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IN these days of literary piracy it is refreshing to find in the United States a paper taking to task the decision of a New York Judge for legitimizing the plundering of the work of foreign authors. *The (N.Y.) Nation* quotes a decision of a Judge (Wallace) of the Circuit Court, who held "that any American may take and sell for his own profit all that goes under the name of the ninth edition of the Encyclopædia Britannica, provided he does not use articles therein written by Americans," and then remarks, "we trust there is not one honest man or woman in this community who will read it without a blush of shame and indignation. It means that American jurisprudence sanctions and even protects the wholesale, deliberate, advertised theft of the fruits of another man's labor and capital, provided that other man be born under a foreign flag. It is, therefore, a decision which, without meaning any disrespect to the learned Judge who delivered it, ought never to have been heard from any tribunal but that of an Algerine Cadi in the old days of the Corsairs. It actually makes mockery of our religion and of our morality, and brings disgrace on our courts and legislature. Of course there are plenty of Gallios among us who think it injudicious to say these things lest the thieves should get angry and steal more than ever. But theft and brigandage were never yet suppressed by soft-sawder. They have been always put down by the anger of honest men and the shame and sorrow of religious men."

WE find from an English paper that in a case before the Recorder of Plymouth, on a complaint by a Mr. Treleaven, where four gangs of porters were employed to unload his colliers (one of these gangs consisting of non-union men), and the union decided that he should be requested to discharge the non-union men, and that if he should refuse, the union men should strike, three of the secretaries of the unions were deputed to make this decision known to Mr. Treleaven, who refused to comply with it, and the men struck accordingly, but quietly. The Recorder decided against the union men, as guilty of an offence against the law forbidding intimidation, and fined each of the secretaries £20. The Recorder's judgment is described as "an elaborate and careful piece of reasoning, which betrays no trace of prejudice, and is pervaded throughout by a judicial spirit," and contains the following passage:

"I am of opinion that a strike by the members of a trade union for the purpose of increasing their wages or altering the condition of their employment is lawful, unless accompanied by violence or intimidation . . . . but that a strike for the purpose of compelling employers not to employ other persons, or to alter

the terms of employment of such other persons, is illegal, and renders all persons engaged in it liable to proceedings under this section." (Section 7 of the Conspiracy and Protection of Property Act, 1875).

The working-men in the unions, in their war against those outside the unions, do not meet with the sympathy from the public which they do in their contests with their employers for shorter hours and better pay. The public almost instinctively make the same distinction between the two kinds of strikes as the Recorder. The decision is a most important one, and will doubtless be appealed from. It may be interesting to some of our readers to know that the Recorder is Mr. Bompas, Q.C., a brother of the respected Bishop of the Mackenzie River Diocese, and who is and has been for many years resident therein.

PRIORITIES UNDER REGISTRY ACT.

Some criticism has been recently offered in the pages of our contemporary, the *Canadian Law Times*, on the cases of *Brown* v. *McLean*, 18 Ont. 533, and *Abell* v. *Morrison*, 19 Ont. 669. The reasoning upon which these decisions are based is considered to be inconclusive, and it is suggested that it is inconsistent with the current of previous authorities.

It can, however, hardly be denied that the decisions in both these cases effectuated substantial justice. Even the critic we refer to does not venture to suggest that the contrary is the case; so that even if the reasons assigned for the judgments are in anywise defective, which we do not admit, still one would naturally desire to see the principle which they establish maintained, for the very plain and simple reason that the very object of all law, whether statutory or judicial, should be the effectuating of substantial justice; for whenever the construction of statutes or judicial decisions leads to an unjust conclusion or result, we feel that in that point the law has failed to answer the purpose for which it was intended.

In the construction of such acts as the Registry Act, we think the courts have been careful in the past to construe them so as to give full effect to their provisions for the protection of all persons entering into transactions relying upon the accuracy of the state of facts disclosed by the registry books; and the cases referred to will be found to be no infringement of this fundamental and salutary principle. But it is quite another matter to construe the Registry Act so as to make it the instrument of injustice, by giving a registered instrument thereunder a priority never contemplated when the instrument was registered, and which was never bargained for nor agreed to be given; and for which priority no valuable consideration has ever been paid; and which has the effect of doing an injustice to some other party. It is not to be wondered at, therefore, if the courts are astute to find reasons to prevent such a result.

Apart from, and in addition to, the reasons assigned by the courts for the decisions in *Brown* v. *McLean* and *Abell* v. *Morrison*, we venture to submit that there is a very plain and intelligible principle upon which those cases may be supported, and that is the well-known principle of resulting trusts.

In *Brown* v. *McLean*, the contest was between the plaintiff, who had advanced money to the owner of real estate to pay off existing mortgages thereon, and the defendant, an execution creditor of the mortgagor. The mortgages were paid off and discharged, and a new mortgage given to the plaintiff to secure the advance. Prior to the discharge of the mortgages, the defendant had placed his execution in the sheriff's hands against the lands of the mortgagor, and he claimed that by virtue of the discharge of the prior mortgages he had acquired priority over the plaintiff; and Street, J., as we think, very properly held that he had not. We must remember that an execution creditor's rights in his debtor's lands are strictly limited (apart from any question of fraudulent transfer) to the rights of the debtor himself in those lands. If his debtor is a mere trustee, the creditor cannot sell the trust estate to pay the debtor's private debt, even though the debtor appear to be the ostensible owner on the registry books. In short, apart from the operation of the Registry Act, an execution creditor cannot sell any other than the estate of his debtor which is exigible, having regard to the nature of the creditor's claim: (see *Freed* v. *Orr*, 6 Ont. App. 690). He has no legal or equitable right to be paid out of any other estate which happens to be vested in his debtor. Where the sale is, however, made of land which on the registry appears to be the property of the debtor, and the sale is carried out and the deed to the purchaser registered without notice of any unregistered equitable right, it is possible that the sheriff's vendee might be protected under s. 83 of the Registry Act against the claim of unregistered equitable owners, though we do not think the point has ever been actually determined. See, however, *VanWagner* v. *Findlay*, 14 Gr. 53.

But so far as the rights of the parties in *Brown* v. *McLean* were concerned, they were in no way complicated by the Registry Act. The simple question there was whether the debtor had an estate in the lands in question, free from the prior mortgages, which was liable to the defendant's execution. The principle on which *Hamilton Provident and Loan Society* v. *Gilchrist*, 6 Ont. 434, was decided, we think, clearly shows that he had not. A certificate of discharge of a mortgage, when registered under the Registry Act, operates as a reconveyance to the mortgagor. It has no other or wider effect. Assume that in *Brown* v. *McLean* a reconveyance had actually been made to the mortgagor without disclosing the plaintiff's equity, could it for a moment be successfully contended that the mortgagor could have held it, as against the plaintiff who had advanced the money? We think not. Equity would hold that there was a resulting trust for the latter, and that the mortgagor was his trustee of the estate reconveyed; therefore, by the discharge of the prior mortgages the execution debtor himself acquired no beneficial interest in the property free from those mortgages, and, therefore, the estate which became revested in him by the registration of the discharges, could not be exigible under executions against him.

In *Hamilton Provident and Loan Society* v. *Gilchrist*, no doubt the element of fraud existed; but as against competing execution creditors who were in no way affected by the fraud, it was held that the plaintiffs' equitable right to be regarded as the mortgagees of the land in question was sufficient to oust the right of the

execution creditors, notwithstanding that on the face of deeds the debtor appeared to be the ostensible owner of the property.

In *Russell* v. *Russell*, 28 Gr. 419, the plaintiff, claiming title under an unregistered deed, was held entitled to an injunction to restrain a sale, by an execution creditor of her husband, of the interest which her husband would have had in the land in question but for such deed; and on page 421 we find Spragge, C., expressly denying that an execution creditor stands upon the same footing as a purchaser for value without notice who has registered before a prior purchaser for value, founding his conclusion on this point on *Beavan* v. *Oxford*, 6 D.M. & G. 507, 517; and we believe this point has never been seriously questioned.

For the reasons we have given, therefore, in addition to those relied on by the learned Judge, we do not think there can be very much doubt that *Brown* v. *McLean* was well decided.

Abell v. *Morrison*, 19 Ont. 669, stands in a somewhat different position, but may, we think, be supported on similar grounds. In that case the plaintiff sold a machine to the husband of Margaret Morrison, and she gave him a lien on her land for the price, which lien was duly registered. At that time there were two prior mortgages on the property. The defendant bought the property of Margaret, and not actually knowing of the plaintiff's lien, paid off the prior mortgages out of the purchase money and had certificates of their discharge registered. The plaintiff claimed that the result of this transaction was to give his lien priority over the defendant. The defendant claimed that he was entitled to stand in the place of the prior mortgagees for the amount he had paid them; and the court so held. It is apparent that the plaintiff did not acquire or contract for his lien on the faith of the property being free from the prior mortgages; but on the contrary, with full notice of there being subsisting charges. His position is in no wise damnified or made, by the judgment of the court, any worse than that which he actually contracted for.

Apart from the Registry Act, is there any ground for saying that the plaintiff's equity is not as the court has declared it? This point appears too plain to need any argument.

Margaret Morrison could not have set up the reconveyance from the mortgagees to her as against the defendant; she was merely his trustee of the estate so reconveyed. Though appearing on the registry books to be grantee, she was not really beneficially entitled to the estate reconveyed. The whole question, therefore, turns on the point that the reconveyance was so made as not to disclose the defendant's interest—but the plaintiff was in no wise prejudiced by the omission. Is there anything in the Registry Act which makes the disclosure of his interest imperative in the circumstances of the case, or which renders the omission fatal to his equitable right? A careful consideration of the Act will, we believe, show that there is nothing. Section 76 it will be observed, makes void unregistered conveyances as against "subsequent" purchasers or mortgagees. How can it be said that Abell was a subsequent mortgagee or purchaser to the defendant? He had already bargained for and obtained his lien before the defendant's equity accrued, and, therefore, that section cannot help him. And the reason of the

wording of the Act appears to be perfectly obvious, viz., that its object is to protect persons acquiring interests on the faith of the facts as disclosed on the registry books. If after the defendant had procured the discharge of the mortgages, and while the absolute title appeared to be vested in Margaret, the plaintiff had contracted for his lien, then he would have been a "subsequent" purchaser and the section would have applied; but having obtained his lien before the mortgages were discharged, and not having in any way contracted, or altered his position, on the faith that they were discharged, we venture to think it is impossible for him to claim the benefit of section 76. Neither does section 82 help the plaintiff; that section says: "Priority of registration shall prevail unless before the prior registration there has been actual notice of the prior instrument by the party claiming under the prior registration." The defendant's claim was based on the prior mortgages, which, as he claimed, though discharged in form were nevertheless still subsisting in equity, and of course the plaintiff was not in a position to deny notice of them; besides they were registered prior to his own lien and, under this section, if not effectually discharged in equity as encumbrances, this section assisted the defendant and not the plaintiff. The words of section 83 may at first sight appear somewhat more difficult to reconcile with the view we are contending for. The material point of it is as follows: "No equitable lien, charge, or interest affecting land shall be deemed valid in any court in this province as against a registered instrument executed by the same party, his heirs or assigns," etc. It may be asked, who is "the same party" referred to in this section? We think the answer must be the party creating the equitable lien, etc. If so, in the case in point Margaret is not the person who created the defendant's equity, but the mortgagees, who by their discharge reconveyed the property to her, and therefore it appears to us this section does not assist the plaintiff. We do not think that there are any other sections in the Registry Act material to the discussion, and apart from the Registry Act, as we have said before, the defendant's equity is hardly capable of controversy.

COMMENTS ON CURRENT ENGLISH DECISIONS.

The Law Reports for February comprise (1891) 1 Q.B., pp. 141-318; (1891) 1 P., pp. 9-128; (1891) 1 Ch., pp. 65-201.

CRIMINAL LAW—EXTRADITION—OFFENCE OF A POLITICAL CHARACTER—EXTRADITION ACT, 1870 (33 & 34 VICT., C. 52), S. 3 (1)—JURISDICTION TO REVIEW DECISION OF MAGISTRATE.

