lindsay (non-jury), Monday, 21st December.

MacMahon, J.—Brantford (non-jury), Monday, 21st September; Whitby (non-jury), Thursday, 24th September; Chatham (non-jury), Monday, 19th October; Orangeville (jury and non-jury), Monday, 9th November; Brampton (jury and non-jury), Monday, 23rd November; Peterborough (non-jury), Monday, 14th December.

Street, J.—Owen Sound (jury), Monday, 14th September; Pembroke (jury and non-jury), Tuesday, 22nd September; Perth (jury and non-jury), Monday, 5th October; Ottawa (non-jury), Monday, 12th October; Toronto (criminal), first week, Monday, 2nd November (and to continue four weeks, if necessary); Chatham (jury), Monday, 16th November; Woodstock (non-jury), Monday, 23rd November; Brantford (jury), Monday, 7th December.

Meredith, J.—Hamilton (non-jury), Tuesday, 8th September; Sarnia (jury), Tuesday, 15th September; Brockville (non-jury), Tuesday, 27th October; Owen Sound (non-jury), Tuesday, 24th November; Walkerton (non-jury), Tuesday, 1st December; Simcoe (jury), Monday, 7th December.

QUEEN'S COUNSEL APPOINTMENTS.

His Excellency the Governor-General is understood to have signified it as his pleasure that the honour of being appointed Queen's Counsel should be conferred on many gentlemen of the profession throughout the country. The office is one of some antiquity and has been conferred for generations back by the Sovereign for learning and talent. The attributes of such a position are the right to sit within the bar in the Courts of the realm, and to have precedence over ordinary Barristers. The Queen's Counsel has no active duties, but he cannot plead against the Crown without leave. There is no difficulty now in arranging to be allowed to appear against the Crown, but it was not always so. Indeed, Queen Elizabeth once appointed a brilliant counsel to be her counsel for the express purpose of preventing him taking cases against the Crown. The astute Queen had been sitting in Court, where it was her mortification to see the counsel referred to making his

case against the Crown as solid as he knew how. Her Majesty said: "By my troth, he will not plead against me again," and she kept her word, subsequently making him Queen's Counsel. The gowns worn by the Queen's Counsel are also official in appearance and of a different shape to the ordinary Barrister's gown, as well as being silk instead of stuff. A somewhat dressy broadcloth tail coat and ornamentally cut vest are used extensively. Another distinguishing feature between the Queen's Counsel and the Barrister is that the former carries a red silk bag instead of the blue silk of the Barrister.

Those in Ontario whose names have been given in the daily press as having received the distinguished honour from the Governor-General are as follows:—Wm. H. Beatty, T. G. Blackstock, Wallace Nesbitt, Emerson Coatsworth, John Winchester, Edmond Bristol, Geo. Kappele, W. D. McPherson, A. C. Macdonell, C. C. Robinson, W. R. Riddell, Walter Barwick, Philip H. Drayton, F. A. Hilton, O. A. Howland, R. S. Neville, Hon. R. Harcourt, Frank E. Hodgins, Hamilton Cassels, T. P. Galt, T. H. Ince, Walter Read, A. C. Galt, C. A. Masten, H. H. Dewart, H. D. Gamble H. T. Beck, W. G. Murdoch, all of Toronto; J. J. Scott, Geo. Lynch-Staunton, Samuel Barker, Wm. Bell, Stewart Livingstone, Hamilton; I. F. Heilmuth, Thos. G. Meredith, E. F. Essery, Patrick McPhillips, Hon. David Mills, London; Jas. F. Lister, W. G. Hanna, Sarnia; C. I. O'Neill, Chatham: T. W. Crothers, W. B. Doherty, St. Thomas; E. A. Miller, Aylmer; M. Walsh, Ingersoll; H. B. Murphy, Listowel; Jas. P. Mabee, F. W. Gearing, Stratford; John S. Fraser, Wallaceburg; H. H. Lennox, Barrie; John McCosh, Orillia; D. Robertson, Walkerton; W. H. Hearst, Fred Rogers, Sault Ste. Marie; Thos. P. Coffee, Guelph; Jas. H. Scott, Kincardine; W. L. Walsh, Orangeville: A. R. Wardell, Dundas; Wm. D. Swayzie, J. C. Scales, Dunnville; F. A. Hall, Perth; Jas. A. Hutcheson, J. Reynolds, Brockville; Chas. W. Colter, T. A. Snider, Cayuga; J. A. Leitch, R. A. Pringle, Cornwall; L. C. Raymond, Welland; W. B. Northrup, Belleville; R. G. Cox, St. Catharines; W. A. McLean, Guelph; J. B. Walkem, Kingston; J. A. Gemmill, Wm. Wyld, Geo. E. Kidd, Geo. L. B. Fraser, Ottawa; E. H. Tiffany, Alexandria; John W. Kerr, H. F. Holland, Cobourg; E. H. D. Hall, W. H. Moore. Peterborough; H. A. Ward, Port Hope; John McSweyn, Lindsay; D. M. McIntyre, Kingston; Wm. R. Hickey, Bothwell; A. S. Wink; F. H. Keefer, Port Arthur; A. J. Reid, Cannington; W. H. Bennett, Midland; G. H. Hopkins, Fred D. Moore, Lindsay.

DISSOLUTION OF PARTNERSHIP.

The announcement is made of the dissolution of the legal firm of Messrs. Read, Read & Knight. Mr. H. V. Knight will, in future, take up practice by himself.

RECENT ENGLISH DECISIONS.

CREWE v. FIELD.

[BRUCE, J., 13TH MAY, 1896.—Q. B. D.—Times Law Reports, Vol. XII, p. 409.

Witness — Subpœna — Neglect to appear and give evidence — Action for damages.

Where damages are sought for not appearing to give evidence on subpœna, the plaintiff must show that he has suffered some loss or damage by reason of the defendant's non-appearance. There was an action by the plaintiff against Hyde under the style of "Crewe v. Hyde," and the defendant in the present action was duly subpœnaed by the plaintiff to give evidence in the action. But he failed to appear as directed by the subpœna. The action of Crewe v. Hyde was for commission upon a loan which he was to have procured for Hyde. The defendant, Mr. Field, acted as solicitor for a gentleman who had been introduced by the plaintiff as willing to make the loan. The negotiations fell through, the plaintiff alleging as a reason that Hyde could not make satisfactory title, and as Hyde alleged that the plaintiff's principals were not prepared to make the loan. The evidence the defendant in this case would have given, had he been present, was that his clients were not prepared to make the loan; and inasmuch as this would not have helped the plaintiff in Crewe v. Hyde, judgment was ordered for the defendant in this action.

BEST v. OSBORNE.

[MR. JUSTICE CAVE, 16TH MAY, '96.—T. L. R. Vol. XII, p. 419.

Practice — Verdict for less than amount paid into Court—Entry of judgment.

This was an action for libel. The jury found a verdict for £100. The defendants had paid into Court £100. Counsel pointed out that the foreman of the jury had said that in fixing the amount of the damages the jury had reckoned that the defendants would pay the costs.

Per Justice Cave—The verdict is that £100 is enough to satisfy the plaintiff's claim. On that I give judgment for the defendants; £5 to be paid out to the defendants, the plaintiffs to have costs up to the time of payment into Court, and the defendants to have costs after that; £100 to remain in Court and to be set off against any balance of costs due to the defendants. I can take no notice of the opinion of the jury.

* * *

BEVAN v. CHAMBERS.

[LORD ESHER, M.R., A. L. SMITH, AND RIGBY, JJ., 15TH MAY, 1896.—Court of Appeal.—Times Reports, Vol. XII, p. 417.

Landlord and tenant—Lease—Construction—Determinable at lessee's option—"At end of said term."

