DIARY FOR MAY.

1. Thur..Paris Exposition opened, 1878.
4. Sun...3rd Sunday after Easter.
6. Tues..Primary examinations.
7. Wed..Primary examinations.
8. Thur..Primary examinations.
5. Sat....Treaty of Peace between France and Germany, 1871.
11. Sun...4th Sunday after Easter.
13. Tues..Court of Appeal sits. Co. Court sitt. for York begin. 1st Intermediate exam.
14. Wed...2nd Intermediate examination.
15. Thur..Examination for Attorneys.
16. Fri....Examination for Call.
18. Sun...Rogation. D. A. Macdonald, Lieut.-Gov. of Ontario, 1875.
19. Mon...Easter Term begins. Convocation meets.
20. Tues..Convocation meets.
22. Thur..Ascension day. Earl Dufferin, Gov.-General, 1872.
24. Sat....Queen's Birthday, 1819. Convocation meets. Treasurer and Committee elected.
25. Sun..1st Sunday after Ascension.
30. Fri....Mr. Proudfoot appointed Vice-Chancellor, 1874.

CONTENTS.

Canada Law Journal.

Toronto, May, 1879.

As we go to press, the news comes that a vote has been passed in the House of Commons to repeal the Insolvent Act. It is not likely that the Senate will follow suit, and it is possible, if time permits, that some one of the many suggested alterations may be carried out; if not, things will remain as they were for another year.

A correspondent sends us another "Final Notice before proceeding in the Division Court." It is not necessary for us again to refer to the matter. We have done our share in directing attention to the evil. We are glad to notice that in one County, at least, a prosecution has been commenced against the offender.

A strong feeling has been shewn in the country against the Supreme Court, as evinced by the vote on Mr. Keeler's motion in the House of Commons to do away with it. Some persons speak of this as unaccountable. It may be unreasonable, or at least unwise, but we think it can easily be accounted for, and for some or all of the following reasons: The Court is very expensive, and of a value not always, or easily appreciated; in other words, it is thought that "the game is not worth the candle."—The profession, as a whole, have not that confidence in it which should appertain to a court of final resort; for example, there is hardly a lawyer, in this Province at least, who would not, on a question of Ontario law, prefer the opinion of our Court of Appeal, or even of one of our Superior Courts—Great and unnecessary delays in giving judgment, causing much annoyance and dissatisfaction to suitors.

On several occasions there has been on the part of the Court a marked disregard for the convenience of the profession in the hearing of causes—and, as a minor matter, there has been a tardy issue of the reports of cases decided, and this reporting being generally done (though improved of late) in an incomplete and defective manner. That there must be some such forum as the Supreme Court, for the decision of a certain class of questions, is manifest; it is also manifest that the Court, so far, has been a disappointment.

PREFERENCE OF A SURETY IN INSOLVENCY.

There appears to be a good deal of confusion in the authorities as to the position and liabilities of a surety, who requests and procures payment to be made by the principal debtor, shortly before his going into insolvency. In the case of an accommodation party to a promissory note, it seems to be laid down that if he has cause to believe that the chief debtor is unable to meet his engagements, and solicits the payment of the note by him to a holder who has not such knowledge, this, whether the note is current or has matured, amounts to a fraudulent preference of the surety: *Churcher* v. *Cousins*, 28 U. C. R. 540, and *Botham* v. *Armstrong*, 24 Gr. 216. Indeed the position is laid down in the head note of the latter case very broadly, but very unwarrantably (so far as the text of the judgment goes), that where the payment of a note has been procured by the indorser, he is, under section 133 of the Insolvent Act of 1875, liable to make good the amount thereof to the assignee. But it is to be observed that where the subject matter involved is *money* paid (as opposed to *goods, effects*, &c., which is the language of section 133), then the section properly applicable to such a case is the 134th: *Smith* v. *Hutchinson*, 2 App. R. 405; and section 134 does not appear to contemplate the case of a surety as above stated, for that section applies only to the recovery of money from the person to whom it has been paid. The United States statute goes beyond ours, and expressly provides for the case of a person for whose benefit a payment is made, so that a surety is within the purview of this Act: *Bartholow* v. *Bean*, 10 Bank. Reg. 241; S. C. 18 Wallace, 635. The present Insolvent Act does not even go so far as the old Insolvent Debtors' Act, to be found in Consolidated Statutes of Upper Canada, cap. 18, sec. 57. This was pointed out by Van Koughnet, C. in *Roe* v. *Smith*, 15 Gr. 346, where he said: In the old Insolvency Act, the debtor, on the eve of insolvency, is prohibited from making a voluntary payment or assignment of property to a creditor or to a surety for him; but in the Insolvent Act of 1864, it is the creditors only and not the surety who is inhibited from receiving payment or security for a debt. He goes on to observe, "*the surety is not a creditor till he pays the money.*"

We think that this is the only correct reading of the Act, and that the surety who does no more than procure payment to be made to the creditor, is not exposed to successful attack under either of the sections, 133 or 134. There are English authorities bearing on this question, which do not appear to have been cited in any of the cases before the Canadian Courts, which fortify the conclusion above indicated. The mischief of fraudulent preference, under the terms of the Act, arises where payment is made or security given to the creditor or surety intended to be benefited or preferred, but not where payment is made or security given to one with intent to benefit another. It is true that in *Marshall* v. *Lamb*, 5 Q.B. 115, it was held that a case of fraudulent preference arose where pay-

ment was made to the creditor with intent to retain the property of the debtor's wife, and on that ground the creditor (strange to say) was ordered to refund the money, but this case has not been followed, and is opposed to many more meritorious decisions. (Refer to the comments on this case in Archbold's Bankruptcy, vol. i., p. 430.) *Belcher* v. *Jones*, 2 M. & W. 258, is a strong authority for the position that the intent must be to prefer the creditor who is paid. So it is said, if A. and B. are both creditors for same debt, payment to A. with the intention of securing B. is not a fraudulent preference of A : see Byles on Bills, p. 464, note f (12th ed.).

From a comparison of other English cases, the law laid down there seems to be this : If a party to a bill or note for the accommodation of the maker has money sent to him by the principal debtor, with which he pays the notes, that is a fraudulent preference of the surety and the assignee can recover from him. But if the surety is not a party to the security, but is only collaterally liable, as having given a separate guarantee for the bill or note, then his getting the money from the principal debtor and paying it would only constitute him an *agent* for that purpose of the person liable on the bill or note, and the transaction would not amount to a fraudulent preference of the person so collaterally liable : see *Abbott* v. *Pomfret* 1 Bing. N. C. 462, and *Guthrie* v. *Devereux*, 2 C. & P. 301. It is to be remarked, however, that this distinction is not recognised in *Abbott* v. *Pomfret*, as reported in 1 Hodges, 25. There the judges are reported as holding the view (which is the more reasonable one) that whether immediately liable as being a party to the bill, or collaterally liable as having guaranteed the payment of it, the receipt of the money by the surety from the principal to discharge the note would be a fraudulent preference of the surety.

Another point of interest in this connection may be mentioned. If payment is made by the principal debtor to the creditor, and this payment is afterwards avoided as a preference under the Bankruptcy Act, the surety is not discharged by reason of such payment. His liability revives on the avoidance of the preferential payment : *Pritchard* v. *Hitchcock*, 6 M. & Gr. 157, followed in *Petty* v. *Cooke*, L. R. 6 Q. B. 790.

THE CHARITABLE SPIRIT OF THE LAW.

(Concluded.)

At the conclusion of the last article on the above subject allusion was made to certain apparent departures from a spirit of charity. It seems well to notice them here since many of them appear in connection with the presumption against crime, illegality, and dishonesty, to which attention has hitherto been confined. They are founded, for the most part, on considerations of public policy. Thus, both in criminal and civil cases, a person is liable for what is done under his presumed authority : Tayl. on Ev.; Ed. 7, 129-130, although, indeed, the act of an agent can never convict his principal of a *crime* without further proof (*ib.* 762). Another exception might appear to exist in the rule laid down in *Rex* v. *Woodfall*, 5 Burr. 2667 (1770) : "Where an act is in itself unlawful the proof of justification or excuse lies on the defendant, and on failure thereof *the law implies a criminal intent.*" Yet the safety of society, joined to the difficulty of proving psychological facts, renders this presumption necessary: Best. Ev. 548. Again, Judges will occasionally permit or even advise juries to infer negligence from the mere happening of an accident, *e. g.*, *Byrne* v. *Boadle*,

2 H. & C. 722 (1863). Of such cases it may be said *res ipsa loquitur* (*ib.* per Pollock, C. B.). There are, too, certain apparently harsh presumptions attaching to particular trades, as, *e.g.*, common carriers, cabmen, and innkeepers (see, however, R. S. O. c. 147); but such instances are explained as necessary to the public welfare.

And, probably, a like necessity must be evoked to justify the many undeniably hard cases which have arisen out of the rule that, where, by the use of clear and unequivocal language, capable of only one meaning, anything is enacted by the Legislature, it must be enforced, although it may be absurd or mischievous: Maxw. on Stats. 4 sq. Lastly a most notable example of an apparent departure from the predominant spirit of charity occurs in the maxim, *Qui semel malus, semper præsumitur esse malus in eodem genere.* Thus, if A maliciously discharging a gun at B kills C, A is guilty of murder, for the malice is transferred from B to C: *Reg.* v. *Smith*, 1 Dearsl. C. C. 559 (1855). And thus also, Bayley, J. is reported to have told the jury that they were to consider the circumstance of an erasure in a certain deed, observing that a man who was capable of making an alteration in one deed might be capable of suppressing another within his power: *Doe* v. *Hirst*, 11 Price, 488 (1822). Mr. Best (Ev. 551) states that the maxim is found in terms in the Canon Law, and is thus defended from the charge of uncharitableness, by one of the Commentators:—*Regula videtur contraria charitati, quæ non cogitet malum; sed non est. Non enim charitatis est malum non cogitare in omni casu, sed tantum, cum nullum subest fundamentum, quale subest in casu regulæ.* Modern writers have, however, also attacked the maxim as contrary to natural justice and humanity: Phillimore, Principles and Maxims of Jurisprudence, 43.

These cases, then, appear to be no real departures from a spirit of charity. And many other striking manifestations of this spirit occur in criminal law, besides those already noticed. Thus although it has been questioned whether it is competent, even in extreme cases, to prove the basis of the *corpus delicti* by presumptive evidence, such evidence is always admissible, and often, especially when amounting to *evidentia rei* most powerful to disprove it: Best, Ev. 569. And the wives at least would probably agree that another instance of the same spirit is to be found in the rule laid down in *Rex* v. *Hughes* (Russ. on Crimes, Ed. 5, vol. 1, p. 147): "The law out of tenderness to the wife, if a felony be committed *in the presence of her husband*, raises a presumption *primâ facie*, . . . that it was done under his coercion." This rule, however, does not extend to crimes which are *mala in se*, nor to such as are heinous in their character or dangerous in their consequences (Best, Ev. 543). And altogether the principle of protecting people from punishment on the grounds of coercion appears very carefully guarded: Arch. Crim. Pl. 22. Ed. 11.