In re Castioni, (1891), 1 Q.B. 149, is a decision of a Divisional Court (Denman, Hawkins, and Stephen, JJ.) on a motion for a *habeas corpus*, in order to review the decision of a magistrate committing a prisoner for extradition. The question was, whether the offence with which the prisoner was charged was an offence of "a political character." It appeared that a number of citizens of one of the Swiss Cantons, being dissatisfied with the government, rose against the government, took possession of the arsenal, and provided themselves with arms; attacked and broke open the municipal palace, seized the members of the government, and established a provisional government. On entering the municipal

palace, the prisoner, who was armed with a revolver, shot and killed a member of the government. The prisoner escaped to England. The insurrection having been suppressed by the Federal Government, the application was made by that government for the extradition of the prisoner on the charge of murder. The Extradition Act, 1870 (33 & 34 Vict., c. 52), s. 3 (1), provides that "a fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character." The magistrate committed the prisoner for extradition, on the ground that the offence was not of a political character. The prisoner then moved for a *habeas corpus*. The Divisional Court was unanimously of opinion that the true meaning of the expression "of a political character" was correctly stated in Stephen's History of the Criminal Law, Vol. ii. p. 17, and that the offence in question was incidental to and formed part of a political disturbance, and therefore was an offence "of a political character," and the prisoner was consequently ordered to be discharged from custody. The Court also ruled that the decision of the magistrate, that the offence was not "of a political character," might properly be reviewed by the Court on a motion for *habeas corpus*.

PRINCIPAL AND AGENT—BRIBE PAID TO AGENT BY PERSON CONTRACTING WITH PRINCIPAL—REMEDY OF PRINCIPAL AGAINST AGENT AND THIRD PARTY

The Mayor of Salford v. *Lever* (1891), 1 Q.B. 168, is an appeal from the decision of the Divisional Court, 25 Q.B.D. 363, noted *ante* vol. xxvi., p. 483. It will be remembered that the action was brought against the defendants to recover from them the amount of certain bribes which they had paid to the plaintiffs' agent to induce him to enter into contracts on behalf of his principals for the supply of goods to them, and the amount of which bribes were fraudulently added to the price charged to the plaintiffs for the goods. Similar frauds had been practised by other parties against the plaintiffs in connivance with the agent. On the discovery of the frauds, the plaintiffs entered into an agreement with the agent to assist them by giving the necessary information and evidence to enable them to bring actions against the contractors (including the defendant) for the recovery of damages sustained by the plaintiffs, and the agent guaranteed that the damages recovered in such actions would amount to a specified sum, and by way of securing the guaranty the agent deposited in a bank securities to the value of the sum guaranteed; and it was agreed that any sums recovered in the actions should be accepted by the plaintiffs in part satisfaction of the agent's guaranty, and that upon the receipt of the full amount guaranteed the securities deposited should be returned to the agent, and he should get a complete discharge. This arrangement was carried out by the agent; and the defendant contended that the wrong complained of was a joint tort, and that the agreement between the plaintiffs and the agent operated as a discharge of the agent, one of the joint tortfeasors, and that consequently the defendant was also discharged. The Divisional Court held that the defendant was not discharged, and the Court of Appeal (Lord Esher, M.R., and Lindley and Lopes, L.JJ.) now affirm that decision. Lord Esher, M.R., points out that the effect of the agreement of

understanding with the agent was not to release him but merely to suspend the right of action against him, and at any rate was not binding on the plaintiff corporation because it was not under seal, and was besides *ultra vires*. All the members of the Court were of opinion that the cause of action of the plaintiffs against the agent and the defendant respectively were distinct and not dependent on each other, and that the plaintiffs had a right to recover from one the bribe he had received, and from the other the increased price, and that the recovery in one action would be no defence to the other.

INFANT—CUSTODY OF ILLEGITIMATE INFANT—PRACTICE—APPEAL FROM DECISION OF DIVISIONAL COURT ON APPLICATION AS TO CUSTODY OF INFANT—HABEAS CORPUS.

The Queen v. *Barnardo (Jones'* case) (1891), 1 Q.B. 194, is a case in which the mother of an illegitimate child of ten years old claimed the right to remove it from the care of Dr. Barnardo, the well-known philanthropist, in order to place the child in a Roman Catholic institution. The child had been placed with the doctor with the mother's consent, and had been an inmate of one of his institutions for eighteen months when, instigated by some zealous Roman Catholics, she desired that the child should be removed from the defendant's custody and placed with Roman Catholics. The application was made to a Divisional Court on behalf of the mother for a *habeas corpus* to bring up the body of the infant. The application was strenuously resisted by the defendant, principally on the ground that the mother was a person of bad character and not fit to have the custody of the child herself, and therefore not fit, as the defendant contended, to have any voice in saying whether any other person should have the custody of it. The Divisional Court (Lord Coleridge, C.J., and Mathew, J.) granted the application, and appointed a guardian for the child, nominated by the mother, holding that in the case of an illegitimate child the Court will in a proper case give the same effect to the mother's wishes in respect of the care, maintenance and education of the child, as it gives to the wishes of a father of a legitimate child in these respects. The Court of Appeal (Lord Esher, M.R., Lindley and Lopes, L.JJ.), though not agreeing with the strictures made on the defendant's conduct in the court below, affirmed the decision; and in doing so, decided that an appeal would lie to the Court of Appeal from such an order, and that the recent decision of the House of Lords in *Cox* v. *Hakes*, 15 App. Cas. 506, did not apply.

PRACTICE—GARNISHEE ORDER—AFFIDAVIT ON INFORMATION AND BELIEF—ALLEGATION AS TO DEBT DUE BY GARNISHEE—INQUIRY AS TO OTHER DEBTS—ORD. XIV., R. 1 (ONT. RULE 935).

In *De Pass* v. *The Capital and Industries Corporation* (1891), 1 Q.B. 216, the Court of Appeal (Lord Esher, M.R., Lopes and Kay, L.JJ.) came to a conclusion on a point of practice which is at variance with cases in our courts (see Robinson & Joseph's Digest, pp. 273-4), *viz.*, that on an application to attach a debt an affidavit on information and belief that a specific debt is due from the garnishee is sufficient to found the application; the Court also decided that it is not an answer to the application based on such an affidavit for the garnishee merely to deny that the specific debt is due, but that he may be required to depose that

he does not owe any debt to the judgment debtor, and on his refusal to do so an order absolute may rightly be made. The order of the Divisional Court (Day and Lawrence, JJ.), setting aside the attaching order made by a Master, was therefore reversed.

PRACTICE—COUNTER-CLAIM—JUDGMENT ON COUNTER-CLAIM, MOTION FOR—ORD XXVII., R. 11 (ONT. RULE 727).

Jones v. *Macaulay* (1891), 1 Q.B. 221, settles a point of practice which is not very clear upon the Rules. The question being, where to a counter-claim for a debt, no defence is pleaded by the plaintiff, how is the defendant to obtain judgment on the counter-claim? The defendant claimed the right to sign judgment as of course for the amount claimed, but the Court of Appeal (Lord Esher, M.R., Lopes and Kay, L.JJ.), adopting the practice followed in *Higgins* v. *Scott*, 21 Q.B.D. 10, held that the only way a judgment can be obtained by a defendant on a counter-claim, or default of defence, is by motion for a judgment. Lopes, L.J., comments on the inconvenience and injustice which might result if a defendant could sign judgment as of course and issue execution against the plaintiff before the latter's claim against him had been disposed of.

PRINCIPAL AND SURETY—DISCHARGE OF SURETY BY GIVING TIME TO PRINCIPAL—SUBSEQUENT COVENANT BY PRINCIPAL TO PAY DEBT AT A LATER TIME.

In *Bolton* v. *Buckenham* (1891), 1 Q.B. 278, the defendant, who was a surety, claimed to have been discharged from liability by reason of time having been given to his principal by a subsequent agreement, to which he was no party. The circumstances of the case were as follows: The defendant was surety for the payment by a mortgagor of a mortgage debt of £450 on 4th March, 1858, under a covenant made September 4th, 1857. By a deed made December 15th, 1884, this mortgage, which was made to one Cooper, was assigned to the plaintiff, together with various other mortgages on other properties, and together with the benefit of all covenants therein contained, he advancing £3,200 to take them up; and the mortgagor executed a new mortgage to him, subject to a proviso for redemption on repayment of (the amount advanced) £3,200 and interest thereon, on January 19th, 1885, and which sum the mortgagor covenanted to pay. Day, J., who tried the action, held that the effect of the transaction was to give time to the mortgagor, and therefore the surety was discharged; and he doubted whether the assignment of the benefit of all covenants applied to the surety's covenant for payment, and thought it was confined to "collateral covenants," *e.g.*, for further assurance, etc. The Court of Appeal (Lord Esher, M.R., and Lopes and Kay, L.JJ.), without discussing the latter question, affirmed the decision of Day, J., on the ground that the taking of the mortgagor's covenant in December, 1884, necessarily involved by implication that the lender of the money was not to sue for it before the day named in the covenant for payment; and it made no difference that the benefit of the first mortgage was expressly reserved by the second, because the right to sue under the first mortgage was inconsistent with the implied undertaking not to sue contained in the second.

SHIP—BILL OF LADING—INCORPORATION OF CONDITIONS OF CHARTER PARTY INTO BILL OF LADING.

In *Serraino* v. *Campbell* (1891), 1 Q.B. 283, the Court of Appeal (Lord Esher, M.R., Lopes and Kay, L.JJ.) affirmed the decision of Huddleston, B. (25 Q.B.D. 501), which we noted *ante* vol. xxvi., p. 583, the question, it may be remembered, being whether, where a bill of lading contained the words, "they (the consignees) paying freight for the said goods, *and all other conditions as per charter*," these latter words in italics had the effect of incorporating a clause in the charter party exempting the ship-owners from liability for loss occasioned by the stranding of the ship through the negligence of the master or crew, which was contained in the charter-party. The Court of Appeal were agreed that the words incorporated only those stipulations in the charter-party which were to be performed by the receiver of the goods, and did not include conditions which would exempt the charterer from liability for negligence. As Kay, L.J., puts it, the expression was equivalent to "they paying freight, and performing or observing all other conditions."

PRACTICE—SERVICE OF WRIT—ACTION AGAINST FOREIGN FIRM—SERVICE ON PERSON TEMPORARILY WITHIN THE JURISDICTION "AS PARTNER"—ORD. IX., R 6 (ONT. RULE 265).

Western National Bank of New York v. *Perez* (1891), 1 Q.B. 304, shows that the procedure prescribed by the Rules for the service of writs on defendants sued by the name of a firm is not in as clear or satisfactory a condition as it ought to be. We have had two or three judicial attempts to elucidate the Rules on this point lately, but the difficulty and confusion seem to become "worse confounded." In the present case the writ was issued against a firm which carried on business abroad, and all the members of the defendant firm were domiciled and resident abroad. The writ was served on a person not named in the writ, who was temporarily in England, whom the plaintiffs alleged to be a partner, and who was expressly served "as partner." He entered a conditional appearance, which was struck out as irregular. He then entered an unconditional appearance, and moved to set aside the service on the ground that he was not a partner of the defendant firm. A Divisional Court (Pollock, B., and Day, J.) refused to set aside the service. On the case coming before the Court of Appeal (Lord Esher, M.R., and Lindley and Bowen, L.JJ.) that Court had some difficulty in deciding what ought be done. Lord Esher thought that the service on the appellant was good service on the firm; but Lindley and Bowen, L.JJ., were of opinion that, on the authority of *Russell* v. *Cambefort*, 23 Q.B.D. 526 (see *ante* vol. 26, p. 8), the defendant firm, being a foreign firm, the service was not good; but that if the appellant had been individually named in the writ, the service on him would have been good, and that the omission to name him in the writ was an irregularity which the defendant had waived by entering an appearance. The order they made, therefore, was that if the plaintiffs amended the writ by naming the appellant and the other members of the firm individually as defendants, the service was to stand as good service on the appellant (not on the firm); but if they neglected to amend as stated, then the service was set aside with costs. Lindley and Bowen, L.JJ., were of the opinion that the effect of *Russell* v. *Cambe-*

fort is to overrule *O'Neil* v. *Clason*, 46 L.J.Q.B. 191, and *Pollexfen* v. *Sibson*, 16 Q.B.D. 792; but Lord Esher, M.R., did not agree to that view. According to the majority of the Court, therefore, in the case of suing a foreign firm whose members are resident abroad, the proper course is not to sue them by the firm name, but to sue and serve the several individuals who compose the firm, and not attempt to apply to such a firm the Rules which enable one partner or a manager to be served on behalf of the firm.