There was a proper lease for 21 years with numerous provisions, including one to the effect that the lessor was to allow the

lessee compensation for gooseberry and currant trees left on the premises "at the end of the said term." By another provision the lessee was to be at liberty after the first seven years or after the first fourteen years to determine the tenancy by giving notice. This provision the lessee took advantage of after 14 years had elapsed, giving proper notice. The trouble then arose over the gooseberries and currants, the lessee demanding compensation, and his landlord contending that he could only do that after the whole term of 21 years had elapsed. The Court upheld the judgment of the trial Judge and afterwards confirmed by the Divisional Court in favour of the tenant, awarding him compensation on the ground that the term had come to an end after 14 years by the act of the lessee as provided for by the lease.

* * *

IN RE WARD.

[LINDLEY, L.J., LOPES, L.J., KAY, L.J., 8TH MAY, 1896.—Court of Appeal.

Solicitor — Taxation of one of several bills of costs—Order of course.

This was an appeal from a decision of North, J. (noted in *The Barrister*, ante, p. 203).

A. Cordery for the appellant.

A. Beddall for the respondents.

Their Lordships dismissed the appeal, with costs. They were of opinion that no valid objection could be taken to the order of course for the taxation of one only of the bills under the particular circumstances of the case. (L. J. vol. 31, p. 317.)

IN RE MACDUFF. MACDUFF v. MACDUFF.

[LINDLEY, L.J., LOPES, L.J., RIGBY, L.J., JUNE 4, 5, 1896.—Court of Appeal.

Will — Construction — Legacy—Blank in will—Charitable bequest—"Charitable or philanthropic purposes."

Appeal from a decision of Stirling, J., reported 65 Law J. Rep. Chanc. 365.

The testator, by his will and a certain testamentary disposition which was admitted to probate, gave his daughter, the plaintiff, a life interest in his residuary estate, and willed that at her death £10,000 from his estate should be appropriated and allocated "for some one or more purposes, charitable, philanthropic, or . The precise purpose or purposes I would desire to be named by my daughter"; and if she should fail to do so, then he left it to certain other persons to see his wishes carried into effect, as "I am unable personally to tie myself down to any specific scheme."

The daughter took out a summons for the determination of the question whether the £10,000 was effectually given for charitable purposes.

Stirling, J., held that the gift was not bad simply by reason of the blank space; but that the word "philanthropic" was wide enough to include objects not recognized as charitable by the Court, and that the gift therefore failed.

The Attorney-General appealed.

The Attorney-General (Sir R. E. Webster, Q.C.) and M. I. Joyce for the appeal.

E. A. Hadley for the respondents.

Their Lordships dismissed the appeal, and affirmed the decision of Stirling, J., on both points. (L. J. vol 31, p. 369.)

* * *

IN RE WEEDING. ARMSTRONG v. WILKIN.

[North, J., June 6th.—Chancery Division.

Will—Construction—"Shares"—Debenture stock.

This was a summons raising the question whether debenture stock belonging to a testatrix at the time of her death, and now known as "Perpetual £5 per cent. Debenture Stock Great Western Borrowed Capital," passed to the defendant Annie Wilkin under the following bequest: "To Annie Wilkin, the wife of Herbert Wilkin, my share in the Great Western Trunk Railway of Canada absolutely."

The testatrix had not, either at the date of her will or at the time of her death, any shares either in the Great Western Railway of Canada or in the Grand Trunk Railway Company of Canada.

At the date of her will the testatrix was the registered holder of £500 5 per cent. Perpetual Debenture Stock of the Great Western Railway of Canada.

Prior to the date of the will, the Great Western Railway of Canada was taken over by and became part of the Grand Trunk Railway Company of Canada.

J. F. Popham, for the plaintiffs, the executors and trustees of the will.

C. E. E. Jenkins, for the defendant Annie Wilkin, submitted that the debenture stock passed under the above bequest.

C. W. Bardswell, for the other defendants, contra.

North, J., held that the testatrix, by the words "my shares in" clearly intended to pass something; and as she had no shares, in his opinion the debenture stock passed. There must be a declaration to that effect accordingly. (L. J. vol. 31, p. 370.)

* * *

IN THE GOODS OF HENRY SWAINSON.

[June 8.—Probate, Divorce and Admiralty Division.

Administration with will annexed—Limited grant—Lunatic—Administration bond.

Henry Swainson died at 48 Angell Road, Brixton, March 11, 1896, leaving a will dated September 22, 1886. He left his property between two sisters. To one he left merely a legacy; the other he made residuary legatee, and appointed her to be executrix. The sister who was residuary legatee had become lunatic, but was not so found by inquisition. The other sister had renounced all claim to administration.

Bargrave Deane, on behalf of John Jones Swainson, the nephew of the deceased, moved for a grant to him of administration with the will annexed, for the use and benefit of the lunatic until such time as she should recover. He also asked to reduce the amount of the administration bond. The estate was worth about £5,229, and the applicant would, in the ordinary course, have to give security for double that amount. He could not find sureties without the assistance of a guarantee society, which would cost him £55 a year, which would come out of the pocket of the lunatic. He cited In the Goods of Binckes, 1 Curt. 286.

The President (Sir F. H. Jeune) made the grant as prayed, and fixed the amount of security to be given by the applicant at £5,500. (L. J. vol. 31, p. 371.)

* * *

SADLER (Appellant) v. THE GREAT WESTERN RAILWAY COMPANY (Respondents).

[House of Lords, May 11.

Practice — Pleading — Parties— Joinder of defendants—Nuisance arising from concurrent acts of two independent parties —Rules of the Supreme Court, Order XVI., Rule 4.

The plaintiff brought an action of nuisance in the Queen's Bench Division against his two next-door neighbours, the nuisance arising from the concurrent but independent acts of the two defendants.

C. M. Warmington, Q.C., E. Russell Roberts, and Chester Jones for the appellant.

H. H. Asquith, Q.C., and Alfred Lyttleton, for the respondents, were not heard.

Their Lordships (Lord Halsbury, L.C., Lord Watson, Lord Herschell, Lord Shand and Lord Davey) affirmed the decision of the Court of Appeal (p. 7 of this vol. of *The Barrister*) that the two defendants could not be joined in one action, and dismissed the appeal, with costs. (L. J. vol. 31, p. 340.)

* * *

IN RE ELLIOTT. KELLY v. ELLIOTT.

[Chitty, J., June 24.— Chancery Division.

Will—Condition—Repugnancy.

Devise and bequest to plaintiff of specified tea plantations and of all other the testator's property, estate, and interest of whatsoever nature and wherever situated which he should die possessed of or entitled to, and appointment of plaintiff as sole executrix, followed by the words: "On any sale by the said (plaintiff) of the said tea plantations I will and direct her to pay my brother, John Elliott, the sum of £1,000 out of the proceeds of such sale; also the further sum of £500 out of the proceeds of such sale to Isabella Boog," his sister.

The question was as to the effect of these words.

E. W. Byrne, Q.C., and A. R. Kirby, for the plaintiff, contended that the direction to pay the two sums was void for repugnancy, absolute dominion over property implying absolute dominion over the proceeds of sale thereof. They cited King v. Burchell, Amb. 379, and In re Rosher, 52 Law J. Rep Chanc. 722; L. R. 26 Chanc. Div. 801.

H. Terrell, for the brother and sister, contended that the legacies were absolute, and that the plaintiff was bound to sell.

Chitty, J., held that, on the true construction of the will, no obligation was imposed on the plaintiff to sell; that the testator's intention was simply that the sums should be paid only out of the proceeds of sale if, and when, the plaintiff thought fit to make a sale; and that the brother and sister had no charge on the plantations. He also held that as the owner of property had, as an incident of his ownership, the right to sell and to receive the whole of the proceeds for his own benefit, the direction that, if he sold, a part only of the proceeds should belong to him, and the residue go to other persons, was repugnant and void. This

was the broad principle of law, and the case did not fall within any of the exceptions which had been allowed, such as those discussed and admitted by Sir G. Jessel In re Macleay, 44 Law J. Rep. Chanc. 441; L. R. 20 Eq. 186.

* * *

IN RE LORD ONGLEY. OTTLEY v. TURNER.

[LINDLEY, L.J., LOPES, L.J., KAY, L.J., APRIL 30TH.—Court of Appeal.

Will — Construction — Settlement of sum of money — Ultimate conversion — Gifts of sums exhausting original sum — Surplus proceeds—Residuary gift.