Other examples, immediately connected with criminal law, may be cited (1) the fact that, although in point of law, *Nullum tempus occurrit regi*, yet as matter of practice *Accusator post rationabile tempus non est audiendus, nisi bene de se commissionem excusaverit*: Moore, 817; Best, Ev. 461: (2) the fact that suddenly becoming rich is not in our criminal courts any ground for putting a party on his defence: Best Ev. 580—although 'How i' the name of thrift does he rake this together?'—may in such circumstances seem a natural thought in the minds of Judge and jury: and (3) the fact that, although it is laid down by Coke—*fatetur facinus qui fugit judicium*—yet now the evasion of justice seems

"nearly if not altogether reduced to its true place in the administration of criminal law, viz. : that of a circumstance."—*ib.* 585).

And as the law presumes against crime, illegality and dishonesty, so it presumes also against all vice and immorality and in favour of marriage. It would be out of place to speak here of the great lengths to which this presumption has been carried in Scotland, owing to the peculiar marriage law of "that remarkable country." But in one of these Scotch cases: ***Breadalbane's case***, 1 L. R. H. L. S. 199, Lord Cranworth says:—"By the law of England, and, I presume, of all other Christian countries, where a man and woman have long lived together as man and wife, and have been so treated by their friends and neighbours, there is a *primâ facie* presumption that they really are and have been what they profess to be." And here is found an exception which illustrates the charity and mercy of the law even more clearly than the rule itself. For where there is an indictment for bigamy, or a claim for damages against an alleged adulterer, the presumption is by no means in favour of marriage. On the contrary, in such cases, it is necessary to prove a marriage valid in all respects: *Catherwood* v. *Caslon*, 13 M. & W., 261 (1844). And the maxim *Pater est quem nuptiæ demonstrant*, and *Semper præsumitur pro legitimatione puerorum et filiatio non potest probari* (5 Co. 98, b.) are further illustrations. At one time, indeed, the presumption in favour of legitimacy was irrebuttable if the husband was within the four seas, that is within the jurisdiction of the King of England, at any time during the pregnancy of the wife, unless there was an apparent impossibility of legitimacy (Co. Litt. 244, a; Phil. Ev. 1, 472, Ed. 10). But now it may be rebutted: those however, who dispute the child's legitimacy are bound to make out the contrary: *Wright* v. *Holdgate*, 3 Car. & K. 158 (1850). And in the *Banbury Peerage case*, 1 Sim. & S. 156 (1811), it is given as the opinion of all the Judges that when intercourse has been established no evidence can be received to prove a child illegitimate except it tend to falsify the proof that such intercourse has taken place: the law will not allow a balance of evidence as to who was most likely to be the father of the child. No doubt decency, morality and policy (*see* per Lord Mansfield in *Goodright* v. *Moss*, 2 Cowp. 594), are the foundation of the whole law of marriage, but whatever the reasons for their establishment, the rules are in their *effect* of a merciful and charitable nature.

Such, too, is the effect of the strong presumption of the due discharge of their duty by public officials. Thus it is said: *De fide judicis non accipitur quæstio* (Bac. Max. Reg. 17), and *Omnia præsumuntur rite et solenniter esse acta* (Co. Litt. 232). Public officials are presumed to do their duty, and the fact of a person having acted in an official capacity is presumptive evidence of his due appointment to the office, because it cannot be supposed that any man would venture to intrude himself into a public situation which he was not authorized to fill: Tayl. Ev. 2, 178. It is obvious that public policy requires such presumptions, in order to secure the independence of public officers and prevent their being harassed by vexatious actions—see *Fray* v. *Blackstone*, 3 B. & S. 576 (1863).

But the charity of the law appears not only in the presumption against all kinds of improper conduct, but in many other different directions. Thus the law inclines strongly against penalties and forfeitures. "The law does not favour forfeitures, which will account for the very strict proof required of a landlord,

when he seeks to enforce a forfeiture and recover the demised premises, by reason of the tenant's non-payment of rent, in a case where there is a sufficient distress upon the premises": Archbold's L. & T. 122, Ed. 3, and *see* R. S. O., c. 51, secs, 59-60. So again, no one is obliged to take advantage of a forfeiture: Banning on Lim. 147; R. S. O., c. 108, sec. 10, and it is said a tenancy from year to year will not arise by implication where it will work a forfeiture. And conditions in leases being in the nature of penalties for forfeitures, the Courts keep a strict hold over them. Thus they cannot be apportioned or divided: Co. Litt. 215, a.; and so it was held that if the lessor assigned the reversion of part of the premises to another, his right of entry was gone: *Knight's case* (5 Co. 55, b.). Though as regards rent this state of the law has been altered (R. S. O., c. 136, sec. 7), and the strictness with which the Statute (32 Hen. VIII. c. 34), giving assignees the right, in certain cases, to take advantage of conditions of re-entry is construed, nothwithstanding the words "other forfeiture" in that statute, illustrates the same point (see 1 Will., Saund. 453, Ed. 1871).

The law of discovery, again, affords other examples of this inclination of the law against penalties and forfeitures. "It is," said Lord Hardwicke, "a general rule, established with great justice and *tenderness* by the Law of England, that none shall be obliged to discover what may tend to subject him to a penalty, or to that which is in the nature of a penalty: *Harrison* v. *Southcote*, 2 Ves. Sen. 389, 394. This of course is but one branch of the rule *Nemo tenetur seipsum accusare*, and the extent to which the discovery sought may affect a person, need not be shown; nor is the amount of the penalty material. A man may object to make a statement which would *even collaterally* have the effect of criminating him; nor is a person refusing to answer a question tending to affect him criminally on that account to be considered as admitting the truth of the allegation. And though the privilege is confined to penal consequences likely to be occasioned *to the party himself* (1 Sim. N. S. 329), yet an exception is allowed where evidence is sought from a wife, which may expose her husband to punishment for felony. And the right to protection from discovery can only be taken away "expressly by clear and unequivocal enactment:" per Alexander, L. C. B., *Orme* v. *Crockford*, 13 Price, 376. And even where the defendant had expressly covenanted to answer a bill of discovery, yet where the charge was a criminal one, it was held the defendant was not deprived of his right to discovery even *by agreement*. For confirmation of the above statements and cases, see Hare on Disc. (Ed 2, p. 100 sq.), who speaks of the right of protection from self-accusation, as, wisely or not, pervading every part of our system of judicial inquiry.

And in accordance with the same spirit "if the gist of an action is the injury committed by the defendant, and the right of action is once barred by time, it is impossible to revive it by admission of indebtedness; and in the case of torts no acknowledgments will suffice to avoid the express words of the statute" (Bann. on Lim. p. 40). And individuals cannot agree *inter se* that they, or some of them, shall be subject to a penalty on breach of contract, for the Courts will relieve against it (Hare, Disc. 117).

As two last examples of a charitable spirit in law may be cited, (1) the fact that want of religious belief or irreligious conduct will not be presumed. Mr. Taylor says (Ev. 1,163, Ed. 7): "Defect of religious faith is never presumed; on the

contrary, the law presumes that every man brought up in a Christian land believes in God and fears Him. The charity of its judgment is extended alike to all. . . . Neither does the law presume that any man is a hypocrite, but it presumes that he is what he professes to be, whether atheist or believer." In which respect our law contrasts favourably with the Civil law, which laid it down, that though, as a rule, in the case of crime no one should be condemned from mere suspicion, however strong, yet that where a man is suspected of heresy there is an exception, and he is condemned, *nisi omnem suspicionem excusaverit* : Best, Ev. p. 53. And (2) the maxim *Nemo præsumitur esse immemor suæ æternæ salutis, et maxime in articulo mortis* (6 Co. 76, a.), which may be one of the grounds on which dying declarations are, in cases of homicide, admitted, notwithstanding the general rule against the admittance of hearsay evidence. For this may seem to rest, in part at least, on a view of human nature endorsed by Shakespeare, where he says :—

Salis: May this be possible? May this be true?
Melun: Have I not hideous death within my view,
Retaining but a quantity of life
Which bleeds away, even as a form of wax
Resolveth from his figure 'gainst the fire?
What in the world should make me now deceive,
Since I must lose the use of all deceit?
Why should I then be false, since it is true
That I must die here, or live hence by truth.
King John.—Act v., Sc. iv.

At the same time the care with which the reception of dying declarations is guarded, is itself no doubt prompted by consideration of the weakness of human nature: Taylor, Ev. 606 sq.

Such, then, are a few examples of the charitable and merciful spirit which seems to pervade English law. In them has been traced, however superficially, one of the principles of conduct which the practical experience of mankind, as recorded in the law books, has shown most conducive to the wise conduct of human affairs. "Human Life," says Sir W. Erle, (Law of Trades' Unions; Introd.) "is a progress between two sets of physical and moral agencies perpetually striving against each other, the one on the side of falsehood, malice, and destruction; the other on the side of truth, *kindness*, and health: and the law, if wisely made and properly administered, maintains truth and *kindness* and health, and so among other things helps persons of honest industry to obey each his own will."

F. Lefroy.

MARRIAGE AND DIVORCE.

[*Communicated.*]

As this subject has recently occupied a good deal of the attention of the public, perhaps some extracts taken from statistics and evidence, furnished to the British Parliament previous to the institution of the Divorce Court, may prove of interest.

Matrimony may be viewed either in a canonical light; or, as a legal bond or contract.

The sources of the law, administered in matrimonial cases, were pointed out in a leading case, determined in the House of Lords, by Lord Chief Justice Tindal. He says: "The Law by which "the Spiritual Courts of this Kingdom "have from the earliest time been gov- "erned and regulated, is not the general "Canon Law of Europe, imported as a "body of Law into this kingdom and "governing those Courts, *proprio vigore*, "but instead thereof, an Ecclesiastical "Law, of which the general Canon Law "is no doubt the basis, but which has "been modified and allowed from time "to time by the Ecclesiastical Constitu- "tions of our Archbishops and Bishops,

"and by the Legislature of the realm, "and which has been known from early "times by the distinguishing title of the "King's Ecclesiastical Law. That the "Canon Law of Europe does not, and "never did, as a body of laws form part "of the Law of England, has long been "settled as established Law. Lord "Hales defines the extent to which it is "limited very accurately. The rule, "he says, by which they proceed, is the "Canon Law, but not in its full latitude; "and only so far as it stands uncorrect-"ed, either by contrary Acts of Parlia-"ment, or the Common Law and Custom "of England; for there are divers ca-"nons made in ancient times and decre-"tals of the Popes, that never were here "in England."

The Council of Trent in its 24th Session (A. D. 1563), declared marriage to be a religious ceremony; but the decree was never accepted as authoritative in England.