The cases in this number of the Probate Division do not call for any notice. We may, however, observe that if any of our readers take any interest in the ritual disputes which have of late been rife in the Church of England, they will find 110 pages of this number devoted to the recent case of *Read* v. *The Bishop of Lincoln*, in which the careful and exhaustive judgment of the Archbishop of Canterbury at least shows the difficulties and perplexities in which the subject is involved.

Notes on Exchanges and Legal Scrap Book.

SAMUEL JOHNSON ON LAWYERS.—"Sir," said Dr. Johnson to Sir William Forbes, "a lawyer has no business with the justice or injustice of the cause which he undertakes, unless his client asks his opinion, and then he is bound to give it honestly; the justice or injustice of the cause is to be decided by the Judge. Consider, sir, what is the purpose of the courts of justice,—it is that every man may have his cause fairly tried by men appointed to try causes. A lawyer is not to tell what he knows to be a lie, he is not to produce what he knows to be a false deed; but he is not to usurp the province of the jury and of the Judge, and determine what shall be the effect of evidence, what shall be the result of legal argument. If, by a superiority of attention, of knowledge, of skill, and a better method of communication, a lawyer hath the advantage of his adversary, it is an advantage to which he is entitled. There must always be some advantage on one side or the other, and it is better that that advantage should be by talents than by chance."—*Boswell's Johnson.*

CHURCH BELLS.—The *Troy Times* is evidently sensitive about one of the pet industries of that lively village when it says: "An English court has just decided that the chime of bells in the village of Deptford must not be sounded, because the noise is offensive to the majority of the property-owners of the vicinity. The souls of property-holders who could object to the delightful melody of church chimes must indeed be devoid of poetical instinct. Could this circumstance be related of any but stolid Britons?" Now, if Britons were really stolid, they would not be annoyed by the ringing of chimes. But the ringing of bells has been frequently forbidden by the courts, not only in England, but in this country, as in Pennsylvania (*Harrison* v. *St. Mark's Church*, Philadelphia Common

Pleas, 15 Alb. L.J. 248), and in Massachusetts (*Davis* v. *Sawyer*, 133 Mass. 289; S.C., 43 Am. Rep. 519), and in Missouri (*Leete* v. *Pilgrim Congregational Church*, 14 Mo. App. 590). Even if the *Times*' presses were so noisy as to be a nuisance they might be restrained by injunction. We can hardly conceive a more annoying nuisance than to be aroused from slumber by church or factory bells at the hour of five a.m. Those "sweet bells" would always sound to us "jangled, out of tune, and harsh." We should prefer a "still alarm." But courts will generally regulate rather than forbid the ringing of bells. In a recent Canadian case the court prohibited whistling for cabs at a London boxing-club between midnight and seven a.m.—*Albany Law Journal.*

How to Apply for Shares.—A curious story is going the round of the press to the effect that a speculative agent of the name of B. made application for some shares in an exploration company floated not long ago. The form required the applicant to give his name, address, and "description." Mr. B., it seems, took this instruction very seriously, and being of a naturally suspicious disposition, and chary of seeking the advice of others, this is what the astonished directors found on his application form immediately following the space for name and address: "Description—height, 5 ft. 4½ in.; weight, 9st. 11lb.; complexion fair, hair light; features small and sharp; thin beard, short, no moustache; teeth sound, with one exception in front; marks, none in particular; married, second time; family, three children by first wife, no issue by second; age thirty-six; occupation, none at present, lately in Government service, expect position in P——— when railway opens. Any other particulars please apply Rev.———. P.S.—Forgot to say have been out here seventeen years, understand the native character, and cattle, as Rev. Mr. ——— will bear out." This very literal gentleman handed in a draft for full amount of shares applied for.—*The Law Journal.*

Innkeepers and Guests.—What constitutes the relationship between innkeeper and guest? The reported cases which throw light on this point are so few in number as to give some value to the decision of the Court of Appeal last week in *Medawar* v. *The Grand Hotel Company*, in which this question was discussed. *York* v. *Grindstone*, 1 Salk. 388; 2 Ld. Raym. 388, *sub nom. Yorke* v. *Greenhaugh*, was a replevin of a horse, which the plaintiff, a traveller, had left at the defendant's inn, and which the defendant had detained for its keep. In this case Chief Justice Holt doubted whether the plaintiff was a guest, because he never went into the inn himself, but only left his horse there, which the innkeeper was not obliged to receive, and, if he did, did so as a livery stable keeper. Three other judges, however, held that the plaintiff was a guest by leaving his horse as much as if he had stayed himself, "because the horse must be fed, by which the innkeeper has gain; otherwise, if he had left a trunk or a dead thing." In *Bennett* v. *Mellor*, 5 T.R. 273, in 1793, an action for the value of goods stolen

from an inn, the plaintiff's servant had taken the goods in question to market, and not being able to dispose of them went with them to the defendant's inn, and asked the defendant's wife if he could leave the goods there until the next market-day. She refused, and the plaintiff's servant then sat down in the inn and had some liquor, putting the goods on the floor behind him. When he got up, after sitting there a little while, the goods were missing. A verdict was, on these facts, found for the plaintiff, and in reporting the case upon a motion for a new trial, Mr. Justice Buller observed that he was of opinion that, if the defendant's wife had accepted the charge of the goods upon the special request made to her, he should have considered her as a special bailee, and not answerable, having been guilty of no actual negligence; but that not being the case, he considered it to be the common case of goods brought into an inn by a guest and stolen from thence, in which case the innkeeper was liable to make good the loss in accordance with *Calye's Case*, 1 Sm. L.C. 8th edit. p. 140. This view was confirmed by the Court of King's Bench. In *Farnworth* v. *Packwood*, 1 Stark. 249; and *Burgess* v. *Clements*, 1 Stark. 251, where private rooms had been taken in an inn by travellers for the exposure and sale of goods, and it was held that a guest who takes exclusive possession of a room for such a purpose, and not *animo hospitandi*, discharges a landlord from his common law liability. In *Jones* v. *Tyler*, 3 Law J. Rep. K.B. 166; 1 A. & E. 522, an innkeeper was asked on a fair-day by a traveller driving a gig whether he had room for the horse, and he thereupon put the horse into his stable, received the traveller with some goods into the inn, and placed the gig in the street, whence it was stolen, and it was held that, as he had the benefit of the guest and provided provender for the horse, he was liable. In *Strauss* v. *The County Hotel and Wine Company*, 53 Law J. Rep. Q.B. 25, the plaintiff arrived at the defendants' hotel with the intention of spending the night there, and delivered his luggage to one of the hotel porters, but after reading a telegram decided not to spend the night there, and went into the coffee-room to order refreshments. Being unable to obtain what he required, he went to the station refreshment-room, which was under the same management as the hotel, and connected with it by a covered passage. Shortly afterwards he went out, telling the porter to lock up his luggage until the time for his train to start, and it was locked up in a room near the refreshment-room, but on his arrival on the platform a part of it was missing. In an action against the proprietors of the hotel, the plaintiff was non-suited upon the ground that there was no evidence that he ever became a guest of the defendants at their inn, and upon argument the non-suit was upheld, Lord Chief Justice Coleridge saying that he could find no ground for saying that the defendant was in any sense a guest within the defendants' inn at the time when his luggage was lost. In *Medawar* v. *The Grand Hotel Company*, the case recently before the Court of Appeal, the plaintiff went to the defendants' hotel early in the morning, having with him a portmanteau, hat-box, and dressing-bag. He was told that the hotel was full, but that there was a room engaged by persons who had not arrived which he could use for washing and dressing, and he was shown up, and his luggage was taken to this room. He there opened his dress-

ing-bag and took out a stand containing, amongst other things, a jewelry case, and having washed and dressed went down to breakfast, leaving the door of the room unlocked and the stand on the dressing-table. After breakfasting, he paid for his breakfast, went out, and did not return till late at night. On asking for his room he was told that he had none, and it appeared that the persons who had engaged the room had arrived, and that on their arrival one of the defendants' servants had removed the plaintiff's luggage into the corridor, leaving the stand, as it was, out of the dressing-bag. On the luggage being brought to a room which had been found for him, the plaintiff found that some of the jewelry was missing, and brought an action against the hotel company to recover its value. The action was tried before Mr. Justice Smith, without a jury, who held that, whatever the plaintiff's position was during the short period of time during which he was dressing and having breakfast, he was not a guest after he left in the morning, and on that ground and on the ground that the plaintiff had not shown any negligence on the part of the defendants which would make them liable as bailees gave judgment in their favor. This judgment has now been reversed by the Court of Appeal. The court were much pressed with the argument that the use of the room by the plaintiff for the purpose of dressing was under the terms of a special contract, but refused to entertain this proposition. In their opinion the proper inference from the facts, construed by the aid of ordinary knowledge of the world, was that the room was given to the plaintiff, subject to the notice that if the expected guests arrived he must quit it, and that he remained a guest until their arrival, and that the innkeeper continued to be the guardian of the guest's property until it was duly delivered to him. This being so, the court held that the hotel company must, in order to escape liability on their part to the extent of the £30, to which it is limited by 26 & 27 Vict., c. 41, show that the goods were lost by the plaintiff's negligence in leaving them open to view in an unlocked room, and that as they failed to prove this, since it was equally likely that the theft took place after the goods were, by the negligence of their own servants, placed in the corridor, the plaintiff was entitled to judgment for £30: *Cashill* v. *Wright*, 6 E. & B. 891, in 1856; *Morgan* v. *Raney*, 30 Law J. Rep. Exch. 131; *Oppenheim* v. *The White Lion Hotel Company*, 40 Law J. Rep. C.P. 231. As, however, the claim of the plaintiff exceeded £30, the court held that, as to the excess, the onus was by 26 & 27 Vict., c, 41, placed upon the plaintiff to prove, in order to entitle him to recover, that the loss occurred by the defendants' negligence, and as it was equally likely that the goods were stolen in the room in consequence of his own negligence, as in the corridor in consequence of the defendants' negligence, he had failed to discharge the burden of proof, and was not entitled to recover more than £30. A more thoroughly illustrative case of the law upon this point it would have been difficult to devise. —*The Law Journal.*

PERSONAL TRADE NAMES.—The law is well settled that every trader has a perfect right to use his own name when carrying on a business, provided that there are no circumstances of fraud attending such user. Of course, it cannot be

said that anybody can always use his own name as a description of goods which he sells, whatever may be the consequences of it, or whatever may be the motive of doing it. It is obvious, however, that there can be no dishonesty, even in the strictest sense, in a man using his own name for the purposes of his trade, or in stating that he is carrying on business exactly as he is carrying it on. At the same time, he must not employ any artifice to attract to himself the business of a rival trader of the same name, and he must not attempt to pass off his own goods as those of the other trader. To debar a man from trading honestly under his own name would be manifestly unjust. Indeed, it would lead to most serious consequences if people having acquired a business reputation with a name could prevent any man of the same name from carrying on the same business. But where a person sells goods under a particular name, and another person, not having that name, adopts it, the Court will presume that he does so in order to represent the goods sold by himself as the goods of the person whose name he uses. As was said by Lord Langdale in the leading case of *Croft* v. *Day*, 7 Beav. 84, 88; Tud. Merc. Law, 482: "No man has a right to sell his own goods as the goods of another . . . . no man has a right to dress himself in colors, or adopt and bear symbols, to which he has no peculiar or exclusive right, and thereby personate another person, for the purpose of inducing the public to suppose, either he is that other person, or that he is connected with and selling the manufacture of such other person, while he is really selling his own." The learned Judge went on to observe that the right which any person might have to the protection of the Court did not depend upon any exclusive right which he might be supposed to have to a particular name or to a particular form of words. "His right is to be protected against fraud, and fraud may be practised against him by means of a name, though the person practising it may have a perfect right to use that name, provided he does not accompany the use of it with such other circumstances as to effect a fraud upon others." It is a question of evidence in each case whether there is a false representation or not. However, according to the decision of the same learned Judge in *Clark* v. *Freeman*, 11 Beav. 112, unless a person would be damaged in his business by the adoption of his name by another person for any particular purpose, he has no ground of complaint. That case does not appear to have ever been overruled, but it came as a surprise to the profession, and can hardly be accepted as sound law. Nevertheless, on the authority of that decision, Mr. Justice Kay, in *Williams* v. *Hodge & Co.*, 84 L. T. 135, held that he could not grant an interlocutory injunction where the name of a medical man had been wrongfully coupled with a certain surgical instrument by the manufacturer thereof. His lordship expressed some doubt as to the correctness of Lord Langdale's decision, observing that, if the point before him had been a *res nova*, he would have decided differently. In *Re Riviere's Trade-mark*, 53 Law J. Rep. Chanc. 578; L. R. 26 Chanc. Div. 48, Lord Langdale's decision in *Clark* v. *Freeman* was severely criticised, Lord Selborne referring to it as a case that "had seldom been cited but to be disapproved." Another somewhat unsatisfactory case is that of *Hendriks* v. *Montagu*, 50 Law J. Rep. Chanc. 456; L. R. 17 Chanc. Div. 638.