Appeal from a decision of Stirling, J. (noted ante, p. 204 of *The Barrister*).

Testator, who died on January 21, 1877, by his will gave to trustees £20,000 upon trust to invest and pay the income of the investments to F. during her life, and after her death to convert the investments into money, and pay "£2,500, part of the said sum of £20,000," to E.; £2,500, further part of the said sum, to G.; £5,000, further part thereof to M.; and £5,000, further part thereof to A. And he directed that "£5,000, the remaining part of the said sum of £20,000." should sink into and form part of his residuary estate. F. died in August, 1895, and at that time the investments representing the £20,000 were worth considerably more than that sum.

Stirling, J., held that the intention of the testator was that the net proceeds of the sale of the investments should be divided among the legatees named and the residuary legatee in aliquot shares.

The residuary legatee appealed.

Dundas Gardiner for the appellant.

E. Beaumont for the assignee of the share of one of the legatees.

Their Lordships reversed the decision appealed from. They were of opinion that the will should be read as a direction to the trustees to pay out of the proceeds of the sale £20,000 in the manner indicated, the amount which each person was to take being specified, and the excess, if any, over that sum was undisposed of, and must fall into the residue. (L. J. vol. 31, p. 301.)

* * *

THE DUNLOP PNEUMATIC TYRE COMPANY v. THE DUNLOP-TRUFFAULT CYCLE AND TUBE MANUFACTURING COMPANY.

[CHITTY, J., May 21.— Chancery Division.

Trade name—Similarity—Deceiving the public—Injunction.

The plaintiff company was recently incorporated for the purpose of taking over the business of a company who owned various patents granted to J. B. Dunlop for the construction of pneumatic tyres, which they were selling in large numbers.

The defendant company issued a prospectus stating that it was formed to work an invention of M. Truffault in respect of an improved form of cycle, and to take over existing works for the manufacture of cycles and steel cycle tubes. The chairman of the directors, who was to join the board after allotment, was C. Dunlop, the managing director of a business of steam printers. On the face of

the prospectus was printed in red ink a statement that "this company is self-contained, and is in no way connected with the Dunlop Pneumatic Tyre Company." The objects mentioned in the memorandum included the business of manufacturers of cycles and bicycles.

The plaintiff company brought an action to prevent the defendant company from trading under their proposed title, and now moved for an interim injunction to restrain them from using the term "Dunlop" as part of their title, or from using any title calculated to deceive the public or lead it to believe that the defendant company was in any way connected with the plaintiff company.

F. Moulton, Q.C., R. Wallace, Q.C., J. C. Graham and A. J. Walter in support of the motion.

G. Farwell, Q.C., and G. F. Hart, for the defendant company, contended that no deception was possible, for as the plaintiff company only made tyres, the two companies would be dealing in different markets. The defendant company would be, in fact, not the plaintiffs' rivals, but their customers, and they were willing to undertake not to make tyres. C. Dunlop had brought Truffault's invention into public notice, and wished his name to be associated with it. The claim was for a monopoly in an individual name, and, on a question of similarity, trade names should not be dealt with on the same principle as trade marks.

Chitty, J., held that the name had been chosen for the purpose of causing the public to believe that the two companies were connected. Trading could not be carried on in the trader's own name if the result was to injure the reputation of another trader of the same name, as in the case where two persons named "Day" and "Martin" were prevented from selling blacking under that style. It was said that the trade of these two companies would not compete, but he was entitled to look at the objects of the company in the memorandum, and these included the making of entire cycles, including tyres. The case of Eno v. Dunn, L. R. 15 App. Cas. 252, though on a trade mark, showed the principles on which the Court acted in the case of words calculated to deceive, and which were acted on by the Court of Appeal in the Stone Ale Case (Thompson v. Montgomery, 58 Law J. Rep. Chanc. 374; L. R. 41 Chanc. Div. 35; affirmed 60 Law J. Rep. Chanc. 757; L. R. (1891) App. Cas. 217). (L. J., vol. 31, p. 340.) Injunction granted.

* * *

ROBINSON v. HARKIN.

[STIRLING, J., MAY 14, 19, JUNE 17. —Chancery Division.

Trustee—Breach of trust—Employment of outside broker—Loss of trust funds—Contribution from co-trustee—Statutes of Limitation—Time when Statute begins to run—Trustee Act, 1888, (51 & 52 Vict. c. 59) s. 8, s.-s. 1 (a), (b).

Action by one of the trustees of a marriage settlement and the infant children of the marriage against the other trustee to make the defendant liable for the loss of £1,000 (part of a sum of £2,500) intrusted to him for investment.

The defendant disputed his liability, but in case he should prove to be liable asked by counter-claim contribution from the plaintiff trustee. A cheque

for £2,500 was in July, 1885, sent to the defendant by the plaintiff trustee, to be invested in accordance with the terms of the settlement. The defendant thereupon handed the cheque to an outside broker, who sent him contract notes for the purchase of railway stock, and subsequently certificates to the extent of £1,500, and informed him that he would be credited with 2½ per cent. interest on the balance. The defendant also obtained from the broker a contract note purporting to be for the purchase of other railway stock, but no further delivery of any stock was made by the broker. The plaintiff trustee left the whole matter of the trust in the hands of the defendant. Down to September, 1888, the broker sent to the defendant cheques for the dividends (as he said) on the undelivered stock. Efforts were then made to obtain payment of the balance of the money from the broker, and various solicitors were employed, but they were of opinion that any proceedings against him for the recovery of the money would be futile.

This action was then commenced, and the question was whether the defendant, either alone or along with the plaintiff trustee, was liable for the loss which had occurred.

At the trial it was argued for the plaintiff trustee that the Statutes of Limitation, and particularly the Trustee Act, 1888, s. 8, were a defence to the defendant's claim for contribution, and leave was asked to amend by pleading such defence. The defendant also applied for liberty to amend his defence by pleading the same statutes.

Graham Hastings, Q.C., and C. E. Bovill for the plaintiff trustee and the infant co-plaintiffs.

Grosvenor Woods, Q.C., and G. Curtis Price for the defendant.

Stirling, J., while not deciding the case on the ground of the employment by the defendant of the outside broker alone, held that the defendant and the plaintiff trustee were jointly and severally liable to make good the loss to the infant plaintiff, but that, according to the principles laid down in Chillingworth v. Chambers, 65 Law J. Rep. Chanc. 343; L. R. (1896) 1 Chanc. 685, the defendant was entitled to contribution from the plaintiff trustee. With regard to the defence of the Statutes of Limitation, his Lordship said he had felt considerable difficulty in acceding to the application for leave to amend, but on the merits he thought the statutes afforded no defence. The principles laid down in Dering v. Lord Winchilsea, 1 Cox, 318; 2 Bos. & P. 270, as to contribution between co-sureties applied equally to contribution between co-trustees. Such right of contribution gave rise to a debt in some cases in the nature of a specialty, in others of a simple contract. The Statutes of Limitation applicable to the recovery of such debts would therefore have been defences to claims for contribution prior to 1888, and, consequently, the case was governed, not by sub-section 1 (*b*) of section 8 of the Trustee Act, 1888, but by subsection 1 (*a*). On the authority of Wolmershausen v. Gullick, 62 Law J. Rep. Chanc. 773; L. R. (1893) 2 Chanc. 514, which, again, was a case of contribution between co-sureties, time did not begin to run under the Statutes of Limitation as between the plaintiff trustee and the defend-

ant until the claim of the infant plaintiffs was established against the latter—i.e., time only began to run from the date of the present judgment.

* * *

HODSON v. HEULAND.

[KEKEWICH, J., JUNE 17, 18.—Chancery Division.

Statute of Frauds—Parol agreement for lease—Part performance—Possession taken prior to alleged agreement — Continuance in possession—Payment of rent—Specific performance—29 Car. II. c. 3, ss. 1, 4.