The Ecclesiastical Commissioners in one of their reports, state: "The Canon "Law was at all times much restricted, "being considered in many respects re-"pugnant to the Law of England, or in-"compatible with the jurisdiction of "the Courts of Common Law; so much "of it as has been received, having been "obtained by virtual adoption, has been "for many centuries accommodated by "our own lawyers to the local habits "and customs of the country; and the "Ecclesiastical Laws may now be de-"scribed in the language of our Statutes, "as Laws which people have taken at "their free liberty, by their own con-"sent to be made among them, and not "as Laws of any foreign prince, poten-"tate or prelate. In addition to those "authorities of *foreign origin*, must be "enumerated also the *Constitutions*, "passed in this country by the Popes "Legates Otho and Othobon, and the "Archbishops and Bishops of England "assembled in National Council in the "years 1237 and 1269—and a further "body of *Constitutions* framed in Pro-"vincial Synods under the authority of "successive Archbishops of Canterbury "from Stephen Langton in 1222 to "Archbishop Chicheley in 1414. These "English Constitutions as they may be "termed, have been illustrated by the "commentaries of English Canonists of "distinguished learning and experience. "These commentaries will be found to "contain much valuable information on "subjects connected with the govern-"ment and history of the Church. To "the foregoing enumeration must be "added the Canons of the English Pro-"testant Church passed in Convocation "in 1603, and such Acts of Parliament "as make particular subjects matters of "ecclesiastical cognizance or regulate "the course of proceeding with respect "to the same."

These last mentioned Canons were never ratified by Parliament, although they received the Royal assent; and are not held to be binding on the Laity, though they are binding on the Clergy.

Lord Hardwicke's Marriage Act, passed in 1773, provided that marriages by minors should be absolutely void; that no marriage could be celebrated without license or publication of banns, and the presence of two witnesses—and further, that no suit should be entertained by the Ecclesiastical Courts to compel the public solemnization of a matrimonial contract, whether de præsenti or de futuro.

By the British Statute 6 & 7 W.IV. chap. 85, persons were enabled to contract valid marriages without any appeal to spiritual authority. By giving notice to the registrar and procuring the prescribed certificate, marriage may be constituted by verbal declaration, or be solemnized in the registered places at cer-

tain hours and in presence of at least two witnesses.

In 1857, the State, by 20th Victoriæ, chapter 85, resumed the jurisdiction in all matrimonial causes which had formerly been determined by the Church. The powers once vested in the Ecclesiastical Courts, and the Parliamentary prerogative of granting divorces *a vinculo matrimonii* were transferred to the "Court for Divorce and Matrimonial Causes." The Court decrees judicial separations, etc. in its character of successor to the Spiritual Courts and dissolves marriages under the powers given to it by the Statute.

The British Legislature by the establishment of the Court fully recognized the right of a married party to a divorce upon certain grounds and in particular cases.

The Law in this respect having been so fully and so long established in England, would it not be worthy of the consideration of the Dominion Government the advisability of introducing a Bill, by which jurisdiction should be given to the Judges of the Supreme Court or any number of them to determine all cases of divorce—a tribunal of such a character would afford a more speedy and less expensive remedy to an injured party than the present cumbersome and costly appeal to the Legislature, which is often influenced by considerations which do not touch the real question at issue between the parties.

J. H.

NOTES OF CASES.

IN THE ONTARIO COURTS, PUBLISHED IN ADVANCE, BY ORDER OF THE LAW SOCIETY.

COURT OF APPEAL.

C. C. Bruce.] [March 22.

BRUCE v. TOLTEN.

Sale of Goods—Acceptance.

In reply to an offer by the defendants for the sale of certain wheat, the plaintiffs telegraphed, "Will take your five cars at 85 cents per bushel," to which the defendants replied by postal card on the 25th July, "Send instructions for the shipment of the five cars, spring." On the 26th, the plaintiff mailed a postal card with instructions, but this was never received by the defendants.

Held, affirming the judgment of the County Court, that the postal card sent by the defendant on the 25th July, amounted to an absolute acceptance and not merely a conditional acceptance should the defendant be satisfied with instructions he might receive as to the mode of shipment.

Robinson, Q. C., for the appellant.

J. A. Boyd, Q.C., for the respondent.

Appeal dismissed.

C. P.] [March 22.

SAMIS v. IRELAND.

Judgment recovered for mortgage debt—Sale of equity of redemption and legal estate thereunder. C. S. U. C. c., 22, sec. 257.

Where the equity of redemption in the mortgaged land, consisting of 25 acres of a certain lot, and also the remaining 75 acres of the said lot, belonging to the mortgagor were sold to the mortgagee under a *fi. fa.* lands issued on a judgment recovered by him for the mortgage debt, and a *fi. fa.* issued out of the County Court upon the transcript of a judgment recovered in the Division Court which was inoperative against these lands, the consideration being to accept the equity of redemption and the freehold for the amount of the two writs.

Held, affirming the judgment of the Common Pleas, that although the sheriff had power under the Statute authorizing the sale of the equity of redemption, to sell the legal

and equitable estates together, the offer in question was one which he had no right to accept as equivalent to a bid for the amount of the writs, and that the sale was void.

J. K. Kerr, Q.C., and *J. A. Boyd*, Q.C., for the appellant.

Bethune, Q.C., for the respondent.

Appeal dismissed.

C. C. Lincoln.] [March 22.

Chesney v. St. John.

Money paid under mistake—Promissory note—Evidence.

Upon a purchase of land from one Mrs. C., the plaintiff gave her a mortgage for $1,100, of which $200 was paid at the time of execution, and endorsed on the mortgage, the balance was to be paid in nine equal instalments with interest at six per cent., the first of which became due on the 7th of November, 1875. At the same time the plaintiff gave her nine promissory notes payable at intervals of one year. The first of these notes was drawn payable to Mrs. C. or bearer, one year after date, and contained the additional words "which when paid is to be endorsed on the mortgage bearing even date with this note." In August, 1875, Mrs. C. and her husband executed an assignment on general terms of this mortgage to the defendant, purporting to grant and assign all the estate and interest of Mr. and Mrs. C., in the land and the mortgage and the moneys thereby secured. In the recital descriptive of the mortgage, it was stated that, in consideration of $1,100 the plaintiff conveyed and assured the lands by way of mortgage to Mrs. C. The amount then due upon the mortgage, was not expressly mentioned in the assignment. At the date of the assignment the first note had been transferred to a third party for value. The plaintiff in ignorance of this paid it to the defendant, to whom he had been notified the mortgage had been assigned. The defendant told the plaintiff that he had not got the note, but that he would get it and give it to him. The plaintiff was afterwards sued by the holder of the note, and was compelled to pay it, whereupon he sued the defendant for the amount. The jury found that the defendant only purchased $800 of the mortgage money and eight notes: that the plaintiffs made the payment under the impression that the defendant held the note as well as the mortgage, and that when the plaintiff paid the money the plaintiff promised unconditionally to give him the note.

Held, affirming the judgment of the County Court, that the note was a negotiable instrument; and that being negotiable and having been transferred before the assignment, parol evidence was admissible to show that it had not in fact been assigned to the defendant, and that under the circumstances, the plaintiff was entitled to recover.

J.K. Kerr, Q.C., for the appellant.

Bethune, Q.C., for the respondent.

Appeal dismissed.

Q. B.] March 22.

Parsons v. Queen's Insurance Company.

Insurance—Statutory conditions—R. S. O. c. 162.

The action was brought on an interim receipt for insurance against fire issued by the defendants after the passing of R. S. O. c. 162, which stated that the plaintiff was insured subject to all the covenants and conditions of the company.

Held, affirming the judgment of the Queen's Bench, that R. S. O. c. 162, extended to the defendants, who were a company formed under the Imperial Joint Stock Company's Act, 7 & 8 Vic. c. 110, and that the defendants could not resort to their own conditions for the purpose of defeating the claim, nor to the statutory conditions.

Robinson, Q.C., and *Small*, for the appellant.

M. McCarthy, for the respondent.

Appeal dismissed.

C. P.] March 22.

Church v. Fenton.

Sale of lands for taxes—Indian Lands—B. N. A. Act, sec. 91, clause 24—Liability to taxation—List of lands not attached to warrant, 32 Vic. c. 36, sec. 128, O.

In 1854, a tract of land was surrendered to the Crown by the Indians, to whom th

interest arising from the sales thereof by the Crown was to be paid. The lands were retained under the management of the Indian Department, and were called Indian lands and after the passing of the B. N. A. Act, still continued under the management of such Department which was under the control of the Dominion Government, "Indian and lands reserved for Indians," being by sec. 91, clause 24 of that Act, exclusively assigned to the Dominion. In September, 1857, the lot in question, being a portion of such lands, was sold by the Crown, the first instalment of the purchase money being paid on the fifteenth of February, 1858, and the last on the twenty-ninth of July, 1867, when the lot was paid for in full, and on the fourteenth June, 1869, the Patent from the Dominion Government issued therefor. In 1870 the lot in question was sold for the taxes assessed and accrued due for the years, 1864-9.

Held, affirming the judgment of the Common Pleas, that upon the lands in question being surrendered to the Crown, they became ordinary unpatented lands within the meaning of the Assessment Acts and that the sale was therefore valid.

It was contended that the Ontario Legislature having repealed the Act of 1876, had after Confederation no power to levy these taxes, the land having been withdrawn from their jurisdiction; but

Held, that sec. 91, clause 24, of the B. N. A. Act, applied only to Indian lands not surrendered and reserved for their use; and moreover that this land being ratable and assessed at the time of Confederation, such liability was not affected thereby.

By the 128th section of the Assessment Act 32 Vic. c. 36, the warden is required to return one of the lists of the lands to be sold for taxes, transmitted to him &c., to the treasurer, with a warrant thereto annexed under the hand of the warden and seal of the county, &c.

Held, that the section was sufficiently complied with by a list, not authenticated by the seal of the corporation and the signature of the warden, attached to a warrant empowering the treasurer to sell "The lands hereinafter mentioned.

M. C. Cameron, Q.C., (*Watson* with him) for the appellants.

Reeve, for the respondent.

Appeal dismissed.

CHANCERY.

V. C. Proudfoot.] [March 5.

THOMPSON v. DODD.

Practice—Decree incorrectly drawn—Setting aside sale under decree.

At the hearing a decree was pronounced declaring a deed void as against the interest reserved in favour of the grantor and his wife, and the children of a daughter of the grantor, but in drawing the decree the deed was declared void as to the children of an intended marriage of the son of the grantor, under which a sale of the trust estate was had at the instance of the plaintiff, a creditor, who had filed the bill impeaching the deed as fraudulent. The Court, under these circumstances, refused to carry out the sale, and ordered the decree to be cancelled, and a new sale had, in which the interests of the children of the marriage should be protected.

JOHNSON v. THE SCHOOL TRUSTEES.

Varying minutes—Practice—Costs.

