Canada Law Journal.

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DIARY FOR DECEMBER.

18. Sun.....*4th Sunday in Advent.*
21. Wed....Shortest Day.
24. Sat.....Christmas vacation begins in H. C. J. and C. C.
25. Sun.....*Christmas Day.* Sir M. Hale died 1676, æt. 67.
27. Tues ...J. G. Spragge, 3rd Chancellor, 1869.
30. Fri.....Holt, C. J., born 1642.

TORONTO, DECEMBER 15, 1887.

As usual we publish with this number the index for the current volume. The sheet almanac for 1888 will be ready in due course. Arrangements have been made for an addition to our editorial staff, and features of interest will be added to the Journal during the coming year.

WE learn from our namesake in England that "the right of appeal in *habeas corpus* is now definitely put beyond question by the decision in *Cox's Case*, unless the House of Lords, which we suppose will be appealed to as a matter of course, should take a different view. It was not intended by the Judicature Acts to take away a right of appeal, and yet an appeal for all practical purposes, by the prisoner, existed in the practice of allowing him to move four courts in turn for his release. If there is an appeal to the Court of Appeal at all, there must be an appeal by the prosecutor as well as by the prisoner. There is, therefore, this dilemma, either that there is an appeal on both sides, or the prisoner's rights are seriously interfered with. The only *tertium quid* is that the jurisdiction of the Courts of Queen's Bench and of Chancery survive in the corresponding divisions of the High Court, just as Terms still exist as a measure of time. This would be highly inconvenient, and contrary to the whole scheme of the Judicature Acts."

OUR cousins to the south of us are, as a rule, rather prompt men of business, and those who live under the jurisdiction of Judge Lynch have a pretty summary mode of administering criminal justice in a crude and an ancient fashion. How then are we to account for the fact that eighteen months elapsed between the massacre of policemen in Chicago by the anarchists, and the execution of four of the criminals who planned and put it into execution? We do not remember exactly how many months it took to bring Guiteau to justice, but it was a long time. In fact it took nearly as long in these cases to empanel a jury as it did for us to try, convict and hang Riel, though his offence was surrounded with many more difficult legal questions than either of the above cases, and the crime was committed in a unorganized territory where the law was in a very unsettled condition, and the practical difficulties in obtaining evidence and getting the trial enormously greater. The extent of the delay in the case of the Anarchists seems to have directed the attention of legal writers in the United States to the matter referred to. Can any reader answer the conundrum?

A DECISION of some interest in relation to the law of extradition has recently been given by Chief Justice Taylor in the Province of Manitoba. The prisoner, one Fant, was arraigned at the Winnipeg assizes last month on the charge of assaulting the chief of police with intent (as stated in the newspaper report) to feloniously murder him. It appears that the chief went to arrest Fant on the suspicion of stealing cattle, and brought him to a stable near the police station in a buggy, when the prisoner jumped out and

ran away. During the chase Fant fired, and wounded the chief in the leg. Fant escaped, but was arrested at Pembina, and sent back under extradition proceedings. For the defence it was urged that the prisoner was now being tried for an offence for which he was not extradited, that this was contrary to good faith, and that the prisoner had rights in the matter apart from any question between the Governments of the two countries. It seemed, however, to be the opinion of the Chief Justice, that the court should not consider, in a case where it is made to appear in evidence that the prisoner was extradited, and is there taking his trial as a consequence, whether or not the offence in the indictment is the same as that for which he was extradited, or whether it was an extradition offence at all. This view, if we understand the matter correctly, does not seem in accord with *Reg* v. *Burley*, 1 C. L. J. N. S. 34. The prisoner Fant was, however, ordered to be acquitted on the ground that the evidence would not justify a conviction for the offence charged.

LEGAL LEGISLATION.

THE report of the Committee on Legislation appointed by the County Law Associations to the Law Society on the progress made in the work undertaken by them, was published in our last issue. It is of sufficient importance to be referred to more at length.

The immediate object of the appointment of the committee was the revision of the practice and procedure in the courts, and the labours of the committee have, it appears, resulted in the framing of a code of civil procedure, which it is proposed shall supersede all existing written rules of procedure, and it is proposed that matters not expressly provided for shall, after the code takes effect, be settled by analogy to the code and not to the former practice.

One of the principal changes sought to be effected by the code is the establishment of fixed periodical sittings of the High Court in the various county towns throughout the Province. It has been found, as we anticipated, that it is impossible to provide for holding as many as four courts annually in every county town. But we think it will be found that in every county town at least as many sittings will be held as at present, and in some, where the business demands it, more sittings will be held than at present. The increase in the number of sittings involves the payment of extra circuit allowances to the judges, and the Dominion Government may possibly have something to say to the proposed increase in the number of sittings.

For the convenience of practitioners it is also proposed that instead of two judges sitting each week, the weekly business of all the Divisions shall be taken by one judge. There are two or three considerations to recommend this provision. It will possibly do something to get rid of the notion still prevailing that the Chancery Division is "still the Court of Chancery," and it will possibly tend to make the High Court somewhat more homogeneous than it is at present.

The concentration of the Toronto offices for filing pleadings and entering judgments in all the Divisions in one central office, is also aimed at, and is in every way desirable, and would no doubt be found beneficial. The principal difficulty in the way of its accomplishment however, is the non-existence of any suitable chamber at Osgoode Hall, where all the clerks who transact this part of the business in the various Divisions could be brought together. This we fear will be found a formidable obstacle in the way of carrying into effect this proposal of the committee.