This was an action for the specific performance of an alleged agreement by the defendant to grant a lease of a stableyard and premises for a term exceeding three years. It was admitted that there was no agreement in writing sufficient to satisfy section 4 of the Statute of Frauds, but the plaintiff relied on a parol agreement coupled with acts of part performance on his part.

The plaintiff and defendant, according to the view the Court took of the evidence, met on April 27, 1895, and agreed that the plaintiff should take on lease the stableyard as occupied by a former tenant at a yearly rent of £140, and the plaintiff went into possession on April 29. The plaintiff found that a small portion of the premises which he desired to hold was not included, and a new agreement was come to on May 1, under which this portion was agreed to be comprised in the lease and the rent increased to £150 a year. The term of the lease was to be up to June 25 following, and then for three years more. A draft lease embodying these provisions was written out by the plaintiff's solicitor, and submitted to and approved by the defendant, but not signed by him. The plaintiff paid rent to the defendant and remained in possession. In February, 1896, the defendant gave the plaintiff notice to quit as a mere tenant at will, and the plaintiff then brought this action.

T. R. Warrington, Q.C., and E. J. Elgood for the plaintiff.

W. C. Renshaw, Q.C., and Norman Craig, for the defendant, submitted that neither the possession, which was taken prior to the date of the parol agreement sought to be enforced, nor the payment and receipt of rent, amounted to part performance.

Kekewich, J., held that the countenance of possession on and after May 1, was, under the circumstances, unequivocally referable to the parol agreement made on that day, and was a sufficient act of part performance to entitle the plaintiff to judgment for specific performance. The mere fact that possession was taken prior to the date of the agreement sought to be enforced was no objection in principle to holding that such possession, if continued after the date of the agreement, was exclusively referable to that agreement, and therefore a sufficient act of part performance provided the fact was sufficiently clear on the evidence, which, in his Lordship's opinion, was the case here. It was therefore unnecessary to consider whether the mere payment of rent was enough to take the case out of the statute.

HUMOR OF CANADIAN BENCH AND BAR.

At a trial in Hamilton, with C. J. Armour presiding, it became necessary for one of the counsel to testify during the trial. Going towards the box he was removing his gown, when his Lordship remarked, "Keep on your gown ——, unless you find it quite impossible to speak the truth in it."

* * *

A Roman Catholic woman named A'' oyd was tried before the Court of Queen's Bench in Dublin for refusing to produce a Protestant child, which she had abducted. Some amusement was created in the Court when the prisoner was sentenced to six months without hard labour, in Richmond prison, which is only for the incarceration of males. Carved in the stone work over the main entrance to the prison are the following words, "Cease to do evil, learn to do well." The commitment was the subject of the following lines:—

In most earthly tribunals some harshness prevails,
But the Court of Queen's Bench is both prudent and mild;
They committed Miss A. to the prison for males,
As the readiest mode of producing a child.
How she'll do so surpasses conception to tell,
If "she ceases to do evil, and learns to do well";
And if in six months, without labour confined,
She produces a child, she'll astonish mankind.

* * *

At a sitting of the Court of Appeal, as case after case was called, it was found that the counsel retained were engaged elsewhere, whereupon the Chief Justice remarked: "It seems to me that everyone finishes all the business they have in every other Court before coming here." A learned counsel who was in the court room answered, "Yes, my Lord, this is the Court of last resort in the Province."

* * *

Scene—The last Chancery Chambers day before long vacation—The benches filled with an anxious and perspiring crowd. The afternoon sun pouring through the windows and blue bottles buzzing lazily on the panes. A succession of weary, tedious, exasperating arguments, and as yet only one-half of the first row disposed of. The usually sweet and unruffled temper of the presiding Judge is suffe ing under the stress, and each applicant is having a harder time with his motion. Talking has been severely checked by the Court once or twice, and the patient waiters scarcely dare whisper. Then is begun a motion which transcends all previous ones in length, complication and apparent lack of importance. As the involved skein is slowly unravelled Mr. Justice F. begins to shift uneasily in his chair; his eye assumes a far-away look. In an atmosphere of hushed expectancy the storm is gathering. The voice of counsel waxes fainter and fainter, and then ceases, and he bows his head as the storm bursts. His Lordship's pen is laid down and his glance filled with an infinite sadness is fixed on the clouds floating far off through the window. Slowly his thoughts take form, and from the depths of his being wells up this: "It appears

"—to me—that the matters— "which come before this Court— "occupy its time—in a ratio— "inverse to their importance—I "suppose that if it could be conceived that an argument should "take place about absolutely "nothing at all, that it would "last for ever and ever. You "may go on, sir."

SWINFEN v. SWINFEN.

How One Case Leads to Many Others.

The case of Swinfen v. Swinfen possesses so much intrinsic and extrinsic interest that I shall deal with it in some detail.

The plaintiff, Mrs. Patience Swinfen, propounded the will of her father-in-law under which she took estates worth about £60,000. The will was disputed by the heir-at-law, Frederick Hay Swinfen, and in July, 1855, the Master of the Rolls directed an issue to try its validity. The issue came on for trial at the Gafford Assizes, before Mr. Justice Crenwell and a jury, in March, 1856. Sir Frederick Thesiger was leading counsel for the plaintiff, Sir Alexander Cockburn, then Attorney-General, represented the defendant. At the close of the first day of the trial negotiations for an arrangement took place between Thesiger and Cockburn, and ultimately the following terms were finally agreed upon and embodied in a memorandum:

"Terms of compromise. Juror to be withdrawn. Estate to be conveyed by plaintiff at law to defendant in fee, free of incumbrance, if any, erected since the death of Samuel Swinfen (the testator), such conveyance to date from Michaelmas, 1855. Defendant to secure to plaintiff an annuity on her life on the estate of £1,000 a year. . . . Plaintiff's costs as between attorney and client not exceeding £1,250 to be paid by defendant. Power to either party to make this agreement a rule of Court. In event of any question arising on the above terms, the same to be referred to Sir Frederick Thesiger and the Attorney-General. The house and grounds to be occupied by plaintiff without payment of rent till Michaelmas next." This memorandum was embodied in an order of nisi prius which was afterwards made a rule of Court. It may well be doubted whether any compromise before or since has given rise to such a crop of litigation. The negotiations had been entered into in consequence of an observation made by the learned Judge as to the course that the case seemed to be taking, and were conducted and concluded in the absence of the plaintiff. The plaintiff did not, however, on her return repudiate the compromise that had been arrived at. Soon afterwards Mrs. Swinfen seems to have determined upon a different line of action. She refused to execute the compromise, and the Court of Common Pleas declined, on a technical ground, to order her attachment for the refusal. The Court of Chancery, "following the law," refused to enforce it on a bill for specific performance; a new trial of the issue

was directed. Mrs. Swinfen obtained a verdict, which was upheld on appeal, and the Swinfen estates came into her possession and power at last. Now for this happy issue she was, and indeed admitted herself to be, largely indebted to the energy and ability of Mr. Charles Raun Kennedy, barrister-at-law, whose acquaintance she had made in April, 1856, and who acted for her in all the proceedings subsequent to the refusal of the Court of Common Pleas to order an attachment. A warm friendship sprang up between counsel and client. Mr. Kennedy had taken no fees for his services except such as were paid by way of costs by Mrs. Swinfen's opponents. In May, 1859, however, he thought it time to make some provision for the future, and induced Mrs. Swinfen to convey the estate recovered in the litigation, to himself in fee, subject to her own life-interest and other charges. The draft of this deed was prepared by Mr. Kennedy, but it was engrossed by a separate solicitor selected by Mrs. Swinfen, who, in the course of a long interview, fully explained to her its nature and effect. It appears that Mrs. Swinfen had also repeatedly and in unequivocal terms expressed her intention of giving Mr. Kennedy £20,000 when she came into her estates. Before this promise was fulfilled, Mrs. Swinfen, who had been a widow since 1854, gave herself in marriage to one Charles Wilsone Brown. Mr. Kennedy then sought to enforce payment of his long-promised outstanding fee. But the Court held that no binding contract could be founded on a promise to pay a barrister for his services—a doctrne with which the case of Kennedy v. Brown is now in legal minds inseparably associated. The next scene in the play was the filing of a bill by Charles Wilsone Brown and Patience his wife. to set aside the deed of May, 1859, and here again Mr. Kennedy was unsuccessful. The Master of the Rolls, Sir John Romilly, held (1) that the influence arising from the relation between the parties still subsisted strongly at the date of the deed, and therefore that the transaction could not stand as a gift; (2) that the previous promises of Mrs. Swinfen to pay Kennedy £20,000 for his services were insufficient to support the deed founded on contract; and (3) that the deed could. not be upheld as having been executed in the fair performance of a moral obligation. Brown v. Kennedy is a case not less important than Kennedy v. Brown. So far Mrs. Swinfen had won all along the line, but an action which she raised against Sir Frederick Thesiger—then Lord Chelmsford — (Swinfen v. Lord Chelmsford) for having exceeded his authority as counsel, was dismissed and the immunity of English barristers was settled on the principles afterwards affirmed and amplified in Strauss v. Francis (1866, L. R. 12 B. 379) and Munster v. Lamb (49 Law Times, 252).