At the hearing a decree was pronounced in favour of the plaintiff with costs generally, but on moving to vary the minutes statements and admissions in the answer were pointed out—to which the attention of the Court had not been drawn at the hearing, which would have enabled the plaintiff to have obtained the same decree on bill and answer. The Court varied the decree by directing that only such costs should be taxed as would have been incurred by a hearing on bill and answer.

FOX v. THE TORONTO AND NIPISSING RAILWAY CO.

Practice—Receiver.

The decree ordered payment of a sum of money by a railway company, and in default that a receiver should be appointed, from which the Company gave notice of appeal, and moved to stay the appointment of the

receiver and the enforcement of the debt until after judgment in Appeal. The Court refused the application unless security was given for payment of the debt in case the decree should be affirmed; and in any event ordered the defendants to pay the plaintiff the costs of the motion.

Pardee v. Lloyd.

Arbitration—Setting aside award—Practice—Improper conduct of arbitrator.

Where a notice had been served by one of the parties (the defendant) to an arbitration of his intention to move against the award in due time after publication, and the plaintiff thereupon served notice consenting to the award being set aside, but the defendant did not proceed with the motion, the Court, under these circumstances, held that the defendant could not afterwards set up delay as an answer to the application by the plaintiff for the purpose of having the award set aside.

Any communication between one of the parties to an arbitration and an arbitrator on the subject of the reference of which the other party and the other arbitrators were not aware, and at which they are not present, is illegal, and renders the award invalid—an arbitrator being a judge, whose duty it is to be indifferent between the parties: Therefore where it was shown that one of several arbitrators had held several interviews with the defendant pending the reference, and that the arbitrator in one at least of such interviews consulted the defendant as to the modes in which the award might be framed, and asked the defendant which he preferred, these facts being withheld from the other arbitrators, the Court set aside the award and ordered the defendant to pay the costs.

Chancellor.] [March 12.

Boyd v. Simpson.

Practice—Costs—Letter written without prejudice.

Although a letter written "without prejudice" by a party in the course of a cause cannot be read against him, it may be read by him on the question of costs in order to show that he had made such an offer as rendered the prosecution of the suit unnecessary.

Full Court.] [March 28.

St. Michael's College v. Merrick.

Practice—Costs—Liberty to move.

Held, on rehearing affirming the order reported *ante* page 18, where costs of interlocutory motions were reserved "until the hearing or other final disposition of the cause," and on a demurrer being allowed, the order drawn up directed the plaintiff to pay the costs thereof, "together with the further costs of this cause forthwith after taxation thereof;" that whether or not such interlocutory costs would fall within the definition of further costs in the cause, the omission to provide for them in the order allowing the demurrer was "a mere mistake;" and that under the general order 186 the parties had a right to apply without liberty for that purpose being reserved.

Viney v. Chaplin.—3 DeG. & J., 281, considered and acted on.

Masuret v. Mitchell.

Fraudulent settlement.

The owner of Blackacre and Whiteacre created a mortgage on Blackacre in favour of a Loan Society to secure an advance of $2,000, the estimated value of the mortgaged premises being at least $3,000. The mortgagor subsequently, being not indebted otherwise, voluntarily settled, in good faith, Whiteacre on his wife. On a bill filed by a subsequent creditor the Court set aside the settlement as fraudulent against creditors, it being shown that on an attempt to sell Blackacre, at the instance of the Loan Society, it had failed to produce the amount of money advanced by the Society, although the Loan Society was not a party impeaching the settlement. (Proudfoot, V. C., dissenting.)

Baird v. Baird.

Construction of will—Trust deed.

A testator devised his real and personal estate to his wife for life, for the benefit of herself and their children, and directed that,

upon the death of the widow, his property should be equally divided among the children. *Held*, that only such of the children as survived the widow were entitled to participate in such partition of the estate; and one of the sons, as personal representative of the testator, having purchased land with the moneys of the estate, and executed a declaration that he held the lands so purchased (except as to his own interests) in trust only for the other parties interested under the will, and afterwards died during the life of his mother, *Held*, that his children were not entitled to any share in such land, the only persons entitled being such of his brothers and sisters as should survive their mother.

V. C. Proudfoot.] [March 26.

GREEN v. THE PROVINCIAL INSURANCE COMPANY.

Deposit by insurance companies—Parties entitled to claim thereon in case of ineolvency of company.

Held (affirming the report of Mr. Harvey, the assignee of an insolvent insurance company) that where an insurance company had been licensed under the 31 Vict., cap. 48, to transact fire and inland marine insurance business, although its original charter authorized the transaction of fire and marine insurance, without distinction of ocean from marine, the holders of ocean marine policies, though resident in Canada, were not entitled to rank as creditors in the fund deposited with and remaining in the hands of the Government, in the event of the company becoming insolvent.

Chancellor.] [April 2.

MUNRO v. SMART.

Married Women—Wills' Act—Power of married woman to devise to oneofher children.

Held, that under the R. S. O., ch. 106, sec. 6, a married woman cannot devise or bequeath her separate property to one or several children to the exclusion of others.

CAMPBELL v. MCDOUGALL.

Mortgagor and Mortgagee—Notice—Priority.

In October, 1863, the owner of real estate created a mortgage thereon in favour of J. M., to secure $20,000, which was duly registered the day of its execution, and was in 1875 assigned to a bank to secure a liability of the mortgagee, there having been a prior mortgage on the same estate, created in 1861, securing $4,000. In 1866 another mortgage was created in favour of the plaintiff for $4,000, which was intended to be substituted for the prior mortgage for that amount, and the money obtained thereon was applied towards the payment thereof, J. M. giving a written consent that the latter mortgage should have priority to his own, notwithstanding its prior registration, such consent not being registered. The mortgaged estate proved insufficient to pay the mortgage assigned to the bank, who had taken the assignment thereof in good faith and without notice of J. M.'s consent to be postponed to the plaintiff. *Held*, that these circumstances did not create an equity in favour of the plaintiff to call upon J. M. to make good his loss by reason of his neglect to notify the bank of his priority. The case of *Slim* v. *Croucher*, 2 Giff. 37, considered and distinguished.

PECK v. POWELL.

Sale of patent—Specific performance.

C. P., who had been for some time carrying on the business of pump-making, in partnership with B. & C., was the holder of a patent for an improved pump, which would expire on the 19th of July, 1877, but was renewable under the Patent Act for two further terms of five years each. On the first of June, 1877, C. P. agreed to sell to the defendant Peck his interest in such partnership business, together with the land and buildings in which it was carried on, for $4,500; and by the instrument evidencing the agreement executed on the 23rd of June, he agreed "to assign his interest in his pump patents to Mr. Peck, for the counties of," etc. After the expiry of the patent (19th of July, 1877), C. P. filed a bill seeking to enforce payment of $3,000 balance of purchase money due in respect of the sale of his interest in the partnership and of the right as before stated, insisting that all he had sold or intended to sell was his interest in the then current patent; one object

which he had in view in so doing it was found, being to prevent them as assignees afterwards disputing the validity of any renewal of the patent, although it was shown n evidence that C. P. in speaking of the patent he held said it was good for ten years. The Court being of opinion that what the defendants intended to purchase was the right for ten years, and that the belief that they were purchasing such right was induced by the representation of C. P., who knew how the fact was, and was therefore bound to specifically perform the agreement by executing such an assignment as would effectually convey the right for the counties named, whether at the time of the original contract the patent was really good for ten years or afterwards became so, made a decree for that relief at the instance of Peck and his partners in a suit instituted by them for that purpose, and ordered C. P. to pay the costs of both suits, the Chancellor in disposing of the case remarking :—"It does not appear to me to be very material whether the ground for relief be placed upon representation or contract. If in fact the patent held by Powell were not good for ten years, and he stated that it was so, Peck dealing with him upon the faith of what he stated being true, it falls under the old head of equity that he was bound to make good his representation, for he knew how the fact was, whether it is to be taken to be false or true. If, on the other hand, his statement that his patent was good for ten years was true, and he agreed to assign a certain interest in that patent good for ten years, it was a matter of contract, and the other party to that contract is entitled to call for its performance."

Chancellor.] [April 9.

Barrett v. Merchants' Bank.

Lessor and Lessee—Notice to quit—Joint tenants—Judicial acts—Priority of acts.

A. B. created a lease in favour of C. W. and W. W., brothers and partners in trade, of certain premises in Toronto in which the partnership business was carried on, reserving the right to the lessor of determining the lease by giving six months' notice, "limited to the act of A. B. himself or his certain attorney." A notice, for the purpose of determining, was, during the currency of the lease, served by A. B., which was in ample time, but was served on W. W. only, who signed an admission of service for himself and C. W., who was at the time absent from the Province, but the fact of such service it was shown had been communicated to him by his brother, whether within the six months or not did not appear. *Held*, sufficient within the terms of the lease.

On the same day, but subsequent to the service of such notice, a writ of attachment in insolvency issued against the firm, of which A. B. was a member. *Held*, notwithstanding the rule that a judicial act relates back to the earliest moment of the day on which it is done, that the notice so given by A. B. was effectual.

Chancellor.] [April 16.

Pressey v. Trotter.

Mortgage—Mortgagor and mortgagee—Assignee of mortgage security—Costs.

Under the facts appearing in the report of this case in 26 Grant, page 154, the Court on further directions refused to allow the plaintiff, Mrs. Pressey, costs against the assignee of the security, although it was shown on taking the accounts in the Master's office that the mortgagee was indebted to her husband at the inception of the mortgage in a sum exceeding that mentioned in the mortgage, restricting her right to recover her costs from the mortgagee alone, though, had the mortgage money been satisfied by payments, costs would have been given against the assignee as well.

Chancellor.] [April 16.

Henderson v. Henderson—
Re Henderson.

Administration suit—Staying proceedings of a creditor suing at law—Costs.

The Court in making an order to stay the proceedings of a creditor, who had instituted proceedings at law to recover his demand, after an order for the administration of the estate had been obtained in this Court, ordered the creditor to receive his costs; the creditor and his attorney in the action

both swearing that at the time of suing out the writ they were not aware of the pendency of the administration suit— although it was shown that a year before they had been notified of it—there being no reason to doubt the *bona fides* of their conduct.

QUEEN'S BENCH.

VACATION COURT.

Cameron, J.] [March 18.

In re Bush and the Corporation of the Village of Bobcaygeon.

Appeal to Quarter Sessions—Order as to costs—Mandamus.

Under 32-33 Vict. chap. 31, sec. 65, as amended by 33 Vict. ch. 27, sec. 1, sub-s. 3, the Court of Quarter Sessions, at which an appeal is heard must determine, on quashing a conviction, whether any and what costs are to be paid, and when.

When, therefore, the only order made was, "Conviction quashed with costs," *Held*, that no subsequent session of the Court could interfere by way of amendment of the order or otherwise; and a *mandamus* to the Chairman and Clerk of the Sessions to issue the said order, with a provision for payment by the respondents to the appellant of the costs of the appeal forthwith after taxation, was refused.