The committee propose to abolish the office of judgment clerk, and make provision for giving deputy registrars (among whom we presume they intend to include the "local registrars") the same power of settling minutes of judgments as are possessed by the registrars, subject to the right to move to vary the minutes. According to the present practice the deputy registrars have the same power to settle minutes as the registrars; but before a motion to vary minutes will be entertained in the Chancery Division the judges have required that the dissatisfied party shall procure the minutes to be submitted to a judgment clerk. The object of the proposed change is, we presume, to enable the parties to appeal direct from the settlement by the deputy registrar to a judge. We are inclined to think that this would be no improvement. Many of the local registrars have had no experience whatever in equity practice, and consequently are quite unable intelligently to discharge the duty of settling minutes, when the judgment deals with equitable rights. In all such cases the officer, to settle the minutes of the judgment, ought to have some knowledge of equity practice, and know how the rights of the parties are to be worked out, and he should be familiar with those provisions which are inserted in judgments as a matter of course, in order to work out those rights. Instead of committing this duty to a class of men, many of whom are profoundly ignorant on the subject, we would suggest that it would be better to commit the duty of settling minutes of judgment in outer counties to the masters who have, or may be reasonably supposed to have, the requisite practical knowledge to enable them to discharge the duty satisfactorily.

The abolition of writs of injunction effected by the Judicature Act naturally leads the committee to suggest that the same principle should be extended to other extraordinary remedies, such as prohibition, certiorari, mandamus, habeas corpus, etc.

We do not quite understand what the committee mean when they propose to abolish references to arbitration. We presume that this proposal only relates to compulsory references in actions, and is not intended to affect voluntary references out of court, or the various statutory provisions regulating them.

The proposed abolition of orders *nisi* and summonses, and substitution of notices therefor, is manifestly desirable for the sake both of simplicity, uniformity, and the saving of time and expense; and the establishment of a uniform practice in motions for new trials is also exceedingly desirable. The suggestion that judgments should be drawn up, signed and entered as decrees were formerly drawn up and entered, strikes us as an improvement. This, of course, has only reference to the manner, and not to the place of entry—as all decrees in Chancery were entered in Toronto at the chief office of the court. It will be necessary to be careful that this practice is not unintentionally revived.

While on this point we may observe that there is no express statement in the committee's report of any intention to introduce any rule regulating the entry of orders. In the Chancery Division perhaps there is too great particularity in this respect, while in the other Divisions there is too great laxity. A careful revision of the class of orders which should be entered in full should be made, and such orders should be entered, no matter in which of the Divisions they are made.

The proposal to return to the former simple practice in Chancery in respect to demurrers, is a good one. The rules at present in force relating to the payment of money into court are not altogether satisfactory, and need improvement, and the proposal to require money paid in

with a defence to remain in court subject to order, unless the plaintiff accept it in satisfaction, is reasonable. We think the English Rules allowing a payment into court with a defence denying the plaintiff's right of action should also be introduced.

Passing over some other proposed changes of a minor character, we see that it is proposed that execution may issue forthwith, upon a judgment by default. This is intended to do away with the stay of execution for eight days after the last day for appearance which the Common Law Procedure Act provided, and which was perpetuated by the Judicature Act. The time between service of the writ and execution would thus be reduced from eighteen days, to ten days. We are not sure that a provision which, on the whole, has worked fairly well for over thirty years should be rashly disturbed. It is not in the best interests of the community that legal procedure should be of a too summary character. The fact that within ten days after a writ has been served on you, you may have a sheriff's bailiff in your house is not a pleasant thing to contemplate from the debtor's point of view, and even debtors appear entitled to some little consideration.

The procedure against absconding debtors is proposed to be brought into harmony with the ordinary procedure in an action, and we presume the same principle will be extended to replevin, though the committee say nothing on this point.

The committee have made a proposal that to a committee composed of the Chancellor, Chief Justice and Attorney-General, should hereafter be committed the task of rule-making. The experience gained since the passing of the Judicature Act has abundantly demonstrated that the present method is unworkable in practice. We are not sure, however, that the fact of a man being a Chief Justice or Chancellor or Attorney-General is an indubitably sufficient demonstration of his qualification to make rules of practice.

The committee also suggest that means should be devised for definitely determining before a case is called for trial, whether it is to be tried with, or without a jury. This they think should be settled on a motion to strike out, or add a jury notice, and not left to be settled by the judge at the trial—and in this we think they are right.

The committee think means should be devised for the more rapid obtaining of copies of evidence. Perhaps Mr. Edison's phonograph may ere long be so perfected that the evidence can be ground in at one end, and ground out at the other—in the meantime we suppose the only solution of the difficulty is the employment of more reporters.

We have touched only on the more salient points in the committee's proposals, and shall look for the proposed code with some interest, only hoping that it may not become law without careful consideration of its provisions and an earnest endeavour to make them as complete as possible, so that when it does become law we may "rest and be thankful" for at least another generation without any more tinkering.

SELECTIONS.

NOTES OF CASES IN UNITED STATES.