From the judgment of the Court of Appeal in that case, it would seem to be sufficient to entitle the plaintiff to an injunction if, without any intention to deceive, the use of his name by the defendant is, in fact, calculated to deceive; and that this rule applies whether the name used is a mere fancy name or the defendant's own name, or the name which would be naturally used to describe his firm. The effect of that authority was, however, explained in the very recent case of *Turton* v. *Turton*, to which we shall presently refer.

The principles governing this branch of the law are, perhaps, best attainable from the well known case of *Burgess* v. *Burgess*, 22 Law J. Rep. Chanc. 675; 3 De G. M. & G. 896, where they are very clearly laid down. The "epigrammatic judgment," as it has frequently been termed, there given by Lord Justice Knight-Bruce is one that is always referred to in cases of this description, although the observations of Lord Justice Turner are generally regarded as furnishing a more accurate statement of the law. A somewhat similar authority is the decision of the Court of Appeal in *Massam* v. *Thorley's Cattle Food Company*, 46 Law J. Rep. Chanc. 707; L. R. 14 Chanc. Div. 748. The long line of decisions on this subject has been considerably added to during the past few years; and as illustrating how the well-established principles are applied, an examination of some of the more recent cases may not be without interest to our readers.

Taking the reported cases in their chronological order, *Franke* v. *Chappell*, 57 L. T. Rep. (N.S.) 141, decided by Mr. Justice Chitty in March, 1887, has first to be mentioned. There the plaintiff had originated a series of concerts, conducted by Dr. Richter, under the name of the "Richter Concerts." Mr. Justice Chitty refused to grant an injunction to restrain the defendant from using that name and advertising a series of "Richter Concerts," Dr. Richter having transferred his services to the defendant. The learned Judge was of opinion that it required a strong case to be made out to sustain a claim to the exclusive use of another person's name as a trade name; that no such case had been established in the present instance; and that there was no ground for saying that the term "Richter Concerts" had become dissociated from Dr. Richter himself, who was at liberty to carry his services to any market he chose.

Two further cases decided in 1887 were *The Marquis of Londonderry* v. *Russell*, 3 Times Rep. 360, and *Goodfellow* v. *Prince*, 56 Law J. Rep. Chanc. 545; L. R. 35 Chanc. Div. 360. *Bumsted* v. *The General Reversionary Company (Lim.)*, 4 Times Rep. 621, which came before Mr. Justice Stirling, was another case where the plaintiffs failed to obtain relief. His Lordship refused to grant an interlocutory injunction to restrain the defendant company, whose registered office was in Liverpool, from carrying on business under the style of "The General Reversionary Company (Lim.)," the plaintiffs being the General Reversionary and Investment Company, carrying on business in London. The learned Judge observed that it was not sufficient to show that there was a similarity of names, but it must also be shown that there was a reasonable probability that the use of the name would result in the defendants appropriating a material part of the plaintiffs' business, as to which, upon the evidence, his Lordship was not satisfied would be the case. But in *The Birmingham Vinegar*

Brewery Company v. *The Liverpool Vinegar Company and Holbrook*, Law J. N. C. 99, 1888; 4 Times Rep. 613; W. N. 1888, p. 139, an interlocutory injunction was granted by Mr. Justice North, his lordship being of opinion that what the defendants had done amounted to fraud. The defendant Holbrook had authorised the plaintiff company to sell sauces of their manufacture under his name, he being their traveller. On his being discharged from their employment he assigned to the defendant company the right to use his name in connection with sauces manufactured by them, and this Mr. Justice North held not to be a legitimate proceeding. The learned Judge considered that, even if Holbrook were selling his own goods under his own name, it would be his duty, under the circumstances, to take care that in so doing he was not passing off his goods as those of the plaintiff company, which had become well known and acquired a reputation in the market under Holbrook's name. So, in *Holt* v. *Smith*, 4 Times Rep. 329, Mr. Justice Kay also granted an interlocutory injunction.

The reported cases in 1889 were two in number, that of *Warner* v. *Warner*, 5 Times Rep. 327, 359, being the earlier. There the Court of Appeal agreed with Mr. Justice Stirling in thinking that an interlocutory injunction ought to be granted to restrain the defendant, whose name was Warner, from applying to a proprietary medicine which he had purchased, known as "Ashton's great gout and rheumatic cure," the name of "Warner's gout and rheumatic cure," which so closely resembled the preparations sold by the plaintiff Warner under the title "Warner's safe cures" as to be calculated to mislead the public. The defendant also sold medicines as "Warner's cures." The inference which the court drew from the evidence was that the defendant was not really honestly advertising his medicines under his own name, but was doing it in such a way as to acquire a portion of the reputation previously acquired by the plaintiff. The other case in 1889, *Turton* v. *Turton*, 58 Law J. Rep. Chanc. 677; L.R. 42 Chanc.Div. 128, is a most important one, mainly because of the clear and comprehensive judgments of the learned Judges of the Court of Appeal.

The plaintiffs in that case had for many years carried on business under the name of "Thomas Turton & Sons." The defendant, John Turton, had for many years carried on a similar business in the same town under the name, first of "John Turton," and afterwards of "John Turton & Co." He then took his sons into partnership and traded as "John Turton & Sons." There was no evidence of imitation of trade-marks, or attempts to deceive the public. It was held by the Court of Appeal, reversing the decision of Mr. Justice North, that, although the public might occasionally be misled by the similarity of names, the defendants could not be restrained from using the name of "John Turton & Sons," which was an accurate and strictly true description of their firm. Mr. Justice North had gone to the length of granting an injunction against the defendants, although his lordship was quite satisfied that they had acted honestly, and that, independently of the use of the name of their firm, which they had used in the honest belief that they were entitled to do so, they had made no attempt to pass off their goods as those of the plaintiffs. The learned Judge considered, however, that he was bound to come to the conclusion

which he did by the authority of *Hendriks* v. *Montagu*. He thought that that case showed that it was not necessary for the plaintiffs to prove fraudulent intention on the part of the defendants. Whether or not Mr. Justice North was right in his view of what was laid down in *Hendriks* v. *Montagu*, it was perfectly evident that his decision in *Turton* v. *Turton* could not be allowed to stand. The Court of Appeal did not regard *Hendriks* v. *Montagu* as rendering it incumbent upon Mr. Justice North to decide *Turton* v. *Turton* as he did. Lord Justice Cotton observed that Mr. Justice North had founded his decision on *Hendriks* v. *Montagu* "without considering what was the subject the learned Judges were dealing with in their judgment when they used the expressions on which he relied." Lord Justice Cotton then proceeded to explain the *ratio decidendi* in *Hendriks* v. *Montagu*.

Among the cases relating to trade names decided this year, perhaps the most important is *Tussaud* v. *Tussaud*, 59 Law J. Rep. Chanc. 631; L.R. 44 Chanc. Div. 678. There Mr. Justice Stirling granted an interlocutory injunction to the plaintiff company, Madame Tussaud & Sons (Lim.), proprietors of the famous waxworks exhibition, to restrain the registration of a proposed new company, under the name of "Louis Tussaud (Lim.)," which was promoted by Louis Tussaud, and of which he was to be manager, for the purpose of carrying on a similar business or exhibition. The defendant had never carried on such a business on his own account. "It could not be doubted," said Mr. Justice Stirling, "that the name of Tussaud was well known and of high reputation in connection with waxworks, and that if another exhibition of a similar nature to that of the plaintiff company were to be established in London in the defendant's name the one would 'in the ordinary course of human affairs be likely to be confounded with the other,'" quoting the words of Lord Justice James in *Hendriks* v. *Montagu* (*supra*). It followed, in Mr. Justice Stirling's opinion, from the decisions in the two cases of *Burgess* v. *Burgess* (*ubi sup.*) and *Turton* v. *Turton* (*ubi sup.*), that the defendant, Louis Tussaud, was at perfect liberty to open on his own account and to carry on in his own name an exhibition of waxworks. Further, he might take partners into his business, and carry it on under the name of Louis Tussaud & Co. The learned Judge, without actually deciding the point, also gave it as his opinion that the defendant, having commenced business on his own account, might sell it with the benefit of the goodwill to third parties, who might continue to carry it on under the same name, and transfer the business and goodwill to a joint-stock company registered under the same name as had previously been used in connection with the business. But his lordship conceived it to be clear that the defendant could not confer on another person the right to use the name of "Tussaud" in connection with a business which the defendant had never carried on, and in which the defendant had no interest whatever; and the learned Judge came to the conclusion that the defendant could not confer that right on a company in relation to which he would stand simply in the position of a paid servant.

The above expression of opinion by his lordship bore fruit in a further attempt by the defendant to make use of his name in connection with a wa-

works exhibition, he having entered into a partnership to carry on such an undertaking under the name of "Louis Tussaud's Exhibition." The plaintiff company again attempted to restrain him from so doing, but on this occasion without success, Mr. Justice Stirling holding that what they sought was practically a monopoly of the name of Tussaud in connection with waxworks to which they were not by law entitled.

The subsequent decision of Mr. Justice Kay in *Rendle* v. *J. Edgcumbe, Rendle & Co.* (*Lim.*), 63 L.T. Rep. (N.S.) 94, fortifies the view taken by Mr. Justice Stirling in *Tussaud* v. *Tussaud*; for Mr. Justice Kay held that the defendant, who was not at the time carrying on a certain business, he having assigned all his interest therein to his creditors, had no right to lend his name to a company promoted by him, and of which he was manager, which name, from its being so like one already attached to an established business, would be calculated to deceive.

Sometimes the question raised is whether on the sale of a business carried on under a particular name the purchaser has a right to use that name. Thus, in *Thynne* v. *Shove*, 59 Law J. Rep.Chanc. 509, the plaintiff had sold to the defendant his business premises and the goodwill of the business carried on by him there. The deed by which the sale was effected contained no express assignment of the right to use the plaintiff's name. Mr. Justice Stirling held (distinguishing *Levy* v. *Walker*, 48 Law J. Rep.Chanc. 273; L.R. 10 Chanc. Div. 436) that the defendant had, by virtue of the assignment of the goodwill, the right to use the plaintiff's name in the business, so as to show that the business was the one formerly carried on by him, and not so as to expose him to any liability by holding him out as the owner of the business, or as one of the persons with whom contracts were to be made.