Marsh, for applicant.

Devlin, contra.

Cameron, J.] [March 18.

In re Grand Junction Railway Company and Masson.

Arbitration and award—Time for moving against—R. S. O. ch. 165, sec. 20, sub-s. 19.

An award against a railway company under R. S. O. ch. 165, was made on the 15th January, and a copy served on the secretary on the 22nd day of the same month. On the 18th of February an application was made to set aside the award, the only material filed upon the motion being a copy of the award and an affidavit, merely stating what one of the arbitrators had informed the secretary of the company were the items constituting the sum awarded, but the evidence given before the arbitrators was not brought before the Court, except in the shape of a statement as to it made on the 7th of March by the claimant under the award, on shewing cause to the rule to set award aside.

Held, that the application was not an appeal under R. S. O. ch. 165, sec. 20, sub-s. 19, there being no evidence brought before the Judge to enable him to decide any questions of fact, but the old ordinary application to set aside an award, and that such as it was too late, the time for so doing having expired on the 15th February. *Quære*, whether service of a copy of the award was a sufficient notice thereof under the statute; but *held*, that even if so, the only evidence of what took place before the arbitrators not having been produced in court for more than a month after such notice, the time allowed for *appealing* had expired.

H. Cameron, Q.C., for applicant.

Masson, contra.

Cameron, J.] [March 25.

Campbell v. Peek.

Award—Uncertainty—Submission—Construction.

Held, that the terms of the submission to arbitrators in this case set out below did not warrant the arbitrator in considering or deciding whether any re-conveyance ought to be made by the vendee to the vendor. *Held*, also, that the award was not bad for uncertainty, for not having ascertained the amount of money to be retained by the vendee.

Maclennan, Q.C., for applicant.

Delamere, contra.

Cameron, J.] [March 25.

In re the Goods of Thomas Cockburn Kerr, deceased.

Mercantile firm—Deceased partner—Probate fees.

For the purpose of taking out probate and paying fees thereon, the representative of a deceased partner in a mercantile firm must be taken to be interested in the corpus of the partnership effects to the extent of the

share of the deceased, undiminished by the debts and liabilities of the firm.

J. K. Kerr, Q.C., for applicant.

McKelcan, Q.C., contra.

Armour, J.] [March 28.

Regina v. Hiscox.

Livery-stable keeper—License—Conviction quashed.

Since the repeal of C. S. U. C. ch. 54, the 31st sub-s. of sec. 294, and which empowered the councils of cities to pass by-laws for regulating and licensing the owners of livery-stables, and the transfer of that power under subsequent legislation to the Board of Police Commissioners, by-laws previously passed by City Councils for such purpose are no longer in force, and a conviction for keeping a livery-stable without license in contravention of a by-law so passed by a City Council was, therefore, quashed.

F. Osler, for applicant.

Ferguson, Q.C., contra.

Hagarty, C. J.] [April 8.

Grant v. Reliance Mutual Fire Insurance Company.

Insurance—Interim receipt—Insurance subject to conditions of policy—Termination of risk—Pleading.

In an action on an interim fire insurance receipt, reciting that plaintiff had paid a certain sum for a three months' insurance, subject to the approval of the directors, and that the property should be held insured for 30 days from date, unless notified to the contrary, but that the insurance thereby made was subject to all the conditions, &c., contained in and indorsed on the printed forms of policy in use by the company, the company pleaded that before the expiration of the 30 days, and before the loss, they notified the plaintiff that the property could not be held insured by them.

On the printed form of policy in use by the company was indorsed the 18th statutory condition, providing that the insurance might be terminated by the company by giving ten days' notice to that effect, and by repaying a rateable part of the premium for the unexpired term, and that the policy should cease after the expiration of ten days from the receipt of such notice and repayment.

Plaintiff replied to defendants' plea, setting up this condition, and alleging that the notice referred to in the plea was not given ten days before the loss, and that there had been no repayment of a rateable portion of the premium for the unexpired term of insurance.

Held, on demurrer, that the replication was good, and that defendants were bound to give the ten days' notice and return a rateable portion of the unearned premium before they could terminate the risk.

Black, for the demurrer.

Clarke, contra.

Hagarty, C. J.] [April 15.

Re Lloyd & Corp. of Alderslie.

By-law—Omission—Refusal to quash.

The Court, in the exercise of its discretion, and following *Grierson* v. *Corporation of Ontario*, 9 U. C. R. 623, and other similar cases since decided, refused to set aside a railway aid by-law, good on its face and which it considered to have been passed in good faith, merely because of the unintentional omission therefrom of the statement of an existing debt of about $2,700, the assessed value of the property of the municipality being about $1,500,000.

H. J. Scott, for applicant.

R. Smith (of Stratford), contra.

COMMON PLEAS.

IN BANCO.

March 25.

Niagara District Mutual Fire Insurance Company v. Gordon.

Mutual Insurance — Alienation of insured property.

Sec. 41 of R. S. O., ch. 161, provides that "in case any property real or personal is alienated by sale, &c., the policy shall be void, and shall be surrendered to the directors of the company to be cancelled, and thereupon the assured shall be entitled to receive his deposit note or notes, upon pay-

ment of his proportion of all losses which have occurred prior to such surrender."

Held, that under this section the alienation by sale, &c., of the insured property avoids the policy wholly, so as to deprive the assured of any remedy thereon, and enables him upon payment of all prior losses and surrendering the policy to be cancelled to relieve himself from further liability.

Mackelcan, Q.C., for the plaintiff.

J. E. Rose, for the defendant.

March 28.

Knowlton et al. v. Mackay.

Agreement to pay a named sum of money for not buying goods—Liquidated damages or penalty.

Declaration: that, by agreement under seal, the defendant agreed on or before the 15th of July, 1878, to manufacture into pot barley, and to store for plaintiffs certain barley of the plaintiffs, and on said date to purchase said barley and pay therefor the sum of $785, alleging a delivery of the barley to the defendant, and the performance of all conditions precedent to entitle the plaintiff to a fulfilment of said agreement, yet that defendant did not manufacture or store said barley, or pay for same on, before or since said date; that by said agreement it was further provided that in case defendant did not pay the said sum of $785 on the said date, defendant should pay the plaintiffs the sum of $100, as liquidated damages, by reason whereof the defendant has become liable to pay the said sum of $100, as in the agreement mentioned, and averring non-payment.

Held, declaration good: 1, that the question could not properly be raised by demurrer, for the plaintiffs were entitled to some damages; and 2, that the $100 so agreed to be paid was not a penal sum or forfeiture for not paying money due, or for any ordinary debt or claim, but liquidated or agreed on damages for one single breach of a contract for not buying at a named price goods of a fluctuating and uncertain value.

Browning (of Dundas), for the plaintiffs.

Mackelcan, Q.C., for the defendant.

COMMON LAW CHAMBERS.

Davis v. Dennison.

Hagarty, C. J.] [March 14,

Dower—Death of tenant—Scire Facias.

In an action for dower, the plaintiff recovered judgment for her dower, but before the execution of the writ of assignment of dower, and after its issue, the tenant of the freehold died, having devised the land in question to the present defendant.

Held, that the plaintiff must proceed by *scire facias*, and not by suggestion or revivor.

Blackstock, for plaintiff.

Creelman, for defendant.

Rogers v. Manning.

Hagarty, C. J.] [March 5.

Evidence—Commission—Further examination of witness.

Held, that if a witness who has been previously examined under a commission states on affidavit that he has further evidence to give to explain or correct his former evidence, a new commission may issue to further examine him, and in such case he is to be considered as a witness for the party who so desires to re-examine him.

Held, that strong suspicion of a depraved motive in the witness who desires to be re-examined is not a sufficient ground upon which to resist the application.

Biggar, for plaintiff.

Shepley, for defendant.

McCleary v. Morrow.

Mr. Dalton.] [March 28.

Old issues—Notice of trial—Term's notice to proceed.

In an old issue where no proceeding has been taken in the cause for a year subsequent to issue being joined, the plaintiff must give a term's notice of his intention to serve notice of trial.

Armour, for plaintiff.

Langton, for defendant.

THURSTON v. BEARD.

Hagarty, C. J.] [March. 28.

Pleading—Replevin—Form of counts—Replevin Act.

In an action of replevin, the sheriff replevied part of the goods, and certified in his return to the writ that the remainder had been eloigned to places to him unknown before the writ came into his hands. The plaintiff declared in two counts :—1. For that the defendant unjustly detained the goods of the plaintiff, specifying the goods replevied, until, &c. 2. For that the defendant unjustly detained, and still detains, against sureties and pledges, the goods of the plaintiff, specifying the goods eloigned.

Held, under R. S. O., ch. 53, sec. 24, that the second count is good.

Aylesworth, for plaintiff.

Ward, for defendant.

McDONALD v. McKINNON.

Mr. Dalton.] [April 14.

Pleading—New assignment—Time to plead.

Held, that a defendant has only four days to plead to a new assignment.

Aylesworth, for plaintiff.

H. J. Scott, for defendant.

CHANCERY CHAMBERS.

Referee] [Feb. 24, '77.

VARS v. GOULD.

Security for Costs—Trustee—Assignee in Insolvency.

An assignee in insolvency *bona fide* suing in the discharge of his duty as such assignee will not be required to give security for costs on the ground that he is without means and not beneficially interested in the suit.

Referee and [Feb. 8.
Blake, V.C.] Mar. 17.

McDERMID v. McDERMID.

Sale under decree—Purchase money—Payment into Court.

On a sale under a decree the purchaser, except under special circumstances, will not be compelled to pay his purchase money into court until he has accepted or approved of the title, or the Master has reported that the vendor can make a good title.

Referee and [Feb. 25.
Proudfoot, V.C.] Mar. 3.

CRUSO v. CLOSE.

Costs—Deposit by defendant on sale—G.O. 428, 429, 436.

Where a defendant by bill in a foreclosure suit demanded a sale, and paid $80 into court as a deposit,

Held, that although the costs of the sale would exceed that amount, the defendant could not be ordered to increase it, the amount being fixed by Schedule S. endorsed on the office copy of the bill under Order 436.

Referee—Spragge C.] [March 1.10.

SHELLEY v. GORING.

Married woman—Next friend—Practice.

Where a married woman files a bill in respect of property acquired by her after the passing of 35 Vict., c. 16 (the 2nd day of March, 1872), she is not, though married before that date, required to sue by a next friend.

Leave was given to strike out the name of a next friend, where one had been named by mistake, and an order had been obtained requiring security for costs.

Proudfoot, V. C.] [March 3.

RE ARNOTT.

CHATTERTON v. CHATTERTON.

Partition under General Order 640—Reference—Jurisdiction of Referee.

Under G. O. 640, where special circumstances are shewn on an application for partition or sale of lands, a reference to a Master other than the Master in the county town of the county where the lands are situate will be directed.