In *Glover* v. *Burbridge*, South Carolina Supreme Court, Oct. 6, 1887, plaintiff deposited with defendants, as accommodation depositaries, a sum of money, which was sealed up in an envelope and placed in their safe, and took a receipt therefor. In an action to recover the sum, the trial court, in enumerating the matters which would amount to gross negligence so as to make the defendants liable, stated that if the money was abstracted out of the safe by any one of their employees who were occasionally sent to the safe, the defendants would be liable. *Held*, that as the question was whether defendants exercised ordinary care in reference to the deposit, this was to be determined by what was their business habit in regard to entering their safe, and the question should have been left to the jury. The court said: "We agree entirely with the announcement here made of the general principle, that naked depositors are only liable for gross negligence or a lack of ordinary care. But we think that in enumerating the matters which would amount to gross negligence, the rule, as applied to employees sent to the safe, was stated somewhat too positively and broadly. In the connection here, the question was not whether a principal is responsible for the criminal act of his servant, or if so, to what extent; but it was simply whether the defendants exercised ordinary care in reference to the deposit, which, as it seems to us, was to be determined by what was their business habit in regard to entering their safe. When the plaintiff voluntarily made the defendants his accommodation depositaries for a day or two, he must be taken to have done so with reference to the fact that they had a safe, and to their known habits of business in regard to it. If it was the habit of the defendants occasionally, as found necessary or convenient, to send a trusty clerk to the safe with a key, we can hardly suppose that by accepting the deposit they bound themselves to a higher degree of care than they habitually exercised in their own business, and in reference to their own cash. The very question was as to ordinary care—whether the occasional sending of a trusty clerk to the safe was, under the circumstances, less than ordinary care, and necessarily gross negligence. 'When the bailment is for the sole benefit of the bailor, the law requires only slight diligence on the part of the bailee, and of course makes him answerable only for gross neglect.' Story Bailm., § 23. 'If goods deposited are stolen by the servants of a private depositary, without gross negligence on his own part, he is not chargeable any more than he would be if the theft were by a stranger.' Story Bailm., § 88, *Foster* v. *Bank*, 17 Mass. 479. 'The fidelity which the depositary ought to apply to the care of the thing confided to him, should be the same which he applies to the care of his own.' Story Bailm., § 65. In any view that can be taken, it seems to us that the question was not one purely of law, but to a large extent at least, one of fact, and should have been left to the jury." McIver, J., dissented.

In *Coleman* v. *Jenkins*, Georgia Supreme Court, April 18, 1887. Bleckley, C.J., said: "Now, there is high authority for saying that 'he that is robbed, not knowing what is stolen, let him not know it, and he's not robbed at all.' This, though good dramatic law, would perhaps not hold in real life. But another less poetic proposition is both sound and applicable to business. He that thinks he is robbed, but having in his own purse what he thought was stolen, is not robbed at all. When one gets his due ignorantly, if he is not hurt by his ignorance, it is the same as if he acted with knowledge. Thus, where a negotiable promissory note was transferred before maturity as collateral, and was afterward paid off in property, not to the holder but to the payee, who collected without authority, and who, after converting the property into money, transmitted the proceeds to the holder as his own money, and the holder applied the same to the secured debt only, not applying it also to the collateral, and not knowing that he was dealing with a fund

derived from the collateral, this was a discharge of the collateral debt, notwithstanding such ignorance on the part of the holder."

In *Foster* v. *Singer*, Wisconsin Supreme Court, Oct. 11, 1887, it was held that where the garnishee employs defendant at a specified salary per month, to be paid at the end of each month, and the summons is served August 28th, he is not liable to plaintiff for defendant's salary during the month of August, the salary for that month being neither "then due" nor "to become due." The court said: "It seems to us evident that under the testimony given in this case, had Phillips brought his action for his salary for August, 1885, on the day the garnishee summons was served, viz., 28th of August, his action would have been prematurely brought, and he must have failed in his action. There certainly was nothing due to Phillips on the 28th of August, 1885. . . . The only other question in the case therefore is whether there was any thing 'to become due' from the garnishee to Phillips on the 28th of August, when he was served with the garnishee summons, within the meaning of the statute above quoted. We think this question has been answered by this court against the claim of the appellant. In *Bishop* v. *Young*, 17 Wis. 46-53, the present chief justice, in speaking of the construction to be given to the language of the statute above quoted, says: 'And the debts due or to become due evidently relate to such as the garnishee owes absolutely, though payable in the future. We have no idea the statute intended to include the language 'to become due' a debt which might possibly become due upon a performance of a contract by the defendant in attachment. . . . There was nothing absolutely due to him at the time of service of garnishee process upon the respondent. And whether any thing would become due depended upon a contingency.' See also *Smith* v. *Davis*, 1 Wis. 447; *Huntley* v. *Stone*, 4 id. 491. Under the evidence in the case at bar there was nothing due absolutely from the garnishee to Phillips when he was served with the garnishee summons. The evidence clearly shows a hiring by the month for a salary to be paid at the end of the month, and according to the decisions of this court the contract is an entirety. Phillips could not recover any part of his wages unless he worked the whole month. If Phillips had quit work on the 29th he could not have recovered any part of his wages for the month. The debt therefore would only become due upon the contingency that Phillips continued to work for the garnishee for the entire month. See *Gordon* v. *Brewster*, 7 Wis. 355; *Lee* v. *Merrick*, 8 id. 229; *Jennings* v. *Lyons* 39 id. 553; *Diefenback* v. *Stark*, 56 id. 462; *Koplitz* v. *Powell*, id. 671. It can make no difference as to his liability whether the summons was served on the 28th day of the month or on the 2nd. In either case whether any thing would become due depended upon Phillips working the entire month; and if the garnishee is liable when served on the 28th, he would be equally liable if he had been served on the 2nd, if it appeared on the trial that Phillips had worked the entire month. See also upon this subject, *Hancock* v. *Colyer*, 99 Mass. 187; *Knight* v. *Bowley*, 117 id. 551; *Wood* v. *Partridge*, 11 id. 488; *Wyman* v. *Hichborn*, 6 Cush. 264. There is nothing in the case of *Jones* v. *St. Onge*, 30 N.W. Rep. 927, which in any way changes the rule laid down in the case above cited in this court."—*Albany Law Journal.*

SERVANTS' WAGES DURING ILLNESS.