LEX, in *The Green Bag.*

GENERAL NOTES.

When is a Man Drunk?

During a session of the Philadelphia License Court, legal circles are always more or less disturbed. Now it is one judicial ruling, and then it is another, which agitates the professional brain. A recent session seems to have developed the posing question, "When in the eyes of the law can a man be called drunk?" One of the Judges threatened to impose a fine for contempt upon a lawyer who in his plea for a defendant quoted the moss-covered couplet:

"He is not drunk who from the floor
Can rise and drink and ask for more;
But he is drunk who prostrate lies,
Without the power to drink or rise."

The lawyer besought the Court for a ruling by which his client might be governed in the refusal of drinks to drinking people. The curt reply of the Court was, "If a man cannot tell when another is drunk, he has no business to retail liquor." So the question that is still exercising the Philadelphia lawyer is, "When is a man drunk?"—From *Chicago Law Journal Weekly.*

* * *

Sitting on Unlicensed Practitioners.

The profession will hail Mr. Waddy's appointment as County Court Judge with satisfaction if he continues in the way he has commenced. At the Glossop County Court, after the usual congratulations, his Honour and the solicitors were discussing future arrangements for the business of the Court, when Mr. Tweedale, solicitor, said he and his friend would chat the matter over, and let his Honour know the result. Mr. Josiah Mellor, auctioneer, remarked that Tuesday was the most convenient day, as tradespeople were busy on Saturday. Thereupon, said his Honour, are you a solicitor? The Registrar: No, he is an agent and collector. His Honour: As agent for other people I don't recognize any such right for you to speak to the Court. Later on Mr. Josiah Mellor applied for an adjournment in a case in which neither plaintiff nor defendant appeared, but he was informed that he had no *locus standi* in the case. The parties could be represented by a solicitor or a barrister, but the law did not allow him (the Judge) to hear Mr. Mellor, who had no right to lift up his finger in the matter. He would uphold this rule so long as he presided over that Court. Agents and others need not in future trouble Mr. Waddy.—*Law Notes* (Eng.)

* * *

The innovation of having women serve as jurors has, according to Judge Howe, of Wyoming, had a beneficial effect. Wyoming was the first state to recognize women, and in giving them the right of suffrage and the responsibility of performing the duties of a citizen, which before that time had been wholly exercised by the men of the community. Judge Howe says the female jurors are much in favor of enforcing the laws and punishing crime, and tells how the

keepers of dance halls and gambling houses fled the city when a grand jury was in session which was composed largely of women, and how efficient their services were in this department of the duties of citizens.

* * *

William Blaikie, an old college oarsman and author of "How to Get Strong," is now a lawyer in New York, and is counsel for the legatees under the Fayerweather will, which leaves several million dollars to various colleges, religious and benevolent institutions. He has made a protest against the manner in which other lawyers are eating up the estate, and has asked the Court that no more money be paid to the attorneys for the executors. According to the executors' report they paid one law firm $50,000, and another $80,000 in the first accounting. The second accounting showed $40,000 more paid to the same firms, anl a third accounting debits them with $30,000.

REPORTS OF CANADIAN CASES.

THOMPSON v. MILLS.

[Before Meredith, C.J., and Rose, J., 10th June, 1896.

Election by widow between dower and interest under husband's intestacy—R. S. O. c. 108, s. 4, s.-s. 2—Election by mortgage.

E. D. Armour, Q.C., for defendants W. Mills, and T. H. Haycock (a lunatic appearing by John Hoskin, official guardian), appealed from judgment of County Court of Halton upon a special case submitted as to estate (if any) of plaintiff Thompson, in the land in question in a partition proceeding. The question submitted is whether Margaret P. Mills, by the execution of a certain mortgage (still unpaid), covering her own land and that of her husband (deceased), elected to take an interest in his land within R. S. O. ch. 108, sec. 4, sub-sec. 2, and amending Acts, there being no issue of the marriage. The plaintiff Thompson is the sole surviving brother of Margaret P. Mills, who also died intestate. The mortgage contained recitals stating that the husband had died intestate without issue, and that mortgagor was entitled to half his estate, and had agreed to execute the mortgage. J. Bicknell, for plaintiff, contra. Held, that there had been no election within the statute by Margaret P. Mills, and therefore plaintiff had not an undivided half interest in the land. Appeal allowed with costs.

*

REGINA v. SIMPSON.

Reference from Police Magistrate under sec. 900 of the Criminal Code— Keeping open shop for retailing poisons under the Pharmacy Act — Defendant not licensed, but his employee properly licensed.

Osler, Q.C., and E. T. Malone for private prosecutor, Shepley, Q.C., and Ludwig for defendant. This is a special case referred by the Police Magistrate of the City of Toronto to a Divisional Court under section 900 of the Criminal Code. The defendant entered into an agreement with one Lusk to conduct the drug and patent medicine branch of his depart-

mental store on the corner of Yonge and Queen streets, Toronto. Lusk is a duly qualified pharmaceutical chemist, registered under the Pharmacy Act, and who has a certificate under sec. 18. He was to receive one per cent. of the net profits from all sales of medicine containing poison, and also a salary, and was to have absolute control of the medicines containing poison, which were in a portion of the building partitioned off from the general store, and the key of that portion was kept by Lusk. The information charged that defendant did "unlawfully keep open shop for retailing, dispensing, and compounding poison contrary to the provisions of the Pharmacy Act." Held, that defendant kept open shop within meaning of 24th sec. of the Act. Case remitted to Police Magistrate. No costs.

*

BLAND v. MUTUAL RESERVE LIFE ASSOCIATION.

Principal and agent—Authority of agent for insurance company — Note given for premium and subsequent refusal of risk—Return of note.

Lynch-Staunton (Hamilton), for defendants, appealed from judgment of County Court of Wentworth. The plaintiff had applied to defendants' agent for a policy of insurance, giving him two promissory notes for $80, payable six and twelve months after date respectively. The half year's premium on the policy applied for was $40, and the plaintiff alleged that the defendants declined the risk and sued to recover the notes or their value. The trial judge found that the proceeds of the notes were deposited by the agent in the bank to the credit of the local treasurer of defendants; that, whether or not the agent received the notes as the defendants' agent, he retained them as their agent; and that by reason of the company's defendants having subsequently demanded payment of the premiums with a knowledge of the facts and of the discount of the notes, and for other reasons given in his judgment, the defendants were bound as principals; and he gave judgment for the return of the notes or payment of the amount of them. P. D. Crerar (Hamilton), for plaintiff, contra. Appeal dismissed with costs.

*

McVITTIE v. O'BRIEN.

[15TH JUNE, 1896.

Recovery of penalties for neglect to perform duties as clerk under Voters' List Act, 1889—Right to plead the provisions of R. S. O. c. 73.

Watson, Q.C., for defendant, appealed from order of Falconbridge, J., affirming order of Master in Chambers refusing leave to defendant to plead the provisions of R. S. O. ch. 73, in action against a clerk of the townships of Drury, Denison, and Graham, to recover penalties for alleged neglect in the performance of his various duties under the 35th and 36th sections of the Ontario Voters' Lists Act, 1889. W. H. P. Clement, for plaintiff, contra. Appeal dismissed. Costs to plaintiff in any event.