The application under the order should be made to a Judge in Chambers.

The Master—Spragge, C.] [March 7.

HYNES v. SMITH.

Mechanics' Lien Acts—Priority of encumbrancers.

Work was] commenced by a contractor

before the 31st December, 1877, and two mortgages made by the owner were registered against the property, one on the 31st May and the other on the 8th June, 1878. On the 18th June, 1878, the contractor registered his lien, and on the 28th August, 1878, filed his bill, not making these mortgagees parties, and obtained a dercee with a reference.

The Master in Ordinary refused to make the mortgagees parties in his office, holding that they were prior not subsequent encumbrancers.

On appeal, *ex parte*,

Spragge, C. upheld the master's ruling.

Blake, V.C.] [Mar. 18.

Porte v. Irwin.

Decree for sale.

Where a decree directed a sale of certain property at the expiration of a year from the date of a Master's report, a sale at the end of a year from the date of the decree, instead of the date of the report, was allowed under special circumstances on the ground that the decree was in effect equivalent to a judgment at law.

Referee] [Mar. 20

Butler v. Standard Insurance Co.

Appeal—Stay of proceedings in Master's Office—Practice.

Where a decree has been made declaring the plaintiff entitled to insurance moneys and directing a reference to ascertain the amount and payment forthwith after the making of the report; an order staying proceedings in the Master's Office was refused pending an appeal from the decree.

Proudfoot, V. C.] [March 24.

Burn v. Gifford et al.

Expenditure of trustee on trust property—Priority in regard thereto.

When certain persons advanced money to complete building a yacht, and scrip under seal was executed, declaring that one G. was to hold the yacht in trust as security for such advances, and G. expended certain sums for running expenses in taking the yacht to a race.

Held, The expenses not being impeached as improper, that G. was entitled to a first charge on the proceeds of the sale of the yacht for these expenses.

Referee—

Spragge C.] [March 25-31.

Collver v. Swayzie.

Jurisdiction of Referee—Appointing representative ad litem—R. S. O., c. 49, s. 9.

A motion made under R. S. O. c. 49, s. 9 to appoint an administrator ad litem of the estate of a deceased person, may be made before the Referee, as that section merely extends a jurisdiction already possessed by him under G. O. 59.

Spragge, C.] [April 2.

Building and Loan Association v. Carswell.

Married woman—Dower in equity of redemption—Ont. Stat. c. 42 sec. 22.

When the wife of a mortgagor is a party to and bars her dower by the mortgage, she is not improperly made a party defendant to a bill for foreclosure under the mortgage, since the coming into force of above statute, on the 11th March, 1879.

Spragge, C.] [April 21.

Blaylock v. McFarlane.

G. O. 642—Time for appeal from Master's report—Mistake of solicitor.

A Master's report was dated 6th March. On April 2nd a notice of motion was served for leave to appeal therefrom, on the ground that the solicitor was not aware of the new orders passed on the 10th January, 1879, and that he did not know report was made till 31st March, and therefore this was a proper case for the Court to exercise its discretion in his favour.

Spragge, C., dismissed the application with costs.

CANADA REPORTS.

ONTARIO.

ELECTION CASE.

DISTRICT OF ALGOMA.

Reg. ex rel. Londry v. Plummer.

Jurisdiction of County Judges of Algoma to try Controverted Elections—Qualification of Councillors under Rev. Stat., cap. 175—Disqualification on the ground of holding license to sell liquors.

[Sault Ste. Marie, Feb. 24.

The statement of the relator was to the effect that he and the defendant were both nominated as candidates for the Reeveship of the Municipality of Sault Ste. Marie, on the 30th day of December last. That at the said nomination he, the relator, caused a notice to be publicly read by the returning officer protesting against the eligibility of the defendant to be elected and act as such reeve, on the grounds that he was a shopkeeper licensed to sell spirituous liquors by retail, and therefore disqualified under the 74th section of the general Municipal Act, and that all votes cast for the said defendant would be thrown away; and that he, the relator, would claim to be duly elected to the said office of reeve, although the said defendant should have a majority of votes cast for him.

On the return of the summons of *quo warranto* it was admitted on both sides that they both went to the polls, and that the defendant was declared duly elected by a majority of forty votes.

The relator claimed the seat.

The relator appeared in person.

Hamilton, for the respondent, contended:

1. That no power is conferred upon the Judge of the District of Algoma by cap. 174 or 175, Rev. Stat., to try controverted elections.

2. That the relator discloses no legal objections to the validity of the election of the defendant to the reeveship of Sault Ste. Marie, which is a municipality created under cap. 175, Rev. Stat., into which Act the disqualification clauses relied on by relator —sec. 74, Rev. Stat. cap. 174—is not incorporated.

3. That cap. 175, governing municipalities in Algoma, &c., contains no disqualifying clause other than a property disqualification.

McCrea, Co. J.—On the argument it was urged on behalf of the defendant that under Rev. Stat., cap. 175, I had no power to grant *fiats* for municipal summonses, or try contested election cases in the District of Algoma, on the ground that stipendiary magistrates had none, and the 54th section of the Act only empowered me to do what might be done by such magistrate; and the 55th section only further enabled me to decide as to the validity of any by-law or resolution or order of any municipality in the District of Algoma.

The 18th section of the Act, speaking of "the Municipal Act," says: "The provisions of the said Act relating to township municipalities and their officers shall apply to the municipalities erected under this Act, except where inconsistent with this Act."

The 45th section enacts that, "The provisions of law for the trial of controverted elections applicable to councillors of townships in counties shall apply to the members of the council of any municipality formed under this Act."

These sections seem broad and full enough to make the councillors amenable to "The Municipal Act," and to give me the same powers to try contested elections as given by it to the judges of counties. It seems to me it could not be fuller unless indeed all the restricting and empowering clauses of "the Municipal Act" were imported into our constituting one; and surely the giving me additional powers as by the 54th and 55th sections is done, cannot be held to curtail or entirely sweep away those given me in other portions of the Act. I must therefore hold that my jurisdiction is complete.

In like manner it was contended on the part of the defendant that the 18th section of cap. 175, Rev. Stat., did not extend to

the qualifications and disqualifications of councillors under "the Municipal Act," because the 38th section fixed a property qualification and was silent as to disqualifications. This point, however, it will not be necessary to decide for reasons which will presently appear.

Our constituting Act, cap. 175, Rev. Stat., is the 35 Vict., cap. 37, and was passed on the 2nd day of March, 1872.

At that time shopkeepers licensed to sell spirituous liquors by retail were not disqualified from being elected and serving as councillors by any law.

On the 23rd day of March, 1873, the different Municipal Acts of Ontario were consolidated by 36 Vict., cap. 48, and then, for the first time, such shopkeepers were disqualified, by section 75 of that Act, to be a member of the council of any municipal corporation. This clause is now the 74th one of the Rev. Stat., cap. 174, known as "the Municipal Act." But the 514th section of the 36 Vict., cap. 48, enacts as follows: "Nothing herein contained shall affect the Acts of this Province passed respectively in the 33rd and 35th years of the reign of Her Majesty for establishing municipal institutions in the District of Algoma, Parry Sound, Muskoka, Nipissing and Thunder Bay, but the same shall be construed as if the provisions of the Acts herein referred to remained unrepealed, and as if this Act had not been passed."

This clause, though in a much shorter form, is the 597th clause of cap. 174, Rev. Stat., "the Municipal Act." But by the 10th section of chapter 6 of the Revised Statutes of Ontario, it is enacted that "they shall not be held to operate as new laws, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the said Acts and parts of Acts so repealed, and for which the said Revised Statutes are substituted."

Now if it were conceded on the part of the defendant Plummer that the 18th section of cap. 175, Rev. Stat., which is the 35 Vict., cap. 37, sec. 18, did, in fact, import into it all the disqualifications of councillors contained in the general Municipal Act, yet from a consideration of the above named Acts, it is evident that it must be taken as it stood on the 2nd day of March, 1872, when the 35 Vict., cap. 37, was passed, and not as the disqualification now stands. But we have seen that shopkeepers licensed to sell spirituous liquors by retail were then not disqualified, the defendant is, therefore, eligible to be elected and serve as reeve of "the Municipality of Sault Ste. Marie;" judgment will be for him accordingly, and the relator must pay him his costs.

CHANCERY CHAMBERS.

RE C. AND L., SOLICITORS.

Solicitor and client—Agreement—R. S. O. c. 140, sec. 40—G. O. 595.

Where it is a matter of dispute whether there has or has not been an agreement between solicitors and client as to costs, an order for delivery and taxation should be applied for on motion and not on præcipe.

[Mr. Stephens, Jan. 10-14, 1879; Proudfoot, V. C., March 3, 1879.

In May, 1878, in an alimony suit of Purcell v. Purcell, a consent decree was made directing payment of a sum of money to trustees for the benefit of the plaintiff, Isabella Purcell, and containing a separate clause ordering the defendant to pay the plaintiff's solicitor $1,000. The latter clause made no reference to the purpose for which the money was to be paid to the solicitors. The solicitors asserted that this sum was fixed upon as an amount to be paid by the defendant for their costs of suit, and for other charges connected with the matter. Mrs. Purcell, the plaintiff, contended that the solicitors should only receive out of the $1,000 their proper costs, and that the balance, if any, should be paid over to her, and conceiving herself to be entitled, as a matter of course, on Sept. 2, 1878, she took out an order on *præcipe* for the delivery and taxation of the bill.

Cattanach now moved, on behalf of the solicitors, to set aside this order on the ground (1) that there was a substantial question in dispute between them and Mrs. Purcell, and the order could not be properly granted on *præcipe*, *ex parte* and without notice. (2) Certain material facts were

withheld on making said order, as, *e. g.*, that pending negotiations for a settlement it was specially agreed between Mrs. P. and the solicitors that the latter should look to the defendant alone for their costs and make any arrangement they chose with him, and that accordingly the solicitors arranged with the defendant that they should receive $1,000 under the decree for their costs, and that Mrs. P. expressly assented to this arrangement. He cited *De Feuchères* v. *Dawes*, 11 Beav. 46, Morgan and Davey's costs in Chy., 314-5; *Gillespie* v. *Shaw*, 10 U. C. L. J. 100; *Re Greenwood ib.* 131.

Bain, contra—(1) The order is *primâ facie* good under R. S. O., c. 140, sec. 40, the onus of proving the loss of the client's right resting with the solicitors, and they have not made out any such agreement as would disentitle Mrs. P. to the order for delivery and taxation: *Re Ingle*, 21 Beav. 275; *Re Whitcombe*, 8 Beav. 140; *Re Carven ib.*, 436; nor have any special circumstances been shown to render necessary a special application for an order for taxation. (2) The decree drawn by the solicitors themselves is silent as to what is to be done with the $1,000, and nothing is said as to costs. (3) Even if the order was improperly issued *ex parte*, now, having been heard, the order should be allowed to stand as in *Re Ingle*, *ubi sup.*

Cattanach, in reply—There was undoubtedly an understanding about the $1,000, and whether binding or not the order could not in such case be issued *ex parte*: *Re Fitch*, 2 Ch. Ch. 288. If all the circumstances had been disclosed the order would not have been so made, and, therefore, it should be set aside, and the solicitors be placed in a position of defence instead of attack: *Read* v. *Cotton*, 6 U. C. L. J. 114.