The last case to which we shall refer is that of *Lewis's* v. *Lewis*, 25 L.J. N.C. 111. The plaintiff, who carried on a large retail business in various provincial towns, widely advertised and known as "Lewis's," claimed an injunction to prevent the defendant, whose name was J. M. Lewis, from carrying on a similar business in Preston under the name of "Lewis's." Mr. Justice Kekewich did not consider that the defendant was using his own name of J. M. Lewis in a fair and honest way when he added to it an 's,' preceded by an apostrophe. The learned Judge was of opinion that the object of the defendant was to represent that his business was that of the plaintiff, and thereby to injure him; and accordingly granted a perpetual injunction.

Summing up briefly the results of the various decisions, the following propositions may, we think, be taken as a correct statement of the law relating to personal trade names, as it at present stands. A trader who adopts as his business name that which is an accurate statement of an existing state of facts—*e.g.*, his own name if trading alone, or his own in combination with those of his partners, or a comprehensive description of them—cannot, in the absence of fraud, be restrained from so doing.—*The Law Journal.*

Reviews and Notices of Books.

The County Court Manual, being a collection of the Statutes relating to the Practice, Procedure, and Jurisdiction of the County Courts of Nova Scotia, with notes, etc. By George Bingay, Q.C., of the Nova Scotia Bar. Toronto: Carswell & Co., 1891.

This compilation, while not as useful to us as a similar work on the law in our own Province would be, is still interesting as affording a comparison between the Procedure and Jurisdiction of this Court in each Province. A jury of five men only is required, and if after two hours absence these cannot agree, four of them may render averdict. An appeal lies to this Court from Justices and Magistrates. Ontario, New Brunswick, and English cases are referred to. The paper is fair, and the work, on the whole, well got up.

Correspondence.

To the Editor of THE CANADA LAW JOURNAL:

SIR,—In a recent issue of THE CANADA LAW JOURNAL reference was made to a case reported in 42 Federal Reporter, in which it was held that a telephone company could not maintain a bill for an injunction against the operation of an electric railway to prevent damages caused by the escape of electricity from its rails.

It may be of interest to mention that in the late case of *City and Suburban Telegraph Association* v. *Cincinnati Inclined Plane Railway Co.*, 30 Central Law Journal, 218, the Superior Court of Cincinnati, in March, 1890, arrived at an opposite decision.

Yours, etc., S. G. WOOD.

DIARY FOR MARCH.

1. Sun.....*3rd Sunday in Lent.* St. David.
2. Tues.....General Sessions and County Court Sittings for trial in York.
5. Thur.....York changed to Toronto, 1834.
8. Sun.....*4th Sunday in Lent.*
9. Mon.....Civil Assizes at Toronto.
10. Tues.....Court of Appeal sits. Prince of Wales married, 1863.
13. Fri.....Lord Mansfield born, 1704.
15. Sun.....*5th Sunday in Lent.*
16. Mon.....Chancery Sittings H.C.J. at Toronto.
17. Tues.....St. Patrick's Day.
18. Wed.....Arch. McLean, 8th C.J. of Q.B., 1862. Sir John B. Robinson, C.J., Ct. of Appeal 1862.
19. Thur.....P. M. S. Vankoughnet, 2nd Chancellor of U. C., 1862.
22. Sun. .....*6th Sunday in Lent.* Palm Sunday.
23. Mon.....Sir Geo. Arthur, Lieut.-Governor of Upper Canada, 1838.
26. Thur.....Bank of England incorporated, 1694.
27. Fri.....Good Friday.
28. Sat.....Canada ceded to France, 1632.
29. Sun.....*Easter Sunday.*
30. Mon.....Easter Monday. B.N.A. Act assented to, 1867. Lord Metcalfe, Gov.-General, 1843.
31. Tues.....Slave trade abolished by Britain, 1807

Reports.

ONTARIO.

SECOND DIVISION COURT, COUNTY OF ONTARIO.

[Reported for THE CANADA LAW JOURNAL.]

SMITH ET AL. *v.* A. LAWRENCE AND J. LAWRENCE (Claimant).

R.S.O., c. 124, sec. 2—Fraudulent preference—Lease by a debtor to a creditor—Counsel fee in Division Courts—D. C. Act, secs. 197, 155, and 208.

Neither the leasing in good faith for a fair rent by a debtor to his creditor, nor the subsequent application of the indebtedness of the lessor in part payment of the rent, are transactions which can be impeached under R.S.O., c. 124, sec. 2.

An interpleader, when the sum or value of the goods in dispute is over $100, is a "contested case" within the meaning of sec. 208 of the D. C. Act, and the successful party may have a counsel fee taxed to him, even if sec. 155, s-s. 2, did not expressly extend sec. 208 to contestations of this nature.

[Whitby, January, 15th, 1891.

This was an issue under the 197th section of the D. C. Act, to try whether the monies paid into court by the various garnishees are applicable towards the payment of the various judgment creditors of Albert Lawrence, as against James Lawrence, who claims them under the circumstances set forth in the judgment.

Dow and *McGilvray* for the primary creditors.

D. Ormiston and *J. E. Farewell*, Q.C., for the claimant.

DARTNELL, JJ. The primary debtor, Albert Lawrence, and the claimant, James Lawrence, are brothers. The former is a farmer, a married man with a family, and the latter, a mechanic and a bachelor, living for some years past with the primary debtor, who appears to be of an improvident nature; whereas James is a thrifty, saving man, to whom his brother constantly applied for, and received, pecuniary assistance, repaying part, but always having a balance against him, which balance at the time hereafter mentioned amounted to about $178. Albert (an instance of his improvidence), during the Toronto Exhibition of 1889, and after the threshing season was half over, was induced to become the purchaser of a steam thresher. He had no knowledge or skill in running such a machine, and had to hire his brother James at $1.00 per day to run it for him. In August 1890, he proposed the same arrangement which James refused to accede to; whereupon, rather than let the machine lie idle, Albert proposed to lease it to James at a rental of $350, payable on the 1st of January, 1891, the latter undertaking to furnish all labor and do all repairs. The only witnesses examined were the two brothers. They both say that, when the lease was drawn, nothing was said about applying Albert's indebtedness to James upon the rent; but I have no doubt it was in their minds that, when it came to be settled for, such indebtedness would be so applied.

The monies garnished formed the earnings of the machine, except $40.00 thereof, which, at Albert's request, James previously turned in in payment of debts due by Albert to parties for whom James threshed, and the balance was paid by James to Albert, after satisfaction of his own claim, and this $40.00 and the balance was also, as Albert swears, applied in payment *pro tanto* of his debts.

The two transactions, viz., the lease itself, and the payment or arrangement in advance of the rent, are both impeached as fraudulent preferences under R.S.O., c. 124, s. 2.

I do not so consider. It seems to me that both transactions were *bonâ fide* and natural, and that no creditors have suffered. The rent is a fair and reasonable one. James has only earned about fifty cents per day for his own labor over and above the rent and cost of running the machine. It is true that Albert's indebtedness to him is cancelled, but that is

due to his own labor and risk; and if there is insufficient to pay the remaining creditors, they are in a better position than if the machine had been idle during the threshing season of 1890. Is a debtor to be precluded from renting his house to a creditor at a fair rental? or similarly a chattel, as in this instance? Surely not.

The settlement of the rent in October appears to have been also *bonâ fide* and without fraudulent intent. The whole went in payment of Albert's debts, and was not in payment or preference by a debtor to a creditor, but the contrary. Albert, to about the extent of $350.00, was a creditor, not a debtor; and in no ways could the anticipation of payment by his debtor to him (and which is the latter's privilege) be construed as coming within what is forbidden by the Act.

I think that section 3, construed in a broad and liberal spirit, protects both transactions; and that the claim of the intervener should prevail. To hold otherwise must be to assert that any mutual adjustment of cross accounts between two parties would be a fraudulent preference as against the creditors of either of them. I submit that no such construction can be put upon the statute. But if I am mistaken in this view, I am of opinion, by the long chain of cases culminating in *Molsons Bank* v. *Halter*, 16 A.R. 326 (affirmed by S.C.), and *Gibbons* v. *McDonald*, 19 O.R. 290 (affirmed in appeal), that James' claim must prevail against the execution creditors of Albert. It is not clear that Albert is insolvent, or unable to pay his debts in full. Whether he is or is not will depend upon the margin over incumbrances on sale of his realty. At all events, I cannot find, on the evidence, that he was so, with the knowledge of James.

And, further, I cannot find that there was any intent on the part of either, or both, to make a preference.

Under all the circumstances I find in the claimant's favor, with costs (including a $5.00 counsel fee), to be borne rateably by the execution creditors.

The amount in question, and in court, is considerably more than $100.00. It is a "contested case" and the claimant is a "successful party," within the meaning of section 208 of the C. C. Act, even if s-s. 2 of section 155 did not expressly extend section 208 to contestations of this nature.

Early Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE.

Chancery Division.

FULL COURT.] [Jan. 19.

WATEROUS ENGINE CO. *v.* PALMERSTON.

Municipal Corporation—Contract for purchase of fire engine—Necessity of by-law.

The defendants, pursuant to resolution, invited tenders from the plaintiffs for supply of a fire-engine, and subsequently contracted under seal for the purchase of a fire-engine from them, subject to certain tests, which were satisfactorily fulfilled; after which the defendants nevertheless refused to accept the engine, and the plaintiffs now brought this action to recover the price thereof.

Held, affirming the decision of Rose, J., that the action must be dismissed, for under the Municipal Act, R.S.O., 1887, c. 184, ss. 480 and 630, as amended by 52 Vict., c. 36, ss. 20 and 40, the power of municipal bodies to purchase fire-engines can only be exercised by by-law.

Wilkes for the motion.

Clarke contra.

Full Court.] [Jan. 19.

BOYD *v.* ROBINSON.

Bond of indemnity—Judgment—Damages.

Boyd and Robinson were in partnership, and Boyd retired. Robinson (who continued the business) and his wife, Mary Robinson, executed a bond in a penal sum of $6000, conditioned that "If the said Robinson shall from time to time, and at all times hereafter, well and truly save, defend, and keep harmless, and fully indemnify the said Boyd, his executors and administrators, from and against all loss, costs, charges, damages, and expenses, which the said Boyd may at any time hereafter bear, sustain, or suffer, or be put to for or by reason of the non-payment by the said Robinson of the liabilities of the said firm of Robinson & Boyd, when and as the same become due and pay-

able, it being the intention, and the said Boyd is hereby indemnified, or intended so to be, from all and every liability of every nature and kind soever of the said firm of Robinson & Boyd, then this obligation to be void, otherwise to be in full force and effect."

Judgments were recovered by creditors of the firm against both Boyd and Robinson, and Boyd now sued Mary Robinson to recover the amount required to pay those judgments, although he had not himself paid them.

Held, reversing the dicision of ARMOUR, C.J., that the plaintiff was entitled to have the amount of the judgments paid into court, and to the costs of the action.

Per BOYD, C.: The strict construction of such contracts to be found in some earlier cases, limiting to recovery for actual damage, is not now to be commended when the court can so mould its judgment as to secure the application of the proceeds of the judgment to the person ultimately entitled to receive them.

J. Macgregor for the plaintiff.

Shepley, Q.C., for the defendants.

Full Court.] [Feb. 3.

BARBER *v.* CLARK.

Mistake — Over-payment of legacy — Interest, when allowable.

This was an action brought to recover a balance alleged to be due and unpaid upon a certain legacy.

The legacy, $60,000, was to be paid to the executor of the will, for the plaintiff, by the devisee of certain real estate, upon which it was charged, in twenty equal semi-annual payments, commencing six months after the testator's death, and to bear interest at the rate of 6 per cent. payable semi-annually at the time of each of such payments on the amount of such payment, to be computed from the time of the decease.

It appeared that eighteen of such semi-annual payments of $3000 had been made, but interest had been paid half-yearly on the whole amount of principal money unpaid, instead of interest computed merely upon each $3000. This arose from common error and mistake.

The moneys were paid so as to separate principal and interest, and the interest payments were consumed by the plaintiff in living expenses, whereas the principal moneys were nvested by him from time to time.