A recent decision of the courts reversing a decision of a magistrate, where an apprentice, who had been disqualified by illness from work, was held, nevertheless, entitled to claim the usual wages during this disability, shows that justices are apt to go wrong on this point. And as the subject is of great practical interest, and the circumstances must be of frequent occurrence, it will be useful to notice some of the authorities, so that justices may be able more accurately to discriminate the important elements of the question. In the case of domestic servants, the difficulty caused by illness is mitigated by this circumstance, that owing to the ready way of determining the contract by a month's notice, the loss can seldom be very serious

if deemed irksome; but as a rule the master requires to determine the contract altogether, in order to escape the duty of paying the usual wages while the servant is disabled, for as an old case expresses it, "the master takes his servant for better and for worse, for sickness and for health." Common charity has seldom allowed this point to be often contested in the case of domestic servants, but in the case of workmen and apprentices and skilled artists, there have been occasional litigations, and some of them attended with nicety. Again there are peculiar contracts where it is necessary for a court to consider whether the good health of the contracting party was not necessarily assumed as a condition of the contract, or as a basis on which the whole contract was founded. The simplest of the cases may, however, first be looked at.

In *Harmer* v. *Cornelius*, 5 C. B. N. S. 236, the question arose whether an artisan who had been engaged for a term to work in his art, and proved incompetent, could be discharged on that account, and the right to dismiss servants for illness, and the relations between master and servant were carefully considered by judges of great insight. A scene painter had been employed at wages of £2 10s. per week, to work at Manchester. An advertisement had been put in a theatrical newspaper asking for two first-rate panorama and scene painters, and the plaintiff was engaged and was set to paint some scenes, but in a short time was dismissed as incompetent. He then sued the employer for damages. After time taken to consider, Willes, J., delivered the judgment of the court to the effect, that when a skilled labourer, artisan, or artist is employed, there is on his part an implied warranty that he is of skill reasonably competent to the task he undertakes. If there is no general and no particular representation of ability and skill, the workman undertakes no responsibility. Here the correspondence showed that there was an express representation that the plaintiff did possess the requisite skill. So the plaintiff lost his cause.

This decision paved the way to another more closely bearing on the subject of a servant's illness, namely, *Cuckson* v. *Stone*, 1 E. & E. 248. In that case the plaintiff had entered into an agreement to serve the defendant for ten years, in the capacity of a brewer, at weekly wages of 50s. with dwelling-house and coals in addition. During the service he was taken ill at Christmas, 1857, was confined to his bed until March following, and was unable to attend to work till June 19, following, when he tendered his services and was again employed as before; but the employer refused to pay the wages during his illness, and for this sum the servant sued. It was admitted that the contract had never been rescinded. Lord Campbell, C.J., said the court agreed with what Willes, J., said in *Harmer* v. *Cornelius*, and if the plaintiff from unskilfulness had been wholly incompetent to brew, or by the visitation of God he had become, from paralysis or any other bodily illness, permanently incompetent to act as brewer, the employer might have determined the contract. He could not be considered incompetent by illness of a temporary nature. But if he had been struck with disease so that he could never be expected to return to his work the employer might have dismissed him, and employed another brewer in his stead. Instead of being dismissed, the servant returned to the service, and was employed as before. The contract accordingly being in force, and never rescinded, there was no suspension of the weekly payments by reason of the plaintiff's illness and inability to work. It is allowed that under this contract there could have been no deduction from the weekly sum in respect of his having been disabled by illness from working for one day of the week; and while the contract remained in force there was no difference between his being so disabled for a day, or a week, or a month. Hence the servant succeeded in recovering his wages.

In the case of an apprentice becoming disabled, something obviously turns on the language of the indenture. In one remarkable case of *Boast* v. *Firth*, L. R. 4 C. P. 1, the father of the apprentice had covenanted that the apprentice would honestly remain with and serve the plaintiff as his apprentice during all the term agreed upon. And the master sued the father on the ground that this covenant was broken. The defence was that by the act of God the apprentice had become permanently ill, and the father thereby

was excused from performance of his covenant. The question raised was whether permanent illness caused by the act of God, and which commenced after the making of the indenture, was an answer. The court said that the whole contract was of a personal nature, and it must be taken that permanent illness or death must have been within the contemplation of the parties, and would override the liability of the parties under the covenant. A condition was obviously implied that the apprentice should continue in such a state as to be able to perform the service. And on that footing the father was held to be excused.

A case of a similar contract occurred in *Robinson* v. *Davidson*, L. R. 6 Ex. 269. The plaintiff was a contractor for musical entertainments, and had agreed to pay £20 to the husband of Arabella Goddard so that she would perform on the piano with other artists, but she failed to appear at the appointed time. The reason was that she was too ill to perform. The plaintiff sued for damages for breach of agreement. The defendant accordingly set up this excuse as an answer to the action. The question again was, whether illness was an excuse, and the point was argued at length. Kelly, C.B., in giving judgment, quoted another decision in *Hall* v. *Wright*, E. B. E. 746, where it was laid down as law that all contracts for personal services which can be performed only during the lifetime of the party contracting, are subject to the implied condition that he shall be alive to perform them; and should he die, his executor is not liable to an action for the breach of contract occasioned by his death. So a contract by a painter to paint a picture within a reasonable time would be deemed subject to the condition that if the painter became paralytic, and so incapable of performing the contract, by the act of God, he would not be liable personally in damages any more than his executors would be if he had been prevented by death. So in this case of the artist engaged to play the piano, the parties must have known their contract could not be fulfilled unless the defendant's wife was in a state of health to attend and play at the concert on the day named. The court at the same time held, that it was the duty of the lady to give early notice of her inability, so as to lessen the loss that might fall on the plaintiff.