The Referee held that the order for taxation should have been applied for on motion and on notice, and granted the order asked.

The question of costs was afterwards discussed. Mrs. P. did not apply for the order by her next friend, and the question was whether any and what order could be made against her, she being a married woman. Finally, the learned Referee, on the authority of *Lawson* v. *Laidlaw*, 3 App. 77, ordered that the order be discharged, "with costs to be taxed by the Master and to be paid out of the separate property of the said Isabella Purcell, which is, at the date hereof, vested in the said Isabella Purcell, or in any other person or persons in trust for her, with which said sum, when so taxed, the said separate property is hereby charged."

On appeal from this decision—

Bain, for the appellant, urged the same arguments and cited the same cases as before. He also maintained that *De Feuchères* v. *Dawes*, the case on which the Referee based his judgment, was different from this. There there was a settlement for costs binding on the parties, here there was no arrangement or agreement which could be contended to be binding on the client, nor by which the client was released from liability to the solicitor.

Proudfoot, V. C., held that all the Referee had determined was that the order for delivery and taxation should have made on motion. It is not necessary, said the learned Vice-Chancellor, to determine whether the plaintiff is or is not entitled to any balance which might remain of the $1,000 after the taxation of the Bill. All that it is necessary to determine is that the facts in this case should have been presented to the Court before the order of taxation was granted.

Appeal dismissed with costs.

IN THE COUNTY COURT OF THE COUNTY OF YORK.

Kersteman et al. v. King.

Land Agent—Acting for vendor and vendee at same time—Commission.

If an agent employed on a commission for the purchase of real estate receive or agree to receive from the vendor any remuneration or commission contingent on the sale of the property, he acts in contravention of his duty to his principal, and forfeits his right to commission from the latter.

[Mackenzie, Co. J.—Jan. 24, 1879.

This was an action brought by the plaintiffs as land agents against the defendant, for whom they were acting in the proposed purchase of a house and lot.

The plaintiffs declared for money payable by the defendant to the plaintiffs, for work, journey and attendances of the plaintiffs, by them done, performed and bestowed, as the agents of the defendant, and otherwise for the defendant, and for the commission and reward due from the defendant to the plaintiffs in respect thereof, &c.

Pleas.—Never indebted and payment.

The case was tried before His Honour Judge Mackenzie without a jury, on the 19th November last, when he directed a verdict for the plaintiffs for $150, reserving leave to the defendant to move the court to enter a verdict or nonsuit for him if the court should be of opinion that the plaintiffs are not entitled to recover.

At the trial the contest was whether the plaintiffs were entitled to recover $150 commission on the alleged purchase of certain property in Rosedale. Contradictory evidence was given in regard to the terms of the purchase and the payment of commission. One of the plaintiffs gave evidence to the effect that he purchased the property for the defendant, and that the defendant was to pay them, the plaintiffs, $150 commission. The defendant swore that he instructed the plaintiffs to purchase a house in Rosedale on conditions that they should get for him a builder's certificate of the house that it was properly built, and that they should get for him a written certificate of the value of the land, and of the condition of the house which stood on it, from some competent valuator and builder. They did not get these certificates.

It appeared also that the vendors were to pay a commission or premium to the plaintiffs for getting a good purchaser.

The plaintiffs admitted that they were to get $100 from the vendors, but said it was not as a commission, and that they intended to credit the plaintiff in their account against him for whatever they were paid by the vendor.

On the 7th February, 1878, the plaintiffs sent a telegram or cable message to the defendant—"one thousand dollars thirty days, balance in four months." On the following day the defendant sent the plaintiffs a cable message, containing one word, "close." This word had reference to the message of the previous day and previous understanding.

On the same day, the 8th February, 1878, the plaintiffs wrote the vendors the following letter :—

"We are now prepared to close for the above property, subject to the terms already agreed upon, on condition that you pay us the usual commission, which amounts to $150."

On the 13th February aforesaid the vendors sent the following communication to the plaintiffs :—

"Your offer of $7,000 net to us, free of all legal expenses, for the White House, Yorkville, we accept, and will give you $100 commission. We cannot at the moment say when we shall be able to give possession, but we expect almost immediately. Our solicitors in the matter are Messrs. ————."

One of the plaintiffs in his evidence said "they, the vendors, agreed to give me $100. It was on the 7th February he (Mr. Cassels) agreed to give me $100 commission. I did not cable King that Cassels was paying me a commission. I asked Mr. Cassels for $150 commission. He said he would not pay it. $100 was verbally agreed on."

The defendant swore that he understood the plaintiffs were acting for him alone, and if he supposed they were not doing that, he would not have employed them.

In January Term, *O'Brien* for the defendant, obtained a rule to set the verdict aside, and to enter a verdict or nonsuit for the defendant pursuant to leave reserved, and the Law Reform Act.

Jas. Robertson—The verdict was right. (1) The evidence does not show the obtaining certificates to be a condition precedent, and the defendant having repudiated the contract must pay for the serviees rendered. It was to the defendant's interest that the commission should be divided. It was the plaintiffs' intention to relieve the defendant of commission to the extent of the amount they should receive from the vendors.

O'Brien supported the rule. (1) All the services required of the plaintiffs, who were acting solely for defendant, were not performed, and they did not obey his instructions. The defendant repudiated the contract for sufficient reason. Story, ss. 8, 211, 329, 344; Evans, 325, 336, 342, 351. (2) There was misconduct and violation of duty on the part of plaintiffs, as agents of defendant, in taking any remuneration as commission or otherwise from the vendors, without the defendant's knowledge and consent: *Salmon* v. *Pender*, 3 H. & C. 642; *Morrison* v. *Thompson*, L. R. 9 Q. B. 480; *Raisin* v. *Clark*, 41 Maryland Rep. 158; 10 Am. Law Rev. 363; and see Wharton, 336, Evans, 345, Bishop, 337, Snell, 457, 466.

Mackenzie, Co. J.—It looks something like this, that the plaintiffs were charging the vendors $150 commission for getting a purchaser for the property in question, and claimed $150 commission from the defendant as purchaser. They were to get a commission from the one party for one thing, and from the other party for another thing, in respect to this property.

In *Salmon* v. *Pender*, 3 H. & C. 636, the Court of Exchequer held that an agent employed to sell land in which he was interested as a shareholder, was entitled to no commission from his employer in respect of the sale. *Morrison* v. *Thompson*, L. R. 9 Q. B. 480, has also been referred to. In the American case of *Raisin* v. *Clark*, 41 Maryland Rep. 158, the plaintiff, a real estate broker, was employed by one Cooper to sell a farm. He advertised it, and the defendant, seeing the advertisement, applied to him, and proposed to exchange for the farm a house in the city. The exchange was made, and the plaintiff received from Cooper his commission of two and a-half per cent., of the value of the property exchanged. He demanded a like commission from the defendant, and brought the action to recover it. This claim was placed upon two grounds: (1) An express agreement with defendant; (2) An alleged usage among brokers in Baltimore to charge each party, upon exchange of real estate, a commission of two and a-half per cent. The Court of Appeal held that he was not entitled to recover upon either of these grounds. It being conceded that he was Cooper's agent to sell the farm, and that the alleged agreement, if made at all, was entered into while this employment continued, he could not lawfully become the agent of the purchaser. It is a general rule, that a person cannot, in an agency of this kind, act as agent or broker for both persons in the same transaction, because there is a necessary conflict between the two interests; and the law will not allow an agent of the vendor, while his employment continues, to assume the essentially inconsistent and repugnant relation of agent for the purchaser. In the present case, from the oral evidence and the letter of the plaintiffs of the 8th Feb. to the vendors, the plaintiffs were acting for the vendors, and charge them with "the usual commission which amounts to $150. See also *Fawnsworth* v. *Hemmer*, 1 Allen 494 (Massachusetts Reports).

The present plaintiffs certainly acted for both parties, and claimed commission from both parties. The defendant, as already stated, swore that he understood that the plaintiffs were acting for him alone, and if he had supposed they were not doing that, he would not have employed them. The vendors have since become insolvent, whether that had anything to do with the subsequent action of the plaintiffs does not not appear. It is questionable on the evidence if a purchase as directed by defendant has ever been effected in respect of the property in question. I think the plaintiffs are not entitled to recover a commission from the defendant under the circumstances of this case. The rule must be made absolute to enter a nonsuit.

Rule absolute to enter a nonsuit.

CORRESPONDENCE.

Division Court Jurisdiction.

To the Editor of The Law Journal

Sir,—In the December number of your valuable journal, you have given this sub-

ject a fair and impartial consideration. I am convinced of the correctness of your view of the great danger of "everlastingly tinkering" with legislation affecting the constitution of our Courts.

The replies given to the questions in the Circular (addressed by the Hon. Attorney-General to members of the profession) by the local Law Societies of Peterboro' and Kingston, I do not think are altogether correct, but are, I have no doubt, the opinions of the profession honestly expressed. I dare say if I had the honour of being a member of the profession, I would take the same views as are therein set forth.

That "the officers of the County Courts" are, as a rule, "men of higher training and capacity for the discharge of their official business than those of Division Courts," I deny, at least in this part of the country, and I do not think the statement that "the costs in the Division Court are in proportion to the amounts recovered larger than in the County Court," correct. I fancy the writer must have had some special case in his mind, when penning this sentence: A judgment for $100 can be obtained in a Division Court for $2.65 if undefended, when defendant lives within a mile of the clerk's office; and the total costs when defended, $3.00, of which the defendant (to enter his defence) must pay 35cts. I do not think a judgment can be had in the County Court for any such amount of costs.

I think the Attorney-General would have done well if he had addressed his circular to prominent business men. He makes a great mistake in thinking that the profession alone are interested in the administration of our laws; the public at large, and the commercial community are, in particular, interested in any legislation affecting the Courts, having especial jurisdiction in the collection of debts, and are justly entitled to be heard.

As to the increase of the jurisdiction of these Courts to sums of $200, Division Court clerks would not be benefitted to any great extent, except in a few great centres of business. The clerks in County Divisions would not get many suits in addition by the increase, as there would not be any great number of transactions of that amount to go into suit, even if they did take place. Supposing that one-half the number of County Court suits now entered are for sums of over $100 up to $200, and that they number one hundred per County (which is, I dare say, a very large average), a division of these amongst the Division Courts in the country (which average about seven to a County) would only increase the clerk's number of suits 14 to 15 each, and his emoluments about $40 per annum. In all probability the Judges would think it only right to increase the amount of the bonds given by clerks, and the small advantage of an increase in business would be more than counterbalanced by the costs of increased bonds to the Crown.