Held, that all the payments made should be taken into account, and applied (without addition of interest) to the aggregate of the amounts properly due and payable under the terms of the will, and so it should be ascertained if there was any balance due to the plaintiff.

Kilmer for the plaintiff.

Macdonald, Q.C., for J. R. Barber.

Kappele for J. P. Clarke.

Practice.

ROBERTSON, J.] [Jan. 21.

IN RE PARSONS, JONES *v.* KELLAND.

Money in court—Payment out to administratrix—Infants.

The administratrix of a deceased party was allowed to take out of court a sum of $210, which was part of the personal estate of the deceased, notwithstanding that two infants were among the next of kin who would be entitled to share in the estate after payment of debts, etc.

Hanrahan v. *Hanrahan*, 19 O.R. 396, followed.

Swabey for the administratrix.

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

MACMAHON, J.] [Jan. 31.

IN RE BUTTERFIELD, A SOLICITOR.

Solicitor and client—Delivery of bills of costs before termination of actions—Application for taxation—Time—Special circumstances—R.S.O., c. 147, s. 34.

The solicitor defended an action of ejectment and prosecuted three actions for malicious prosecution on behalf of the applicants. On the 18th October, 1889, before the termination of any of the actions, the solicitor delivered to the applicants his bills of costs in them all up to that time. On the 29th April, 1890, he delivered further bills of costs in all the actions, which had then been brought to an end.

Application for a reference of all the bills to taxation was made on the 20th November, 1890.

Held, that the application was in time; for the retainer existed until the litigation ended; and the applicants had a full year from the delivery of the bills last delivered to apply for the taxation of all the bills.

Held, also, that the "special circumstances" which, by s. 34 of R. S.O., c. 147, must exist to justify a reference to taxation after twelve months from delivery of the bills are not confined to cases of actual fraud or gross overcharge and pressure.

Re Norman, 16 Q.B.D., 673, followed.

Held, also, that bringing three separate actions which might all have been joined in one, and charging excessive counsel fees, were special circumstances to be regarded in ordering a taxation after twelve months.

J. B. O'Brian for the applicants.

Masten for the solicitor.

FERGUSON, J.] [Feb. 4.

STEWART *v.* WHITNEY.

Money in Court—Payment out to administrator—Infants.

Money in court belonging, at the time of her death, to an intestate, was paid out to her administrator, notwithstanding that infants might be, or might become entitled to it or a share of it.

Semble, if the money belonged specifically to infants, the disposition might be otherwise.

Stephen M. Jarvis for the administrator.

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

BOYD, C.] [Feb. 10.

GAGE *v.* DOUGLAS.

Assignments and preferences—R.S.O., c. 124, s. 7—Action by creditors to set aside fraudulent transaction—Right to continue after assignment for benefit of creditors—Order continuing action for benefit of particular creditors.

An action begun by creditors of an insolvent to set aside a transaction in fraud of creditors, before an assignment by the insolvent for the benefit of creditors under R.S.O., c. 124, can be prosecuted by the creditors after an assignment has been made; for the assignment has not the effect under s. 7, s-s. 1, of transferring the existing cause of action to the assignee.

S. 7, s-s. 2, may be read so as to apply to pending litigation instituted by the assignee or into which he has been introduced; and an order was made under that enactment in an action begun by creditors before an assignment, in which the assignee was after the assignment added as a co-plaintiff, authorizing the original plaintiffs and other creditors to continue the action as constituted for their own benefit upon indemnity to the assignee.

W. Creelman for the plaintiffs.

E. B. Brown for the defendants.

MANITOBA.

COURT OF QUEEN'S BENCH.

BAIN, J.] [Jan. 31.

BANK OF MONTREAL *v.* POYNER.

Jurisdiction of County Judge—Defendant resident in another county—Acquiescence in jurisdiction—Prohibition.

Action on promissory note made by defendant at his residence in the county of Brandon. Action was brought in County Court of Selkirk. No evidence was given that any order had been made by a Judge, under section 48 of the County Court Act, authorizing the action to be brought in the County Court of Selkirk. Defendant filed a dispute note objecting to the jurisdiction of the court; at the time the action was commenced he did not reside or carry on business in the county of Selkirk. Defendant applied for writ of prohibition.

Held, that defendant was entitled to a writ of prohibition with costs.

Objection: that defendant had submitted to the jurisdiction overruled. Where a defendant takes express objection to the jurisdiction, and follows up his objection without delay by applying for prohibition, he cannot be said to have acquiesced in, or submitted to, the jurisdiction.

F. H. Phippen for plaintiff.

W. R. Mulock, Q.C., for defendant.

TAYLOR, C.J.
DUBUC, J.
BAIN, J. } [Feb. 2.

THE QUEEN *v.* STARKEY.

Conviction under Liquor License Act—Rule to quash discharged—Costs awarded to Justices.

Defendant was convicted for selling liquor illegally, under Liquor License Act, 1889, and after proceeding by certiorari, he took out a rule calling upon the Justices to show cause why the conviction should not be quashed. The rule was discharged, on the ground that

there was no recognizance as required by 53 Vict., c. 2, s. 40, and an order made granting costs to the Justices.

On appeal,

Held, that the Judge had, irrespective of any recognizance, and in the exercise of the general jurisdiction of the court, power to award costs. Appeal dismissed with costs.

W. R. Mulock, Q.C., for Justices.

R. Cassidy for defendant.

H. A. Maclean for Attorney-General.

RE BY-LAWS OF CITY OF WINNIPEG EX PARTE BARRETT.

Separate schools—Public Schools Act of Manitoba, 1890, intra vires.

Summons on behalf of Barrett, a ratepayer of the City of Winnipeg, taken out under The Municipal Act, 53 Vict., c. 51, s. 258, calling upon the city to show cause why two by-laws, 480 and 483, should not be quashed for illegality.

By-law 480 provided for levying a rate for Municipal and School purposes in the City of Winnipeg for the year 1890. The second by-law, 483, amended the first by showing the proportion assessed for school purposes.

The principal ground stated in the summons was, "That because by the said by-laws the amounts to be levied for school purposes for the Protestant and Catholic schools are united and one rate levied upon Protestants and Roman Catholics alike, for the whole sum."

Applicant contended that the Public Schools Act, 1890, was *ultra vires* of the Provincial Legislature of Manitoba; that the old law was still in force, and the amounts required for educational purposes should have been levied separately upon Protestant and Roman Catholic ratepayers.

The application was heard before Killam, J., who

Held, 1. That the Public Schools Act was not *ultra vires*.

2. That the Public Schools Act itself did not create a system of denominational schools, or assume to compel any class to support denominational schools other than their own.

3. That the Public Schools Act, if enacted at the outset of the union, would not have been *ultra vires* in establishing a new system of schools, and in authorizing taxation without establishing or providing for the support of Separate Schools for any class. It was competent for the Legislature to abolish the system of Separate Schools which it had established.

Summons dismissed with costs.

On appeal to the Full Court,

Appeal dismissed with costs, DUBUC, J., dissenting.

Ewart, Q.C., and *G. F. Brophy*, for applicant.

Hon. J. Martin, Atty.-Gen., and *J. S. Hough*, for the City of Winnipeg.

[This case has gone to the Supreme Court.—ED.]

The following Manitoba Cases are reprinted, by permission, from *The Western Law Times*.

BAIN, J.] [January 29.

LAIRD *v.* TRERICE.

Writ—Service out of the jurisdiction.

The plaintiff sued the defendant, a non-resident, upon a cause of action which arose out of the jurisdiction. No order allowing the service was obtained prior to the service of the writ, but the copy of writ was served in the usual way. After the service, the plaintiff applied to the referee for an order allowing the service and for leave to proceed. The referee held that the two orders must be separate and that the order allowing the service must be served upon the defendant before the order for leave to proceed could be obtained. The plaintiff then applied to a Judge in Chambers, who held:

1. That the service of a writ outside the jurisdiction has practically no effect at all until an order allowing the service has been obtained, and "I am quite satisfied that the proper practice is to obtain an order allowing the service of the writ before the writ is served and serve it with the writ." The amendment to the A.J.A., 1885, in 1886, (49 Vict., cap. 35, sec. 32,) practically repeals sec. 18, C.L.P.A., 1852.

Application refused.

Patterson for applicant.

BAIN, J.] [Feb. 10.

FREEHOLD L. & S. CO. *v.* BRYSON, AND GALT, ET AL, CLAIMANTS.

Interpleader—Defects in sheriff's affidavit—Waiver of—Plaintiff in issue—Possession.

Appeal to Judge in Chambers from interpleader order of the referee directing an issue

in which claimants were made plaintiffs. The claimants appealed from the order, on the ground that the summons and order were improperly granted, and that there was no basis or foundation for the order, because:

(1) The affidavit of the sheriff on which the interpleader summons was granted did not state (*a*) that the goods seized were the property of the defendants, or (*b*) that the sheriff believed them to be so, (*c*) or any facts which would warrant the seizure of them as defendant's goods.

(2) That the affidavit did not state that the sheriff was in possession of the goods at the time of making the application, or that the proceeds of any sale thereof were then in his hands.

(3) That the evidence before the referee showed that the claimants were in possession of the goods at the time of the seizure, and claimants should therefore have been made defendants in the issue, and not plaintiffs.

It was urged, in reply, that the claimants, by not raising the first two questions before the referee, had waived the right to take advantage of the same on appeal, as they were mere irregularities, and that as to the question as to who should be plaintiff in the issue, the referee had exercised his discretion, which would not be reviewed on appeal.

Counsel for claimants in reply: The defects complained of in the sheriff's affidavit are not mere irregularities or formal defects, but matters of substance going to the whole foundation of the sheriff's right to an interpleader under the statute and could not be waived, citing in this connection, *ex parte Coates*, 5 Ch.D., 779, followed by *ex parte Johnston*, 25 Ch.D., 114-116. As to what must be shown by the sheriff in his affidavit to entitle him to relief: *Archbold*, 1406; *Lush*, 777; *Parkinson's* C.P., 151; *Cababe*, 31; *Chitty's Forms*, 822; *Northcote* v. *Beauchamp*, M. & S., 158; *Cook* v. *Allen*, 2 Dow., 11; *Anderson* v. *Calloway*, 1 Cr. & M., 183; *Scott* v. *Lewis*, 2 Cr. M.R., 289; *Holton* v. *Guntrip*, 6 Dow., 131; *Crump* v. *Day*, 4 C.P., 760; *Day* v. *Carr*, 7 Ex., 882; *Wheeler* v. *Murphy*, 1 Prac., 366; *Ogden* v. *Craig*, 10 Prac., 378; *Merchants Bank* v. *Herson*, 10 Prac., 117; *Duncan* v. *Tees*, 11 Prac., 66 and 296, and others. As to plaintiffs in issue: *Merchants Bank* v. *Herson* and *Duncan* v. *Tees*, *supra*; *Dom. Sav. & I. Co.* v. *Kilroy*, 7 C.L.T., 87, and *Morris* v. *Martin*, 19 Ont., 564.

The fact of an issue having been decided by the referee constituted no waiver on the part of the claimants. It was an operation of law under the statute, consequent upon the sheriff's application. The claimants would not "abandon their claim," and as they decided to maintain their rights, the referee could only, in such case, direct an issue, which was a position forced on the claimants by the statute without any alternative.

Held, (1) That the sheriff's affidavit was clearly insufficient, but the objections thereto not having been taken before the referee, and the learned Judge being of the opinion that the objections did not go to the jurisdiction, but were merely questions of practice, they could not prevail on this appeal.

(2) The practice in this court is settled, that when goods have been seized in the possession of a claimant, he should be the defendant in an issue between him and an execution creditor; and as the only evidence on the point shows that *prima facie* the claimants were in possessio when the goods were seized, the order of the referee should be varied by making the claimants the defendants in the issue.

Order accordingly.

The issue was settled according to that directed in *Duncan* v. *Tees*, 11 Prac., 296.

Nugent and *Archer Martin* for claimants.