Thus the servant is, as a rule, entitled to the wages during illness, and if sued can set up illness as an excuse for performance. Here again arises a distinction that might occur to most people, namely, whether if the illness is caused by the servant's imprudence or misconduct the same consequence follows. This very point was decided in *R.* v. *Raschin*, 38 L. T. N. S. 38. The plaintiff was a merchant's clerk engaged at a salary of £120 a year. He became unwell on 30th July, and obtained permission to be absent from work till 6th August following. He remained away, and was under medical treatment and unable to return till the first week in September, when he tendered his services which were declined. The employer had meanwhile, on 20th August, given him notice terminating the employment from that date. He claimed wages from 1st August to 20th September, during the absence; but the employer declined on the ground that the clerk had by his own misconduct (which was proved at the trial) rendered himself incapable of performing his duties. The plaintiff being nonsuited, leave was given to enter a verdict for the plaintiff, and after argument, the court held the plaintiff to be entitled. Cleasby, B., said that the question was, whether or not illness was such an excuse as to disentitle him to recover wages during his absence from the employment in consequence of it. *Prima facie* illness is to be attributed to the act of God, and the court is not justified in going back for any length of time and entering into an investigation as to what may have been the cause of it. The effect of disability from illness is not to be extend[1] The illness which rendered the plaintiff unable to perform his duties for a time came upon him unexpectedly, and the court cannot go back to first causes and into the question of how it arose. The maxim, *causa proxima non remota spectatur*, is applicable. As to precisely how the disease arose, there may be different opinions and the greatest uncertainty. It was merely a misfortune which could not have been foreseen at the time the contract was made, and the servant was entitled to wages.

The case of *Carr* v. *Hadrill*, 39 J. P. 246, may also be referred to as confirming the previous cases. A biscuit baker had been employed on the terms of a week's notice. One day he sent word that he was ill and unable to attend, and on inquiry this was found to be correct. After an absence of five weeks he returned, when the master refused to allow him to resume work. No notice had been given by the master to quit the service. The Court of Queen's Bench held that the contract was not discharged by the servant's absence from illness and, being still a servant, was entitled to his wages, and to return to work till he got a week's notice to leave.

The same doctrine was further confirmed in the case of *Poussard* v. *Spiers*, 1 Q.B.D. 410. The plaintiff agreed to sing and play in a female part in a new opera at a weekly salary of £11 for three months. The first performance was to be on the 28th November, She attended several early rehearsals, but the final rehearsal had not arrived when the plaintiff was taken ill. She continued unwell and unable to attend the rehearsals for the first performance on 28th November, so that another artist had to be engaged temporarily. On the 4th December the plaintiff was well enough to perform and tendered her services, but these were declined. The question of importance was whether the employer was entitled to rescind the contract when it was discovered that the plaintiff was so ill as to endanger the success of the opera. And the court held that as the inability to attend the first performances went to the root of the matter, it entitled the employer to rescind the contract.

The recent case of *Patten, appellant*, v, *Wood, respondent, ante*, p. 549, was scarcely needed in order to ascertain the law bearing on these matters, but as the magistrate made a mistake, it obviously requires to be borne in mind how the law stands. The appellant, a plumber, had taken as apprentice the respondent, and the deed covenanted that he should pay the apprentice, after a certain date, 14*s*. a week. During that year the apprentice had a tumour in his right hand, and it necessitated his going to a hospital to be treated, and he became an in-patient for a fortnight and underwent an operation. For the next fortnight he was an out patient. The apprentice claimed wages during his absence and the master refused, whereupon the application was made to justices under 38 & 39 Vict. c. 90, for an order on the master to pay these. The magistrate refused and held that the master was not liable. The court, however, held that the magistrate was wrong, and that the series of cases which had established the right of the servant had been overlooked. Such a point can scarcely indeed be argued when the authorities are properly understood and applied.—*Justice of the Peace.*

NOTES OF CANADIAN CASES.

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CHANCERY DIVISION.

Proudfoot, J.] [November 9.

SMITH v. FAIR.

Trade mark—Canadian and Imperial Acts—Colour—Seal—Former action—Account of profits—Necessity for registration—Goodwill—Assignment.

Action by the plaintiff, a cigar manufacturer, to restrain the defendant from infringing certain of the plaintiff's trademarks, amongst others a certain trademark consisting of a seal with portions of ribbon attached and the letters "R. S." forming a monogram above, below, and beside it, and the words "Red Seal"; and also a similar seal but made of wax or other composition, with portions of ribbon attached and the letters "R. S." in monogram thereon.

Held, the above constituted a good trademark.

The Canadian Trademark and Design Act of 1879, sec. 8, defines trademarks in much more comprehensive terms than the Imperial statute of 1883, sec. 64, and some care must be used in considering decisions in the English court.

The word "Red" and the word "Seal" may each be admitted to be *publici juris*, but when combined and applied to a specific manufacture they cease to be so, and can well be protected as trademarks. Single or more letters may also form a trademark, and more especially when combined, woven, or entwined into a monogram.

Under the Imperial Act, sec. 67, a trade mark may be registered in any colour, and the registration confers on the registered owner the exclusive right to use the same in that or any other colour, and our Act should be construed to have as extensive an application.

Held, also, that the fact that the plaintiff had brought a former action against the defendant which action he had discontinued upon the court expressing a view that an action could not be brought until he had registered his trademark under the 4th section of the Trademark and Design Act of 1879, did not now prevent him now that he had registered it ascertaining his right under the registration.

Held, also, that the account of profits which the plaintiff was entitled to should not be limited to the date of the registration, although he might not have been able to sue on the trademark till it was registered, though this act might admit perhaps of a different consideration if the defendant had infringed the trademark innocently, which however he had not in this case.

Semble, that it is only where a trademark has been infringed innocently that a plaintiff must register before suing.

There is no provision in the Canadian Trademark and Design Act of 1879 similar to sec. 70 of the Imperial Act of 1883, providing that a trademark, when registered, shall be assigned and transmitted only in connection with the goodwill of business concerned in the particular case in which it has been registered.

Held, also, that a plain seal of wax to be used on a cigar box was a good trade mark within the terms of the statute.