*

NEVILLE v. SHIELDS.

Chattel mortgage—Description of cattle—"One smaller red cow, etc., etc."

Ludwig, for defendant, ap-

pealed from judgment of junior Judge of County of York in favour of plaintiff for $200 in action for damages for trespass, forcible entry, and removal from her premises of a cow, and for the value of it. The plaintiff purchased the cow from one Ewing, who had bought it from one Storey. The Judge below held upon the evidence that the cow in question was not the cow described in a chattel mortgage made by Storey to defendant and duly filed before the purchase by plaintiff. The description of the cow in the mortgage was "one smaller red cow purchased from A. W. Shields, of the township of Chinguacousy, in the county of Peel, on the 28th day of January, 1895." A. C. Macdonell, for plaintiff, contra. Appeal dismissed with costs.

*

RE BOKSTAL.

[MEREDITH, C.J., 11TH JU[illegible], 1896.

The Creditors' Relief Act—Surplus of mortgage sale paid into Court — Execution in Sheriff's hands prior to sale of the land.

Judgment on application by execution creditors for payment of their relief claim out of fund in Court, paid in pursuant to Trustee Relief Act, by Ontario L. and D. Co., as surplus proceeds of sale under power in a mortgage made to them by the execution debtor. The execution was placed in the sheriff's hands prior to the sale of the land, which is situate in his county. Held, following Dawson v. Moffat, 11 O. R. 484, and sec. 24 of the Creditors' Relief Act, that the fund must be paid to the sheriff for distribution. Costs of this application of execution creditor to be paid out of fund. L. G. McCarthy, for execution creditors other than Balfour. F. C. Cooke for mortgagor. Geary for execution creditor Balfour.

*

CARSWELL v. CARSWELL.

[BEFORE MEREDITH, C. J., 22ND JUNE, 1896.

Interim alimony—Effect of decree of divorce.

J. E. Jones, for plaintiff, appealed from order of Master in Chambers refusing interim alimony. W. A. Cameron, for defendant, contra. Held, that a judgment for divorce having been pronounced and now existing in an action between the same parties that the discretion of the Master had been properly exercised. Appeal dismissed. Costs in cause.

*

RE HEGLER, McIVOR v. HEGLER.

[BEFORE ROBERTSON, J., 22ND JUNE, 1896.

Private international law—Right of Ontario creditors after foreign administration and payment of foreign debts.

Judgment on appeal by two creditors of an estate now being administered, from interim report or certificate of local Master at Woodstock, finding that the proceeds of the lands in Dakota, U.S. A., are now in this Province in the hands of the solicitor for the widow, and are not subject to administration, as by the Dakota law. By virtue of administration proceedings there, the lands became vested in the widow freed from claims of creditors of the deceased. The testator devised

all his lands to his wife, subject to the payment of his debts, and died domiciled in this Province at Ingersoll. Proceedings were instituted in Dakota, and one Andrew was appointed administrator, with will annexed, and after advertisement for creditors the land in question was vested in the widow by order of the County Court of the County of Deuel, South Dakota. Held, that the certificate of the local Master is a report and within rule 848. Held, also, that question of res judicata did not arise; that the foreign court merely administered the estate as to these lands and debts owing there, and proceeds are now in the hands of the widow in trust as executrix under the will for distribution here. Appeal allowed and proceeds directed to be paid into Court. Costs of appellants out of estate. No costs to other parties. W. H. Blake for appellants. F. A. Anglin, for defendant, contra. J. B. Clarke, Q.C., for certain creditors.

*

RE FOULDS and McLAUGHLIN.

[26TH JUNE, 1896.

Arbitration and award—Board of Trade General Act, 1894—Omission of arbitrators to take the oath under the 9th section.

Judgment on motion by J. McLaughlin to set aside award of majority of arbitrators upon a reference under The Board of Trade General Act, 1894, in respect to a dispute upon a sale of 4,200 bags of flour. The parties are members of the Toronto Board of Trade. Held, that it being necessary under the by-laws of the Board of Trade that all differences between members shall be submitted to arbitration, it is absolutely necessary that all the provisions of the Act should be adhered to, and the omission of the arbitrators to take the oath under the ninth section was fatal to the validity of the award. Order made setting award aside, but, under the circumstances, without costs. C. Millar for McLaughlin. W. R. Riddell for Foulds and Shaw.

*

STARK v. ROSS.

[BOYD, C., 26TH JUNE, 1896.

Equitable execution — Appointment of Receiver ex parte in case of danger — Reviewing costs on ex parte orders.

Judgment upon question of costs of two ex parte orders by Rose, J., appointing receiver by way of equitable execution reserved upon motion to continue receiver when order was made appointing plaintiff. Held, that a receiver may be appointed ex parte after judgment in case of emergency or danger. Re Potts, (1893), 1 Q. B. at p. 662; Minter v. Kent 11 T. L. R. 197. The learned Chancellor does not consider that he is in a position to review the disposition of costs of the ex parte orders, and distinguishes McLean v. Allan, 14 P. R. 88, and after consultation with Rose, J., who concurs, directs the costs to be added to the plaintiff's claim. Moss, Q.C., for plaintiff. Langton, Q.C., for defendant.

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WILSON v. MANES.

[BOYD, C., 15TH JUNE, 1896.

Practice—Security for costs—Rule 1487—"Appeal from a single Judge."

Aylesworth, Q.C., for plaintiff, moved for order for security for

costs of appeal by defendant from judgment of trial Judge. W. E. Middleton, for defendant, contra. Held, that the provisions of rule 1487 do not apply. The words in the rule "appeal from a single Judge" mean a Judge presiding in Court, and not one at the trial of a cause. That rule is directed to cases in which but for the rule the sole right of appeal would be to the Court of Appeal, but by the rule a new right of appeal is given to the Divisional Court, as of concurrent appellate jurisdiction. In appeals of that sort the Court may require security to be given, but there is no intention to fetter or interfere with the previous and still existing right to appeal from the trial Judge to the Divisional Court. On the merits of this case security should not be ordered as substantial questions arise, and the action is of a penal character. No order made. Costs in cause to defendant.

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TRUSTS CORPORATION OF ONTARIO v. RIDER.

[FALCONBRIDGE, J., 15TH JUNE, '96.

Assignment of debts—Absence of any writing—R. S. O. c. 123, s. 7—"At law."

Judgment on special case submitted for the opinion of the Court. The plaintiffs are the administrators of F. J. Rosar, who died in December, 1895. The deceased was indebted to defendant, and from time to time handed him bills of accounts representing certain book debts, with the purpose and intent of assigning the same to defendant as security. The moneys collected were to be applied on the indebtedness. The words used on such occasions, if in writing, would, it was admitted, constitute a valid, legal assignment. The defendant gave notice to the different debtors that he claimed an assignment of the debts. The question is whether the plaintiffs or defendant are or is entitled to the amount of the debts. Held, that the case must be determined adversely to plaintiffs by the decisions and dicta in Armstrong v. Farr, 11 A. R. 186; Hall v. Prittie, 17 A. R. 306; and Lane v. Dungannon, 22 O. R. 264. The omission of the words "at law" in R. S. O. ch. 122, sec. 7, has no significance. English Judicature Act, 1873, sec. 25, commented on. Judgment for defendant declaring him entitled to the book debts in question, and all others in like plight and condition. Costs to defendant. F. A. Anglin for plaintiff. D. Urquhart for defendant.

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WOLF v. McGUIRE.

[MEREDITH, C.J., ROSE AND MACMAHON, JJ., 15TH JUNE, 1896.

Landlord and tenant — Implied covenant to repair — Destruction of property by fire—Receipt for month's rent—Agreement for a letting.