Bailiffs might be benefited to some extent, provided the large claims were all allowed to go to execution, and that they always had to sell to make the money. Unless a bailiff make a sale under an execution, he does not become entitled to the commission of 5 per cent.; in this matter he is not in the same position as a Sheriff, with an execution in his hand. My experience is, that large judgments in Division Courts are seldom collected by the bailiff under execution—many are sued solely to get judgment, and to transfer same to County Court, to get execution against land, and in nearly every case where the defendant is good, he manages to settle before execution issues.

I cannot see that the proposed extended jurisdiction of the Courts would greatly benefit the officers generally; but if the Legislature sees fit to extend it, I will accept the law as in duty bound, and carry it out in my Court cheerfully; but I am convinced it will not benefit me to any great extent.

There are certain things in the present Act that strike me as capable of amendment, and perhaps might be worth while for the Hon. Attorney-General to consider. Would it not be well to require a plaintiff, after his execution is returned *nulla bona*. to make and fyle an affidavit, stating that defendant has land or an interest in

land. Many transcripts are now issued to County Courts when there is no use in so doing, it being well known to plaintiff that defendant has no land, or interest in lands, but for the purpose of keeping the judgment ready for use, in case he should become possessed of such at some future day. On fyling such affidavit, the Division Court clerk should be empowered to issue, to the Sheriff direct, an execution against lands, thereby saving a large amount of costs now paid to Attorneys for their fees in the matter. This would be carrying out the principle of keeping this, the "poor man's Court."

A bailiff by the present law is not bound to go outside of his Division to act on an execution; but when he makes a return of *nulla bona*, he must certify that the defendant has no goods or chattels *in the County*. This frequently causes difficulty and delay, and the plaintiff may not be able to get a return in time to make his claim. I would suggest that a bailiff should be compelled, like the Sheriff, to act throughout the County in which his Division is situate.

There are a few changes necessary in the Rules to make them conform to the Act. This is a matter the Board of County Judges can attend to.

I would respectfully suggest that two or three clerks of experience be added to the Board, as an advisory or consulting body—they would be able from experience in working out the Act and Rules, to point out defects which they find to exist.

There is no fee for the clerk for renewing an execution, although it is held by some lawyers that the clerk must on demand of plaintiff, make the renewal.

I would also suggest that the fee allowed to clerks for transcripts is altogether out of proportion to other fees, and is too small. I also think that a fixed sum for everything up to, and entering bailiff's return, to summons, with a specific addition for each additional defendant, would be an improvement; at any rate it would make charges by clerks uniform.

A Division Court Clerk.

[Whilst we do not agree with our correspondent on some points, he puts his case very fairly. As to the duties of a bailiff, he will find, in the second edition of Mr. O'Brien's Division Court Manual, a full discussion on the subject and a review of the authorities affecting it. Eds. L. J.]

REVIEWS.

Precedents of Pleading under the Judicature Acts in the Common Law Divisions; with Notes explanatory of the different Causes of Action and Grounds of Defence, and a Treatise on the Present Rules of Pleading. By John Cunningham, of the Middle Temple, and W. W. Mattinson, of Gray's Inn. London: Stevens & Haynes, Bell Yard, Temple Bar, 1878.

The whole system of pleading has been so revolutionized by the Judicature Act that the whole profession seemed at sea when it became necessary to draft the most simple statement of claim or ground of defence. For some time it would appear that those concerned kept hammering out forms as seemed best in their own eyes, many of which must have been anything but the lucid and concise statements contemplated by the framers of the Judicature Act; but not until Messrs. Cunningham and Mattinson attempted the task was any effort made to supply what must have been felt as a want by numbers. It is not given to every one to write clearly, and conciseness combined with clearness is a gift of the gods. The old works on the subject are now, as the preface says, of comparatively little value, and only a short time before the work appeared it was remarked as strange that some such book had not been written. We are scarcely in a position to judge of the merits of a work which at present is not appropriate to our more antiquated system. Many of the forms, however, would give valuable hints to some of the prolix pleaders who make life a burdon to those on the Bench, and break the hearts of newly articled clerks. There are some valuable notes to the precedents, after the manner of Bullen and Leake, which are as useful here as in England.

Law Society of Upper Canada.

OSGOODE HALL,

HILARY TERM, 42nd VICTORIÆ.

During this Term, the following gentlemen were called to the Bar :—

William Egerton Perdue.
Elgin Schoff.
James Haverson.
John Cowan.
Ernest Henry Eden Eddis.
Edward Sydney Smith.
John Gilbert Gordon.
Joseph Alfred Wright.
Chester Glass.
Peter Vances Georgen.
James Pearson.
John Bishop.
Frederick William Barrett.
Thomas William Howard.
Daniel Bayarde Dingman.
John Inkerman MacCraken.
James Dowdall.
John Hodgins.
Reginald Gourlay.

And as special cases under 39 Vic. cap. 31 :—

John MacGregor.
William Jex.
Charles McMichael.

And the following gentlemen were admitted as Students-at-Law and Articled Clerks :—

Graduates.

Villeroi Switzer.
Henry Lincoln Rice.

Matriculants.

John Percy Lawless.
Thomas Hadzor Marshall.
Richard Henry Hubbs.
John Robertson Miller.
N. H. Beemer.

Juniors.

Stephen Frederick Washington.
William John Northwood.
John Graham Forgie.
Samuel Thomas Scilly.
Daniel Urquhart.
Levi Thompson.
Denis Joseph Mungovan.
Thomas B. Shoebotham.
Thomas Young Cain.
William Dickinson Farrell McIntosh.
John Dick Hepburn.
David Kirkpatrick J. McKinnon.
David Thorburn Symons.
James Bicknell.
Arthur Wellington Burk.
Lesslie Livingston Jackson.
Charles Creighton Ross.
Arthur Eugene Fitch.
Matthew Elliott Mitchell.
Robert Notman Ball.
George F. Cairns.
James Sidney Garvin.
Gerald Bolster.
Robert Christie.
Noble A. Bartlett.
Arthur Fred. James Spencer.
William Gilbert Macdonald.
Arthur William Johnson.

Articled Clerks.

William Henry Gordon.
Herbert Henry Bolton.
George Holmes Anderson.
Harold Victor Bray.
Edwin Duncan Cameron.

PRIMARY EXAMINATIONS FOR STUDENTS-AT-LAW AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

All other candidates for admission as articled clerks or students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects :—

Articled Clerks.

Ovid, Fasti, B. I., vv. 1-300; or,
Virgil, Æneid, B. II., vv. 1-317.
Arithmetic.
Euclid, Bb. I., II., and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography — North America and Europe.
Elements of Book-keeping.

Students-at-Law.

Classics.

1879 { Xenophon, Anabasis, B. II.
Homer, Iliad, B. VI.

1879 { Cæsar, Bellum Britannicum.
Cicero, Pro Archia.
Virgil, Eclog. I., IV., VI., VII., IX.
Ovid, Fasti, B. I., vv. 1-300.

1880 { Xenophon, Anabasis. B. II.
Homer, Iliad, B. IV.

1880 { Cicero, in Catilinam, II., III., and IV.
Virgil, Eclog., I., IV., VI., VII., IX.
Ovid, Fasti, B. I., vv. 1-300.

1881 { Xenophon, Anabasis, B. V.
Homer, Iliad, B. IV.

1881 { Cicero, in Catilinam, II., III., and IV.
Ovid, Fasti, B. I., vv. 1-300.
Virgil, Æneid, B. I., vv. 1-304.

Translation from English into Latin Prose.

Paper on Latin Grammar, on which special stress will be laid.

MATHEMATICS.

Arithmetic; Algebra, to the end of Quadratic Equations; Euclid, Bb. I., II., III.

ENGLISH.

A paper on English Grammar.

Composition.

Critical analysis of a selected poem :—

1879.—Paradise Lost, Bb. I. and II.

1880.—Elegy in a Country Churchyard and The Traveller.

1881.—Lady of the Lake, with special reference to Cantos V. and VI.

HISTORY AND GEOGRAPHY.

English History from William III. to George III., inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography: Greece, Italy, and Asia Minor. Modern Geography: North A and Europe.

Optional Subjects instead of Greek.

FRENCH.

A Paper on Grammar.

Translation from English into French Prose—

1878 and 1880 } Souvestre, Un philosophe sous les toits.

1879 and 1881 } Emile de Bonnechose, Lazare Hoche.

or GERMAN.

A Paper on Grammar.

Musaeus, Stumme Liebe.

1878 and 1880 } Schiller, Die Bürgschaft, der Taucher.

1879 and 1881 } Schiller { Der Gang nach dem Eisenhammer. Die Kraniche des Ibycus.

A student of any University in this Province who shall present a certificate of having passed, within four years of his application, an examination in the subjects above prescribed, shall be entitled to admission as a student-at-law or articled clerk (as the case may be), upon giving the prescribed notice and paying the prescribed fee.

INTERMEDIATE EXAMINATIONS.

The Subjects and Books for the First Intermediate Examination, to be passed in the third year before the Final Examination, shall be :—Real Property, Williams; Equity, Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery (C.S.U.C. c. 12), C. S. U. C. caps. 42 and 44, and Amending Acts.

The Subjects and Books for the Second Intermediate Examination to be passed in the second year before the Final Examination, shall be as follows :—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law, C. S. U. C. c. 88, and Ontario Act 38 Vic, c. 16, Statutes of Canada, 29 Vic. c. 28, Administration of Justice Acts 1873 and 1874.

FINAL EXAMINATIONS.

FOR CALL.

Blackstone, Vol. I., containing the Introduction and the Rights of Persons, Smith on Contracts, Walkem on Wills, Taylor's Equity Jurisprudence, Stephen on Pleading, Lewis's Equity Pleading, Dart on Vendors and Purchasers, Best on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

FOR CALL, WITH HONOURS.

For Call, with Honours, in addition to the preceding :—Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Hawkins on Wills, Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

FOR CERTIFICATE OF FITNESS.

Leith's Blackstone, Taylor on Titles, Smith's Mercantile Law, Taylor's Equity Jurisprudence, Smith on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the Final Examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

SCHOLARSHIPS.

1st Year. — Stephen's Blackstone, Vol. I., Stephen on Pleading, Williams on Personal Property, Hayne's Outline of Equity, C. S. U. C. c. 12, C. S. U. C. c. 42, and Amending Acts.

2nd Year. —Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

3rd Year.—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Taylor's Equity Jurisprudence, Fisher on Mortgages, Vol. I. and chaps. 10, 11, and 12 of Vol. II.

4th Year. —Smith's Real and Personal Property, Harris's Criminal Law, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis's Equity Pleadings Equity Pleading and Practice in this Province,

The Law Society Matriculation Examinations for the admission of students-at-law in the Junio Class and articled clerks will be held in January and November of each year *only*.