Meredith, Q.C., and *MacBeath*, for the plaintiff.

McMichael, Q.C., and *H. M. Wilson*, for the defendant.

Boyd, C.] [Nov. 22.

LICENSE COMMISSIONERS v. COUNTY OF FRONTENAC.

Canada Temperance Act—Provincial Acts in furtherance thereof—Constitutionality—Revision of the Statutes of Canada.

Held, that the adoption of the Canada Temperance Act by the municipality of Frontenac has not been changed or interfered with by the revision of the Statutes.

The effect of the revision of the Statutes, though in form repealing the Act consolidated is really to preserve them in unbroken continuity.

Held, also, that R.S.O. c. 181, s. 92, 93, 105, 106; 41 Vict. c. 14, s. 6, 8; 44 Vict. c. 27, s. 11-14, 16; 47 Vict. c. 34, s. 34; 50 Vict. c. 33, by which ways and means are provided for the enforcement of the Canada Temperance Act by the application of local funds raised by local taxation or otherwise in the county, are not *ultra vires* of the Local Legislature.

The general law as to Prohibition respecting all Canada, which can only be enacted by the Dominion, being localized by municipal suffrages, its enforcement becomes also a matter of local importance in the Province within the meaning of the B.N.A. Act, s. 92, item 16.

Britton, Q.C., for the License Commissioners.

Walkem, Q.C., and *Agnew*, for the municipality.

PRACTICE.

Chy. Div. Ct.] [Dec. 1

FARRAN v. HUNTER.

Jury notice—Action to enforce lien on land—Severing issues.

An action for part of the price of a machine and to enforce a lien on land for such price, with a defence of breach of warranty in the defective condition of the machine, is not distinguishable from an ordinary mortgage action to which a defence is raised. Such an action would have been in the exclusive jurisdiction of the Court of Chancery before the Judicature Act, and a jury notice is therefore

improper under s. 45. A separate trial by jury upon the issue raised as to the character of the machine should not be ordered in a case of this kind, where there is but one cause of action.

Temperance Colonization Society v. *Evans*, 12 P. R. 48; *McMahan* v. *Lavery*, 12 P. R. 62, distinguished.

Watson, for the defendant.

T. Langton, for the plaintiff.

Chy. Div. Ct.] [Dec. 2.

RE MCRAE V. ONTARIO AND QUEBEC R.W. CO.

Costs — Taxation — Appeal — Arbitration — Witnesses — Subpœnas — R. S. C. c. 109, s. 8, ss. 22, 23.

The order of PROUDFOOT, J., in Chambers, 12 P. R. 282, affirmed on appeal.

J. M. Clark, for the appeal.

Aylesworth, contra.

DOMINION CONTROVERTED ELECTIONS ACT.

The following is a form of order for particulars in a controverted elections case settled by Mr. Justice Osler, J.A., in the case of *Saylor* v. *Platt*, on October 1st, 1887. It may be of use to record as a precedent. Comparison may be made with the order in *Dickson* v. *Murray*, 19 C. L. J., N. S. 211.

1. It is ordered that the petitioner do not less than fourteen days before the trial hereof deliver to the respondent, his solicitors or agents full particulars in writing of the "bribery, treating and undue influence and intimidation" charged in the fourth paragraph of the said petition, showing the places where and the times when the said alleged acts of bribery, treating and undue influence and intimidation were committed, the names, addresses and occupation respectively of the persons so bribing, treating and exercising undue influence and intimidation, and of the persons alleged to have been bribed, treated, influenced or intimidated respectively, and in each case the nature of the said acts of bribery, treating, unde influence and intimidation.

2. And it is further ordered that the said petitioner do not less than fourteen days before the trial hereof deliver to the said respondent, his solicitors or agents full particulars in writing of the "personation" charged in the fifth paragraph of the said petition showing with particularity the places where and the times when the said alleged acts of personation were committed, the names, addresses and occupations respectively of the persons so personating and of the persons alleged to have been personated, and also full particulars in writing of the acts of inducing persons to commit personation charged in the said fifth paragraph of the said petition showing when, where, by whom and upon or in reference to whom the said acts are alleged to have been committed.

3. And it is further ordered that the said petitioner do not less than fourteen days before the trial hereof deliver to the said respondent, his solicitors or agents full particulars in writing of the "hiring and promising to pay for" conveyances charged in the sixth paragraph of the said petition, the places where and the times when the said alleged acts of hiring and promising to pay for were committed, the names, addresses and occupations of the persons so hiring and promising to pay, and of the persons alleged to have been paid for hire of teams and conveyances, and also in each case the amount or approximate amount so paid or promised to be paid, also full particulars in writing of the acts of "paying travelling expenses of voters" charged in the said sixth paragraph of the said petition showing the times when and the places where the said expenses are alleged to have been paid, also the amounts or approximate amounts paid, and the names, addresses and occupations of the persons by whom and of the persons to whom the said expenses are charged to have been paid.

4. And it is further ordered that the said petitioner do within the time aforesaid deliver to the respondent, his solicitors or agents full particulars in writing of the "other corrupt practices" charged in the seventh paragraph of the said petition and relied upon by the said petitioner, showing the times when, the places where the said corrupt practices were committed, and also the names, addresses and occupations of the persons concerned therein, and in each case the nature of the corrupt practice.

5. And it is further ordered that within the time aforesaid the said petitioner do deliver to the said respondent full particulars in writing of the agent and other persons mentioned in the 4th, 5th, 6th, 7th, 8th and 9th paragraphs of the said petition respectively, showing their names, addresses and occupations

6. And it is further ordered that no evidence shall be given by the said petitioner under the said paragraph of the said petition of any matter not specified as aforesaid in the said particulars except by leave of a Judge upon such terms as may be ordered.