Judgment on appeal by plaintiff from judgment of Falconbridge, J., dismissing action with costs. The plaintiff let a stable to defendant, giving her a receipt in the following terms:—"Toronto, 20th October, '94. Received from M. McGuire the sum of nine dollars in full for rent of stable from 25th October to 25th November, 1894." The defendant took possession, and during the month the stable was destroyed by fire. The plaintiff brought the action upon an implied covenant to repair, arising from the tenancy.

Counsel contended that if receipt be taken as an agreement for a letting the plaintiff was entitled in the lease to the usual covenants, which included one to repair; and that if it be taken to be the lease an implied covenant to repair could not be excluded. He also urged that the agreement to pay rent should not be held to involve the whole contract between the parties. Appeal dismissed with costs. McCarthy, Q.C., for plaintiff. Wallace Nesbitt for defendant.

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JONES v. METHODIST CHURCH.

[ROSE, J., 23RD JUNE, 1896.

Will—Annuity of a named sum out of a named sum to be set aside — Subsequent insufficiency of corpus — Right of annuitant to encroach on balance of estate.

G. G. Mills, for plaintiffs executors, moved for judgment on the pleadings in action for construction of a will. The testator by his will in question directed that a fund of $30,000 should be set apart in order to provide for the payment of an annuity of $2,000 to his widow during her life. The interest on the corpus of the estate having proved insufficient to provide for the annuity, the question now arises whether the widow is entitled to encroach from time to time upon the corpus of the estate in order to make up the deficiency. Moss, Q.C., for the defendant, the widow. Delamere, Q.C., for the other defendants. Held, that corpus not liable to make up deficiency. Judgment accordingly. Costs to plaintiff out of estate. No costs to other parties.

SPROUL v. WATSON.

[THE FULL COURT OF APPEAL, 30TH JUNE, 1896.

Testamentary capacity—Probate of will since Devolution of Estates Act—Notice of intention to use probate as evidence.

Judgment on appeal by plaintiff from order of Common Pleas Divison, reversing decision of Robertson, J., holding plaintiff entitled to recover a legacy claimed by her under will of Henry Watson, deceased, and charged by testator upon his real estate. Appellant contended that the grant of probate of will is, since Devolution of Estates Act, conclusive evidence of testamentary capacity of testator as to real estate, and also that notice of giving in evidence of the probate at the trial having been given under section 41 of R. S. O. ch. 62, and no objection raised thereto, proof of testamentary capacity was conclusive. Appeal dismissed. Question of costs reserved. W. M. Douglas and F. Ford for appellant. Watson, Q.C., and Rogers (Perth), for defendant.

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GUINESS v. DAFOE.

Trespass and malicious prosecution — Magistrate issuing warrant for arrest for felony without written information.

Judgment on appeal by defendant from order (27 O. R. 117) of a Divisional Court (Armour, C.J., and Street, J.) reversing judgment of Falconbridge, J., dismissing action for trespass and malicious prosecution. The Divi-

sional Court held, following Ashfield's case, 6 Co. 320, that a magistrate acts without jurisdiction if he issues a warrant for arrest for a felony without a previous written information, and that the notice given before action was a good notice in trespass against magistrate. Counsel for appellant relied on Sinden v. Brown, 17 A. R. 173. Appeal dismissed, but order below varied by confining the new trial to the question of trespass. No costs of appeal. W. Nesbitt and W. R. Riddell for appellant. Clute, Q.C., and J. A. MacIntosh for plaintiff.

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ROGERS v. TORONTO PUBLIC SCHOOL BOARD.

Negligence — Personal injury — Damages for suffering and for "permanent injury" — Duty of having safe premises.

Judgment on appeal by defendants from judgment of Armour, C.J., in favour of plaintiffs upon findings of jury in action for damages for negligence. The action was brought by the late Benjamin Rogers in respect of injuries received by him on the 16th July, 1894, and was continued by his executors after his death, which took place in October, 1895. His death was not caused by the injuries so received. He was a yardsman in the employ of Elias Rogers & Co., coal merchants of Toronto, and received the injuries in the basement of the Ryerson school, Toronto, where he went on the evening before the delivery of a large quantity of coal to inspect the premises in order to see where it should be stowed, by falling into the furnace pit, which caused a fracture of the hip-bone. The jury awarded him $2,700 for his suffering, and $3,000 for "permanent injury." Defendants contended that they are not liable as a School Board for what occurred, and, even if they had been ordinary individuals, that they owed no duty to deceased under the circumstances; and also that there could be no damages for "permanent injury" under the circumstances. Appeal allowed with costs, and action dismissed with costs. Robinson, Q.C., and F. E. Hodgins for appellants. Osler, Q.C., and H. S. Osler for respondent.

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JAMIESON v. LONDON AND CANADIAN LOAN CO.

Assignment of lease—A grant of the full term but a reservation of a day in the habendum.

Judgment on appeal by defendants from judgment of Robertson, J., in favour of plaintiff in action brought to recover rent and taxes due under a lease. The lease in question was made by plaintiff to one J. R. Armstrong, who executed a mortgage in favour of defendants upon a form of assignment of lease which granted the term and in the habendum reserved a day. The trial Judge held that the grant, being of the whole term, and the habendum contrary to it, the former must govern. Appeal allowed with costs. Robinson, Q.C., and Arnoldi, Q.C., for appellants. Armour, Q.C., and W. H. Irving for plaintiff.

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RE THRASHER AND TOWN OF ESSEX.

Quashing by-law—Chap. 56 of 53 Vict. sec. 18—Sale of liquors.

Judgment on appeal by town corporation from order of Galt,

C.J., quashing by-law passed under 53 Vic. (O.) ch. 56, sec. 18, providing "that the sale by retail of spirituous, etc., liquors, is and shall be prohibited in every tavern, inn, or other house or place of public entertainment, and the sale thereof is altogether prohibited in every shop or place other than a house of public entertainment." Appeal allowed without costs. J. J. Maclaren, Q.C., for appellants. W. H. Blake for Thrasher.

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RE UNION SCHOOL SEC. 7, EAST GARAFRAXA, AND S EAST LUTHER.

[BOYD, C., ROBERTSON AND MEREDITH, JJ., 26TH JUNE, 1896.

The Education Department Act, s. 7 — Award under Public Schools Act, 1891—Award set aside — Sec. 42 of the Public Schools Act, 1896.

A. F. Lobb for the Minister of Education. W. M. Douglas for non-union school sections. Question submitted for opinion of Court under provisions of sec. 7 of the Education Department Act, 1891. This school section was formed by an award dated July, 1895, pursuant to the Public Schools Act, 1891, sec. 87. Trustees were elected and an auditor and a secretary-treasurer appointed. In March, 1896, the High Court of Justice made an order setting aside the award. On 1st April, 1896, sec. 42 of the Public Schools Act, 1896, came into force, and the question submitted for the decision of the Court is whether this new Union school section is now to be deemed to have been legally formed. The Court answered the question in the negative.

REGINA v. STEWART.

[BOYD, C., FERGUSON AND MEREDITH, JJ., 24TH JUNE, 1896.

Rule nisi quashing conviction— "Disorderly house," R. S. O. c. 194, ss. 73 and 79—"Mayor or magistrate" and persona designata.

Judgment on motion to make absolute a rule nisi to quash summary conviction of defendant, who keeps a hotel at the corner of Front and George streets, Toronto, for unlawfully allowing disorderly conduct there, and order of magistrate suspending his license for two months. It was contended that evidence showed that defendant had no knowledge of the improper acts complained of, which consisted in the letting of rooms by a servant in his hotel to two different male informers, who occupied them each with a female companion; and that such acts did not constitute the keeping of a disorderly house within R. S. O. ch. 194, sec. 73, under which conviction was made, and under which license may be suspended, and not under sec. 79, as contended by prosecution, under which a fine only may be imposed; and also that conviction, being by deputy of the Police Magistrate, is bad, because the Mayor or Magistrate mentioned in the Act is persona designata. Held, that information is properly phrased within sec. 79, and it is competent to allow amendment of conviction as upon appeal to the sessions, under sec. 105, which extends to defects of substance, provided it can be understood from the conviction that the same was made for an offence against some provision of

the Act within the jurisdiction of the justice, and there is evidence to prove such offence, and no greater punishment is imposed than warranted by the Act. Other objections overruled. Per Meredith, J.:—The conviction and proceedings are completely authorized by forms in Liquor License Act, sec. 103, and form 13. Rule discharged with costs. DuVernet and T. E. Williams for defendant. J. W. Curry for magistrate and prosecutor.