Campbell, Q.C., and *Mathers*, for execution creditors.

Cumberland for sheriff.

[The claimants have appealed from so much of this order as discharges the summons in appeal to set aside the interpleader summons and order.—ED.]

TAYLOR, C.J.] [Feb. 14.

LONDON & CAN. L. & A. CO. *v.* MUNICIPALITY OF MORRIS.

Practice—Appeal to Supreme Court from order allowing final judgment.

Application by way of summons to Judge in Chambers for leave to appeal to Supreme Court from ruling of Full Court confirming order of KILLAM, J., allowing plaintiffs to sign final judgment under A.J. Act.

It was objected that an appeal would not lie as this was an order made in the exercise of judicial discretion, within the meaning of sec. 27, Sup. Court Act.

Urged, in reply, that this was a final judgment within the meaning of those words in *Bank of Minnesota* v. *Page*, 14 A.R. 347.

Held, that the order appealed from was a final judgment and so appealable to the Supreme Court, but the objection that the order was not appealable should properly have been made in the Supreme Court.

Objection was taken that the defendants, a municipality, could not be parties to the appeal bond, on the ground that this was beyond their powers under the Municipal Act.

Held, that a municipality having the ordinary rights of suitors, to sue and be sued, could properly join in a bond in a suit in which they were parties, as an incident to such rights. The bond should be allowed.

Order made allowing bond and appeal, costs to abide event of appeal.

Perdue for plaintiffs.

Crawford for defendants.

THE REFEREE.] [Feb. 16.

MERCHANTS BANK *v.* GALBRAITH.

Foreign judgment — Pleading — Striking out embarrassing pleas.

The plaintiff sued on a foreign judgment recovered in the Common Pleas in Ontario in 1881. The defended pleaded never indebted, payment, and the Statute of Limitations, as of six years. The plaintiff moved to strike out the pleas as embarrassing, claiming that never indebted and payment could not be so pleaded and the plea of the statute was improper, on the ground that the statute, if at all limited, is to twenty years.

Held, that the pleas of never indebted and payment were properly pleaded, and if so advised, the plaintiff could apply to plead and demur to the plea of the statute.

Summons discharged with costs.

C. H. Campbell for applicant.

Cumberland for defendant.

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Adams (G.H.), New United States Tariff, 2nd and revised edition, New York, 1890.

Birdseye (C.F.), Table and Index to New York Revised Statutes, Codes and Laws, vol. 4. New York, 1890.

Bolles (A.S.), Bank Officers, their Authority, Duty, and Liability, New York. 1890.

The Law Relating to Banks and their Depositors and to Bank Collections, New York, 1887.

Freeman (A.C.), Void Judicial and Probate Sales, 3rd edition, St. Louis, 1890.

Kerr (J.M.), A Treatise on the Law of Homicide, New York, 1891.

Moore (J.B.), The Law of Extradition and Interstate Rendition, 2 vols., Boston, 1891.

Smythe (E.H., Q.C.), The Law of Bills of Exchange and Promissory Notes, Toronto, 1891 (6 copies).

Stephen (L.), Dictionary of National Biography, Hailes-Harriot, vol. 24, London, 1890.

Wood (H.G.), Byles on Bills, 8th American edition, Philadelphia, 1891.

Law Students' Department.

EXAMINATION BEFORE HILARY TERM : 1891.

CERTIFICATE OF FITNESS.

Taylor on Equity.

Examiner : A. W. AYTOUN-FINLAY.

1. A. pays to B., executor of an estate, the sum of $750, which he (A.) supposes to be an existing debt. B., in turn, pays this money away to creditors of the estate.

As a fact, A.'s. debt had already been paid.

What remedy, if any, have A. and B., or has either of them?

2. Two parties enter into a valid agreement for the sale by one and the purchase by the other of certain land, and the purchase money is paid.

At the time the bargain is made the land is no longer existent, having been destroyed by an inundation.

What is the position of each party respectively, and why?

3. Distinguish and discuss the meaning of the expressions—*suggestio falsi ; suppressio veri.*

Illustrate your answer by examples.

4. Under what circumstances, if any, will a Court of Equity grant relief to a party who is

particeps criminis with the party against whom relief is asked?

5. An official bond is given for faithful performance of duties. Through negligent supervision of the conduct of the officer he is enabled to perpetrate serious frauds.

The sureties on the bond are called upon to make good his defalcations.

On the above statement, what is the liability of the sureties?

6. Will Courts of Equity ever decree specific performance of a contract to enter into a partnership? Give reasons for your answer.

7. A. agrees to sell B. the goodwill of A.'s long-established business, apart from the premises in which the business has been carried on. A. refuses to complete the agreement. To what extent, if any, can Courts of Equity grant relief?

8. What right of property in private letters does equity recognize, so as to permit of its interference to restrain their publication?

9. Under what circumstances, if any, may a party purchase the interest of another in a contract, or security, or other property, which is in litigation?

May a solicitor purchase *pendente lite* the subject matter of a suit?

10. What is meant by general average, and what is the governing principle upon which it is established?

Benjamin on Sales.

Examiner: A. W. AYTOUN-FINLAY.

NOTE—Answers to each half of this paper are to be handed in separately.

1. A. inspects a consignment of wine, consisting of thirty-five pipes, in the possession and the property of B.

A week later A. contracts with B. for the purchase of "twelve pipes of the wine I inspected;" and after the completion of the contract of sale, he (A.) sells twelve pipes of wine to C. and gives him a delivery order for that quantity upon B.

B. accepts this order by writing on its face.

Afterwards B. refuses to deliver the wine.

What are the rights of A., B., and C., respectively, and why?

2. A. agrees to furnish B. within one month after date of contract with twenty reapers, specifically described. He appropriates and tenders the required number, but B. rejects them as not conforming to the contract description.

Just before the expiration of the month, A. again appropriates and tenders twenty reapers which are in accordance with the contract description.

B. refuses to accept them. What is the legal position of each party, and why?

3. A. and B. enter into a contract perfectly lawful and valid in itself, but which is completed on a Sunday.

What effect, if any, would this fact have upon the contract in Ontario? Why?

4. A. contracts with B. to perform certain work; but on account of changed circumstances A. afterwards states to B. that he will be unable to carry out his agreement within the time allowed.

B. thereupon enters into another contract with C. to perform the same work. Then A. offers to go on with the work, but B. refuses to permit him to do so. A. enters an action against B.

What are the rights of the parties, and why?

5. Vendor agrees to forward goods to vendee living at a distance, and by direction of the latter, he ships the goods by certain railways. The goods are in a merchantable condition when so shipped, but are in a bad condition on arrival at vendee's place of residence.

What, if any, is the liability of the vendor, and why?

Hawkins on Wills.

Examiner: M. G. CAMERON.

1. What interpretation was put upon the words "die without issue" prior to the passing of the Wills Act, and what, if any, change was effected by that Act?

2. When is parol evidence admissible to explain a will?

3. A., the testator, at the time of making his will, owes B. $500, which is secured by bond. By his will he bequeaths to B. a legacy of $500 absolutely. Is there any presumption raised by law in such a case? If so, may it be rebutted by parol evidence? What effect will a direction by the testator in his will, that his debts and legacies be paid, have upon the presumption?

5. The will of A. contained the following pro-

vision: "To Richard Jones I give an annuity of $100 for his life, payable quarterly." And further on in the will, "I give to Richard Jones $100 a year for his life." Will the legatee be entitled to both legacies? Explain. Would it make any difference if one of the two gifts had been by will, and the other by codicil?

5. A. by his will appointed B. and C. his trustees, and directed them to lay out and invest the residue of his estate in the public funds, and to pay and apply the dividends and interest arising therefrom to D. and E. equally between them as tenants in common. D. brings an action to compel the trustees to make to him an absolute transfer of a moiety of the residue. Can he succeed? Explain.

Armour on Titles, Statute Law, and Pleading and Practice.

Examiner: M. G. CAMERON.

1. A., being the owner thereof, conveys a parcel of land to B. B. does not register his deed. A. subsequently conveys to C., who registers his deed, but at the time of registration is aware that B. is in possession of the land.

Will C.'s conveyance be postponed to that of B.'s? Explain.

2. Is a mortgagor entitled to insist upon the mortgagee permitting him to inspect and make copies of the title deeds in the custody of the latter? Has there been any recent change made in the law in this respect?

3. A. conveys a parcel of land to B., who gives back a mortgage for a portion of the purchase money. A. assigns the mortgage to C. There is an incumbrance upon the property which A. should have discharged, but has not. What, if any, are B.'s rights against A. and C.?

4. If A. conveys a certain parcel of land to B., and the heirs of his body by his wife Catherine, and Catherine dies, and B. marries again, what interest has his second wife in this land? Explain.

5. Enumerate the different ways by which a will may be proved upon the trial of an action?

6. When is a defendant entitled to a præcipe order for security for costs, and what directions should the order contain?

7. What must be proved by the applicant in order to procure an interpleader order?

8. Will the court upon the application of an infant by his guardian direct the sale of his estate? If so, what facts must be shown in order to obtain such a direction?

9. Within what time must an appeal to the Court of Appeal from (*a*) a judgment of the High Court, and (*b*) an interlocutory order, not being a decretal order, be brought to a hearing?

10. Enumerate the class of actions that must be tried by a jury unless the parties waive their right to such a trial?

Smith's Mercantile Law—Smith on Contracts.

Examiner: F. J. JOSEPH.

1. The rule is that an executed consideration must have arisen from a previous request by the person promising, in order that it may be sufficient to support the promise. Mention any cases in which the law will imply a previous request.

2. Mention any cases in which money paid on an illegal contract can be recovered back.

3. Can a contract entered into by a person in an intoxicated condition be enforced?

4. What is a warranty in a policy of insurance, and how does it differ from a representation?

5. A., a manager of an incorporated company, is instructed by the directors to misrepresent the financial condition of the company. A. holds a large amount of the stock of the company in his own right, and in order to sell it to B. falsely represents to B. that there will be a large bonus declared at the next annual meeting of the company. B. purchases the stock, the company declares no bonus, and consequently the stock becomes worthless. What are the rights of B.?

6. How may an agent forfeit his commission?

7. What is meant by noting a bill?

8. Within what time must an action be commenced in the following cases:

(*a*) For debt upon a bond.

(*b*) For rent upon an indenture of demise.

(*c*) On a promissory note payable on demand.

Supposing the person entitled to any such right of action resides out of Ontario?

9. A. owes B. several sums, some of which are barred by the statute. A. makes a payment to B., but insufficient to discharge his whole liability. What are the rights of A. and B. respectively as to the appropriation of the payment made by B. Supposing neither A.

nor B. appropriates the payment, how will the law apply the payment?

10. What is the liability of a husband married since 1st July, 1884,

(*a*) For debts of his wife contracted before marriage.

(*b*) For torts committed by his wife before marriage.

(*c*) For torts committed by his wife after marriage.

CALL.

Equity and Criminal Law.

Examiner: A. W. AYTOUN-FINLAY.

1. Can a mortgagee be compelled to produce the title deeds of the mortgaged estate?

Explain the position of the parties when inspection of the title deeds is desired.

2. A. and B. purchase an estate for which B. alone advances and pays the purchase money.

(*a*) To what extent, if any, has B. a lien or mortgage on the land, or what right has he?

(*b*) Subsequently to the purchase partition of the property is made. How does this effect B.'s recovery of the part purchase money?

3. A. agrees to deliver to B. 1,000 bushels of a particular kind of barley, to be harvested, at a future day, from a certain field. This specific crop of barley is a failure to a large extent.

What is the liability, if any, of A. to B. on his contract, and why?

4. A mortgagee is in possession of the mortgaged estate.

Certain adjacent coal mine owners trespass upon the mortgaged estate, and take coal therefrom.

The mortgagor requires the mortgagee to account for the value of the coal.

What, if any, is the mortgagee's liability, and why?

5. In consequence of the ignorance or negligence of a solicitor, employed by trustees to prepare a mortgage, a loss occurs.

Can the trustees be held liable? Give reasons for your answer.