7. And it is further ordered that the costs of this motion be costs in the said petition.

LAW STUDENTS' DEPARTMENT.

LAW SOCIETY EXAMINATION PAPERS.

First Intermediate.

SMITH'S COMMON LAW.

1. When is a servant's knowledge of a dog's ferocity the knowledge of the master?

2. When both *wrongful imprisonment* and *malicious prosecution* exist in the same case, at what different times do they respectively begin?

3. When one person, at the request of another, does an act, not apparently illegal, but which injures a third person, what is the law, as to the liability of the person who requested to the person who did the act?

4. Under what circumstances may a landlord distrain for rent after the expiration of the lease?

5. Are there any, and, if so, what *presumptions* of law in regard to the *life* or *death* of a person?

6. What is the common law liability of the publisher of a newspaper for defamatory matter contained in (*a*) a report of a debate in Parliament; (*b*) a report of what passes at a public meeting?

7. What right has a landowner in regard to *lateral support* to his own land from the land adjoining it?

ANSON ON CONTRACTS.—HONOURS.

1. What distinction is there between communication as it is used for acceptance or revocation? Illustrate by example.

2. Distinguish present from past consideration.

3. A. agrees with B. to sell an estate consisting of certain plots of land for $1,000: on adding up the values of the plots he finds he has made a mistake, and that they are worth $2,000. Can B. enforce the contract? Why?

4. What are the rules as to the tests of illegality of contracts which are made in breach of Statutes?

5. A. holds a note for $500 made by B. to C. and transferred by C. to A.; the note was dated 15th November, 1880, and was payable three months after date; no sum was paid on the note until the 15th January, 1887, when C. paid $100 on it to A.; A. endorsed the receipt of the money on the note and sold the note to D. How far can B. rely on the Statute of Limitations?

6. A is a servant who wishes to obtain a situation with C.: he asks B., a former employer, to give him a character; B. thereupon refuses to give one in writing, but verbally gives him a good one to C.; the character is false, but C., relying upon it, employs A. What remedy has C. against B.?

7. What statutory provisions are there as to joining in one action the parties on a promissory note? How are the rights of the parties between themselves affected by being so joined?

Second Intermediate.

REAL PROPERTY.

1. Why could not a corporation convey by bargain and sale at common law? How is this point affected by legislation?

2. An infant purchases land, and dies under age. Can his heirs avoid the contract? Why?

3. After a mortgagee's death, who can discharge the mortgage? Why?

4. Can the owner of land who has been forcibly dispossessed, lawfully recover possession by his own force? Explain fully.

5. What is meant by a wife's equity to a settlement? Is it affected by recent legislation? If so, how?

6. A tenant for life makes a lease for years, the rent being payable annually. A few days before the day for paying the rent, he dies. Who is entitled to the year's rent? Why?

7. What formalities are required to be observed in the execution of a will?

EQUITY—HONOURS.

1. What are the essential elements required in order to raise a case of Election? Illustrate.

2. Distinguish between an Express trust, a Constructive trust, an Implied trust, a Resulting trust. Give an illustration of each.

3. Discuss briefly the general law as to the enforcement by specific performance of (*a*) Contracts respecting chattels personal; (*b*) Contracts respecting land.

4. Distinguish between the construction put by a Court of Equity on (*a*) executory trusts in marriage articles, (*b*) executory trusts in wills, and give an example.

5. Are there any exceptions to the maxim "*Ignorantia juris non excusat?*" If so, what? Illustrate.

6. In what cases did Courts of Equity interfere to prevent waste?

7. In what cases will a Court of Equity decree a dissolution of partnership at the instance of one of the partners?

Certificate of Fitness.

MERCANTILE LAW—STATUTES—PRACTICE.

1. What modes are there of *winding up* joint stock companies? Explain briefly the procedure.

2. What advances can an agent legally charge against his principal?

Law Students' Department.

3. In what cases is the maker of a note or the acceptor of a bill entitled to presentment?

4. Under what circumstances can a creditor legally claim interest on his claim against a debtor?

5. When goods are distrained for arrears of interest or rent what notice of sale is required?

6. A. executes a chattel mortgage to B., and subsequently assigns to C. for the benefit of all his creditors; E. and F. are execution creditors of A., with writs against goods in the Sheriff's hands. What steps can be taken, and by whom, to contest the validity of B.'s chattel mortgage?

7. In a redemption suit on default of payment according to the report what right has the defendant?

8. What is the position of a third party as to production of documents and examination, such third party having been brought into the action by a defendant, and having entered an appearance?

9. What is the general rule as to what facts must be pleaded by a party in an action?

10. On an assignment of a chose in action what effect has notice in writing to the original debtor of the fact of such assignment?

Call to the Bar.

HARRIS ON CRIMINAL LAW—BROOM'S COMMON LAW —BLACKSTONE, VOL. I.

1. Explain what is meant by *involuntary* manslaughter?

2. What statutory change has been made in the common law mode of trying *accessories?*

3. Define the crime of *embracery*.

4. On a trial of A. for the murder of B., will evidence be received to prove that, on a former occasion, A. attempted to murder B.? Reasons.

5. What are the three classes of acts which the crime of *treason* comprises?

6. What facts are necessary to make a *finder* of goods guilty of *larceny?*

7. What facts must be proved to establish a case of *slander of title?*

8. Explain briefly the nature of the *malice* which is required to support an action for *malicious prosecution?*

9. Of what four parts does every law consist according to Blackstone?

10. What is the effect upon a statute of a saving clause which is totally repugnant to the body of the Act? Why?

CONTRACTS—EVIDENCE—STATUTES.

1. A. asks B. to put his name on the back of a bill of exchange, telling him that it is a guarantee. B. does so on the faith of the representation, and without seeing the face of the bill. How far is B. bound? Why?