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WIGLE v. VILLAGE OF KINGSVILLE.

Municipal Act—Lis pendens—Issue of debentures—Attacking by-law after three months.

Aylesworth, Q.C., for plaintiffs, appealed from order of Falconbridge, J. (reported at page 195 of this volume of *The Barrister*), allowing appeal from order of local Judge at Sandwich refusing to vacate the certificate registered by plaintiffs in action to quash a by-law of the defendants and to restrain them from negotiating certain debentures to raise funds for supplying natural gas to the village of Kingsville. Counsel for plaintiffs contended that the certificate complained of was issued pursuant to the provisions of the Municipal Act, and there is no power under the Act to vacate its registration while the action is pending. W. H. Blake, for defendants, contended that as the by-law has not been attacked by summary motion within three months from its passage, it could not now be quashed in this action, and therefore the certificate should be vacated. Appeal allowed. Plaintiff to serve writ of summons forthwith. Costs here and below reserved until trial or final disposition of the action.

JOHNSTON v. CONSUMERS' GAS COMPANY.

[OSLER, J.A., MACLENNAN, J.A., AND ROSE, J., 30TH JUNE, 1896.

50 Vict. c. 85—Status of plaintiff—Reduction of price of gas—Bringing action on behalf of "all other consumers of gas in the City of Toronto."

Judgment on appeal by defendants from judgment of Ferguson, J., in favour of plaintiffs upon a special case in an action brought by J. T. Johnston and the Toronto Type Foundry Co. (on their own behalf, as well as on behalf of all other consumers of gas furnished by defendants in the city of Toronto, on the ground of non-compliance by the defendants with the terms of "an Act to extend the powers of the Consumers' Gas Company of Toronto," 50 Vict. ch. 85 (O.), for an account, repayment of moneys alleged to have been overpaid to defendants, an injunction, mandamus, and other relief. The plaintiffs alleged that the defendants, by their method of dealing, had violated the provisions of the Act, and used the moneys received by way of premium on the sale of their stock, and also their profits, in a manner not authorized by the Act, and thereby had lost large amounts which should have been applied towards the reduction of the price of gas furnished to plaintiffs and other consumers, and had improperly and by ultra vires acts deducted from their profits large sums of money for depreciation in plant. The defendants questioned the status of the plaintiffs to bring the action, and denied that they had violated the terms of the Act. The judgment of Ferguson, J.,

was in favour of the plaintiffs upon the questions raised in the action and submitted by the special case, and directed a reference to Edward Morgan, one of the junior Judges of the County Court of York, to take an account (a) of all moneys received by defendants from all sources from 23rd April, 1887, until judgment; (b) of all moneys disbursed by defendants in their business, and in the purchase of buildings and plant (1) from and out of their paid-up capital, (2) from and out of the reserve fund, (3) from and out of plant and buildings renewal fund, (4) from and out of all other moneys, including moneys received from premiums on sale of stock from 23rd April, 1887; (c) an account of the actual profits made by defendants in their business each year since 22rd April, 1887; (d) an account of the amount standing to credit of the contingent account on 1st October, 1886; and several other accounts of a like nature. The appellants contended that plaintiffs, either on their own behalf, or on behalf of other consumers, had no cause of action; either the Attorney-General or corporation of city of Toronto should bring the action; also that provisions of the statute respecting formation of and dealing with a reserve fund are merely permissive, and not compulsory; that it is competent for defendants to invest the reserve fund in their own business; and supported the appeal on other grounds. Appeal allowed with costs, and action dismissed with costs. The Court unanimously held the view that the plaintiff had no locus standi himself, and could not maintain the action on behalf of the other consumers. The plaintiff, having accepted a reduction on account of over-payments in previous years, was not entitled to bring an action for an account for the purpose of obtaining further relief in respect of over-payments. McCarthy, Q.C., S. H. Blake, Q.C., and W. N. Miller, Q.C., for appellants. Robinson, Q.C., and John MacGregor for respondents.

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CONSUMERS' GAS COMPANY v. CITY OF TORONTO.

Assessment of gas mains and pipes passing under the streets—"Appurtenant to land" owned by taxpayer.

Judgment on appeal by plaintiff from judgment of Boyd, C. (26 O. R. 722), upon a special case holding that the mains and pipes of the plaintiffs laid under the public streets are assessable under the Consolidated Assessment Act, 1892, as appurtenant to the land owned by the company for the purposes of its business. Appeal dismissed with costs. Osler, J.A., dissenting. McCarthy, Q.C., and W. N. Miller, Q.C., for appellants. Robinson, Q.C., and Caswell for defendants.

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FLEMING v. LONDON AND LANCASHIRE LIFE INS. CO.

[HAGARTY, C.J.O., OSLER, MACLENNAN AND BURTON, JJ.A., 30TH JUNE.

Insurance premium—Company taking note of third party (their own agent)—Condition in policy that if not paid the policy to become void.

Judgment on appeal by defendants from judgment of Meredith, C.J., in favour of plaintiff in action upon a life insurance policy. The trial Judge held that there was nothing to prevent defen-

dants from accepting the promissory note of a third person in satisfaction and discharge of the premium, and that the defendants having so accepted the note of their local agent, a note for and on account of the premium, could not avail themselves of a condition in the policy to the effect that if a note should be taken for the first premium, and should not be paid when due, the policy should become void. Appeal dismissed, the members of the Court being divided in opinion, Hagarty, C.J.O., and Burton, J.A., being of opinion that the appeal should be allowed, and Osler and Maclennan, JJ.A., that it should be dismissed. Robinson, Q.C., and W. Nesbitt for appellants. Osler, Q.C., and J. R. Roaf for plaintiff.

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GREEN v. McLEOD.

Action by administratrix of deceased person — Corroboration of evidence for the defence.

Judgment on appeal by plaintiff from judgment of Armour, C.J., at trial at Woodstock, dismissing action brought by the sister and administratrix of the estate of the late Alexander McLeod against the widow of a brother of the deceased to recover for the estate $1,537.82, alleged to be in the hands of defendant belonging to the estate. Fourteen months before the death of the intestate this money was paid to defendant upon two cheques, which cheques the trial Judge found were signed by the intestate, and which money defendant said she drew from the bank upon the cheques, and handed to him, acting simply as his messenger in going to the bank to draw the money. Plaintiff contended that this account of the transaction could not be received without corroboration: R. S. O. ch. 61, sec. 10. Appeal dismissed with costs. F. R. Ball, Q.C., and Aylesworth, Q.C., for appellant. Osler, Q.C., and McMullen (Woodstock), for defendant.

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HINDS v. WILSON.

Fraudulent preference — Taking security to cover actual gift alleging a loan.

Judgment on appeal by plaintiff from order of Divisional Court (Rose, J., MacMahon, J.) reversing judgment of Street, J. In 1885 defendant William Wilson advanced certain moneys to his son, defendant W. D. Wilson, to build a house, and in 1893, having reason to believe that his son was in financial difficulty, took a mortgage from him of $8,350 on the property to secure payment of the advances. The son then obtained a loan from one Stewart of $6,000, the proceeds of which were paid to the father, who took a second mortgage to secure the difference due him. Afterwards the son conveyed the house to his wife, the defendant Mary C. Wilson, subject to the mortgages, for a consideration of $900 actually paid. The trial Judge found that the money advanced by the father to the son was a gift, not a loan, and set aside second mortgage as a fraud on plaintiff, who is a judgment creditor of the son, but held that the conveyance to the wife could not be impeached. Appeal dismissed with costs. Burton, J.A., dissenting. Pepler, Q.C., for appellant. Delamere, Q.C., for defendant William Wilson. C. B. Jackes for defendant Mary C. Wilson. Rowell for defendant W. D. Wilson.

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