6. In what cases will an action for libel lie without laying special damage?

7. In what cases may, and in what cases may not, a magistrate take bail?

8. A *private* individual holds certain persons lawfully in his custody.

They escape therefrom.

How far is he liable (*a*) where the escape is due to negligence on his part? (*b*) Where he has connived at it?

9. Define the *crime* of perjury at common law.

A. swears to a certain state of facts, which state of facts did not exist as he has stated.

What is the test as to whether he has or has not committed perjury?

10. What nuisances are indictable?

When will an indictable nuisance give rise to civil action also?

Best on Evidence.

Examiner: A. W. AYTOUN-FINLAY.

NOTE.—Answers to each half of this paper to be handed in separately.

1. Explain and illustrate the maxim *res ipsa in se dolum habet.*

2. What does Mr. Best give as the one general rule of evidence *in causa*, and what are the three chief applications of it?

3. Under what circumstances, if any, is a witness privileged to refuse answering a question, when the answer may subject him to a *civil* suit?

4. What are the rules governing the admissibility of (*a*) the first wife, (*b*) the second wife, as a witness in cases of bigamy, and why?

5. What is the rule as to admissibility of *character* evidence, and how far is it open to the other side to contradict such evidence?

Dart on Vendors and Purchasers.

Examiner: M. G. CAMERON

1. A. is employed by parol to purchase an estate for B., at a certain price. Can he bind his principal by his written agreement to buy it for a larger sum; and if not, has the seller any remedy against the agent?

2. Is a vendor bound to disclose to a purchaser a latent defect in the title if the estate be sold subject to all fault? Explain.

3. A. was employed by B. to find a purchaser at a certain price for a parcel of land, and by way of compensation he was to be paid a certain percentage if a sale were effected. A. found a purchaser, but B. refused to complete the sale. What are A.'s rights against B.? Explain.

4. What precautions should a purchaser take before entering into possession of property concerning which the title is in dispute? Give the reasons for your answer, and state why the purchaser should take such precautions?

5. If A. and B. agree to purchase an estate, each to advance an equal portion of the purchase money, and at the time fixed for completion, A., for the convenience of B., advances the entire amount, but the conveyance is taken in the name of B. What, if any, are A.'s rights? Will parol evidence be admissible to show the real facts?

Blackstone: Theobold on Wills, the Statute Law, and Pleading and Practice.

Examiner: M. G. CAMERON.

1. What amount of undue influence must be shown in order to vitiate a will, and explain the difference in respect of the burden of proof between the rules applicable in the case of gifts *inter vivos* and testamentary gifts?

2. If there is a gift by will to A.B., second son of C. D., and A. B. is the third son, will A. B. take? Explain.

3. A. owes B. $500. By his will B. makes a gift of this debt to A., his executors and administrators, and directs that securities held for the payment of the debt be handed over to him. What would be the result if A. dies during the lifetime of B.?

4. A. by will devises a personal annuity to B. and the heirs of his body. What interest will B. take? Explain.

5. Where there is no attestation clause in a will, when, if at all, will the presumption that it has been duly executed be raised?

6. A. is a legatee under the will of B., who died on the 1st day of January, 1890. A. applies to the proper officer on the 10th day of July, 1890, for an order for the administration of B.'s estate. Is he entitled to the order? If so, upon what material should his application be based? If he is not, explain why not.

7. In order to determine whether the answers of a judgment debtor are or are not satisfactory, what is the true test to be applied?

8. What is the practice to be observed by a party who is dissatisfied with the rulings of a taxing officer upon the taxation of a bill of costs, and is desirous of appealing therefrom?

9. Is a Judge at liberty, in all description of cases, to direct the jury to answer any questions stated to them by him? Explain.

10. A. brings an action against B. for breach of promise of marriage, and goes into the witness box and clearly proves the promise and the breach, and calls no other witnesses. The defendants calls no witnesses. Can the plaintiff recover? Explain.

Pollock on Contracts—Byles on Bills—Blackstone.

Examiner: F. J. JOSEPH.

1. Under what circumstances can a solicitor purchase the property of, or accept a gift from, his client?

2. A. sells land to B., and covenants that he will not allow any buildings to be erected on the adjoining land owned by him except residents of a certain description. A railway company, under the authority of the legislature, appropriates a portion of A.'s land, and erects a station thereon. What are B.'s rights against A.?

3. Can a covenant partly legal and partly illegal be enforced?

4. Under what circumstances is forbearance to sue a good consideration?

5. What is the effect of the following covenants by A.:

(*a*) Not to marry anyone but B.

(*b*) Not to revoke a will made in favor of B. How would these covenants be affected by A. marrying C.?

6. What is your opinion as to the legality or the following:

(*a*) A. is in possession of certain evidences respecting the title of B. to certain property. B. is ignorant that he has any title to the property. A. agrees to deliver them to B. if he, B., will give him a certain proportion of the property when he recovers it.

(*b*) A., a solicitor, tells B. he will not continue his suit against C. unless he gives him a security on the property in litigation for the costs already incurred.

(*c*) A., a solicitor, tells B. if he will employ him to bring a certain action against C., he will not charge him any costs.

(*d*) A. agrees with B., a common informer, to indemnify him against costs if he will sue C. for a penalty to which C. is liable for the breach of a penal statute.

7. What is the measure of damages on a dishonored bill?

8. What must a protest contain?

9. Who are deemed natural born subjects? Who are denizens?

10. For what length of time may the Parliament of Canada and the Legislature of Ontario be prorogued, and how are they dissolved?

Flotsam and Jetsam.

UPON one occasion, while arguing a case in the Supreme Court of Missouri, Mr. Hayden was interrupted by the presiding Judge, who asked, "Why is it, Mr. Hayden, that you spend so much time in arguing the weak points of your case to the exclusion of the more important ones?" "Because," replied Mr. Hayden, "I have found, in my long practice in this court, that the weak points win fully as often as the strong ones."

"I MUST and will have order in this court," sternly remarked a presiding magistrate; "I have disposed of three cases without hearing a word of the evidence."

BY what authority do architects call their patrons their "clients"? It is a foolish affectation of a standing which they do not possess. They might as well call them their parishioners or patients. By derivation as well as by custom the lawyer is the only man who can have a "client," except in the case of a great man and his dependents. We find no authority in the lexicons for the application of the word to any mere relation of business nor to any other profession than that of the law. The word indicates a following for reasons of trust, dependence and protection, as of advocacy. By-and-bye we shall have plumbers and livery-stable keepers and milliners talking about their "clients." —*Albany Law Journal.*

A LAWYER once asked a Quaker if he could tell the difference between "also" and "likewise." "Oh, yes," said the Quaker; "Erskine is a great lawyer; his talents are admitted by almost every one; you are a lawyer 'also,' but not 'likewise!'"—*Pump Court.*

A LAW recently passed in Denmark provides that all drunken persons shall be taken home in carriages at the expense of the dealer who sold the last glass.—*Ex.*

DURING the chancellorship of Lord Eldon, the following scene took place:—A counsel at the Chancery bar, by way of denying collusion suspected to exist between him and the counsel who represented the other party, having said, "My lord, I assure you there is no understanding between us," Lord Eldon observed, "I once heard a squire in the House of Commons say of himself and another squire, 'We have never through life had one idea between us'; but I tremble for the suitors when I am told that two eminent practitioners have no understanding between them."—*Pump Court.*

Bona fides legalis is a condition of mind to be inferred from facts and circumstances, and consists essentially of a genuine belief of right, based upon reasonable grounds and a colorable title, resulting in acts affecting matters of expediency or utility, in regard to which acts the actor is not constrained or restrained in a contrary or different line of duty by his obedential or conventional obligations.—*Edinburgh Law Magazine.*

IRVING BROWNE, in a recent article, speaks of a certain distinguished lawyer in Troy, who was frequently reluctant to accommodate a brother practitioner, and always laid it on his client; of whom another, who was smarting under the exercise of this calculating caution, once observed in court, that he was "a very obliging man, personally, but had the meanest lot of clients of any man at the bar."

A new exception to the rule, that money paid under a mistake of law cannot be recovered back, has been discovered. A group of anxious students, awaiting the arrival of the examiners, at Osgoode Hall, were endeavoring to refresh their minds on the subject, when one of the number enquired for the exception. A thoughtful silence followed for a moment, when one of them remarked nervously: "The only case of recovering money paid under a mistake of law with which I am likely to become acquainted will be the return of my fees by the Law Society after this examination."

A WELL-KNOWN tailor in this city makes an announcement concerning legal bags which begins: "Important to Students-at-Law, Barristers, Queen's Counsel, and Judges." No doubt this is the proper order of precedence in this democratic age.

A CERTAIN prominent member of the Junior Bar in Toronto was recently asked to preside temporarily over the Division Court, and it is stated that he accepted, without hesitation, what he considered an easy task. When the learned acting Judge, after one afternoon's session, found himself compelled to reserve a number of cases, on one of which he sat up for three nights, and had conferred with various Judges of the High Court about others, he threw up the job, and we understand that money would not now tempt him to resume the judicial position.

RULE TO SECURE UNIFORMITY OF PROCEDURE IN OFFICES OF HIGH COURT.

The Registrars of the several divisions of the High Court shall confer, as often as any two of them shall deem it expedient, and also whenever required by the president of any division of the said High Court, with the view to securing uniformity of practice and procedure in the several offices at Osgoode Hall of the said divisions; and all regulations made by a majority of them and approved by the president of the High Court and by any Judge of a divison other than that of which the president of the High Court for the time being is a member, or made by the said president of the High Court and by any other Judge, respecting such practice and procedure in the said offices, shall be observed and followed therein and by the officers and clerks thereof.

In accordance with the above Rule, the Registrars of the three divisions of the High Court of Justice have agreed to the following matters of practice for the purpose of securing uniformity of procedure in the offices of the court, and they have been approved:

1. All judgments to be given out after entry; all judgments to be entered in the office where the appearance is required to be entered.

2. All orders to be charged for as special, except such as are issued on præcipe, and the fees payable on such special orders to be as set out in the tariff, namely, twenty cents by statute and twenty cents a folio up to six folios and no more than six folios to be charged for, exclusive of charge for entering.

3. On giving out any papers to parties entitled thereto in pursuance of an order or otherwise, no search can be charged. Order and receipt to be charged as separate filings.

4. Certificates for registration to be issued on filing a proper præcipe and production of original or office copy of order, or judgment; no copy of order or judgment need be filed.

5. Copying ordered from any office, when the pressure of business in such office will not allow of such copying being done therein in sufficient time, is to be done in the office of the Clerk of the Records and Writs (see Order-in-Council dated 3rd April, 1884); all copying to be paid for in stamps at the rate of ten cents per folio.

6. All forms to be used in the offices of the Registrars and Clerk of Records and Writs to be furnished by the Clerk of the Process.

7. Affidavits filed on applications before judgment clerks in actions in Q.B. or C.P. Divisions to be forwarded by them to the officer in whose office the action is pending.

8. Rule 28 (*d*) is to be acted on as though the Registrar of the Chancery Division or the Assistant Registrar was named therein as well as the Clerk of Assize.

9. Amendments under Rules 424 and 444 to be made on filing præcipe only.

10. The Registrars of the High Court of Justice for Ontario, pursuant to Rule 450 of the Judicature Act for Ontario, hereby prescribe that all rolls (judgments) and records written or printed (either by typewriter or otherwise) shall be of the length and width of a half-sheet of foolscap paper, and shall be folded in half lengthwise; and it is recommended that all records for trial shall be enclosed or covered by a full sheet of foolscap or other covering of the same size.

11. Rule 545. All appeals to a Judge in Chambers in Q.B. and C.P. Divisions to be set down with the Clerk in Chambers and a fee of fifty cents paid therefor.

12. Præcipe orders under Rule 622 may be issued at any time by the officers with whom the pleadings have been filed, except for the purpose of issuing execution under Rule 886, in which case special leave is necessary; such orders to be entered in full under Rule 744.

13. Rule 1226. Orders for delivery of bills of costs to be granted as of course.