2. A. makes a will by which he leaves a large share of his estate to B., who is not a relative. A.'s relatives attack the will, and seek to throw the burden of proof that the will was not improperly made in B.'s favour upon B. How far are they right? Why?

3. In what circumstances, and to what extent is the knowledge of the parties material on the question of illegality?

4. There is an agreement between A. and B. that B. shall perform certain services. On being asked by A. what he will want for performing such services, B. answers, "I leave it to you." B. performs the services, and then A. declines to pay anything. How far can he do so? Why?

5. What does an acceptance of a bill of exchange admit?

6. A. is indebted to B., and to pay his debt hands A. a bill of exchange, drawn at two months by A. on C.; C. refuses to accept; B. thereupon sues A., who claims that A. having taken the bill, has suspended his remedy thereby. How far is he right? Why?

7. In an action on a bill or note, how do you prove the signature of the defendant?

8. Mention any presumptions drawn from usages of trade.

9. A counsel desires to cross-examine a witness as to previous statements made by the witness in writing without showing the witness the writing. How far can he do so?

10. A. is sued upon a contract by B. He seeks to prove: (*a*) that it was illegal: (*b*) that it was fraudulent. How far can he do either?

EQUITY.

1. Distinguish between the rights of an unpaid legatee to compel other legatees to refund—(*a*) where there was an original deficiency in the assets; (*b*) where there has been waste by the executors.

2. A. and B. are public singers. A. enters into a bond with B that he will not sing in Toronto for one year, the penalty in the bond is $2,000. A. desires to break the agreement and offers B. $2,000; he refuses it and issues a writ for an injunction restraining A. from singing. Should he succeed? Explain.

3. What is meant by election to take under an instrument and against? Explain the general law.

4. What is the nature and operation of a solicitor's lien? Is there any difference between a lien on deeds and books of a client, and a lien upon a fund realized in an action?

5. Explain the doctrine of consolidation of securities. How is it affected by Ontario legislation?

6. A mortgagee in possession spends a considerable sum of money in improving the property. On the mortgagor coming in to redeem, he seeks to have this sum made a portion of the redemption money. Should he succeed? Explain fully.

7. State the general circumstances under which a court will appoint a receiver? What are the duties of a receiver in bringing and defending actions?

8. In what cases will an account be decreed between partners when no dissolution is sought.

9. There are several mortgagees of a property entitled to an undivided part of the money; they have all gone into possession: in the tenth year of their possession one of them gives the mortgagor an acknowledgment in writing, signed by himself, of his (the mortgagor's) title. What effect will such acknowledgment have. Supposing the case to be one of one mortgagee in possession and several mortgagors, to one of whom acknowledgment is given by the mortgagee, who is entitled to redeem. Give authority for your answer.

10. In what case will a Court of Equity direct the delivery up of: (*a*) void; (*b*) voidable instruments? Upon what principle is relief granted?

ARTICLES OF INTEREST IN CONTEMPORARY JOURNALS.

Collateral attack on a judgment by a defendant or by a person claiming by, or through him, when the title and property has been affected by the judgment.—*Central Law Journal*, October 28.

Unincorporated trust companies — Monopoly — Partnership.—*Ib.*, October 28, November 4.

Unpaid corporate stock—Liability to creditors.—*Ib.*, November 4.

Jurisdiction (Want of jurisdiction—Conflict of jurisdiction—Concurrent jurisdiction).—*Ib.*, November 11.

The right to begin and reply in special proceedings —(General principles — Insanity — Devastavit — Replevin — Interpleader — Criminal cases —Fraud).—*Ib.*, November 18.

The same (miscellaneous cases and collateral points considered).—*Ib.*, November 25.

The land system of Ireland. The causes which have given the system its present form, and have made it a fruitful source of disorder; and suggested remedies.—*Law Quarterly Review*, April.

American statute law—Historical sketch.—*Ib.*

The history of contract.—*Ib.*

Preventive jurisdiction—Jurisdiction powers and liabilities of the police and magistrates.—*Ib.*

Trustee improperly employing trust money in trade carried on by him in partnership with others—Accountability for profits received.—*Ib.*

The responsibility of principals for the malicious torts of agents.—*American Law Register*, October.

The crime of abortion and solicitations to commit.—*Ib.*

The boycott and kindred practices as ground for damages. (1) The legal definition of these wrongs and their place in the general topography of the law of torts. (2) The development of the principle and their present settled features.—*American Law Review*, July, August.

Sunday idleness—Legal aspects of the first day of the week.—*Ib.*

Suing receivers in foreign jurisdictions without leave of the appointing court.—*Ib.*

Services of experts in the conduct of judicial enquiries.—*Ib.*

Municipal warrants—Negotiable bonds, drafts or orders of municipal corporations.—*Ib.*

National divorce legislation.—*Ib.*, Sept.-Oct.

Inn keepers and boarding-house keepers' lien.—*Ib.*

The watering of railroad securities.—*Ib.*

The law of real estate brokers' commission. (1 The employment of the broker. (2) The proper services. (3) Double employment.—*Ib.*

Judgments by default against non-resident defendants considered constitutionally.—*Ib.*

Donationes mortis causa.—*Ib.*

Interference with social relations.—*Ib.*

Observations on the Bills of Sales Act in England and amendments thereto in 1882.—*Law Quarterly Review*, July.

Appeals by escaped prisoners.—*Criminal Law Magazine*, July

Evidence of character in criminal cases.—*Ib.*

Dying declarations—Belief of speedily impending death.—*Ib.*

Constitutional statutory jurisdiction.—*American Law Register*, August.

Liability of Pullman Palace Car Company for safety of passengers' luggage.—*Ib.*

Does belief in spiritualism affect the power of a party to execute a contract or will?—*Ib.*

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