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DIARY FOR MAY.

18. Thurs. D. A. Macdonald, Lieut.-Governor Ontario, 1875. Ascension Day.
21. Sun... *First Sunday after Ascension.* Confederation of B. N. A. Provinces proclaimed, 1867.
22. Mon.. Lord Dufferin, Gov.-General, 1872.
24. Wed... Queen's Birthday, 1819. Ferguson, V.C., appointed, 1881.
28. Sun... *Whit-Sunday.*
29. Mon.. Battle of Sackett's Harbour, 1813.
30 Tue... Proudfoot, V.C., appointed, 1874.

TORONTO, MAY 15, 1882.

We have received several numbers of the *Australian Law Times*, published at 74 Chancery Lane, Melbourne. It is pleasant thus to hear from time to time from the land of our noble sister. The numbers are, to a large extent, occupied with short reports of current cases, similar to our Notes of Canadian Cases, and for the rest appear chiefly to comprise selections from contemporary law publications. The whole is very well printed, and on good paper, but each fortnightly number contains far less matter than we are able to give to our readers, yet the subscription per annum is just double what ours is. In the issue of September 3rd last, we notice an interesting editoral on "The Rights of Depositors in Building Societies in Victoria." The writer begins by referring at length to the decision of the English Court of Appeal in the case of *Chapleo* v. *The Brunswick Permanent Building Society*, L. R. 5 C. P. D. 331. This was an action brought by the plaintiffs against the Society and six of the directors, to recover moneys paid to and received by the secretary in excess of the limits on borrowing prescribed by law. The secretary having absconded with these moneys, the directors repudiated for themselves and the Society all liability to the plaintiff for the sums thus mis-appropriated. The Court of Appeal exonerated the funds of the Society, but decided in favour of the personal liability of the directors. It would appear further, that in the opinion of the Court, if the secretary, in accepting loans contrary to the rules of the association, had acted apart from the authorization of the directors, express or implied, these latter also would be exempt from responsibility. Thus, as the *Australian Law Times* observes, a depositor or insurer, after paying for years his deposit or premium, may be suddenly told that the society was all along prohibited from doing business on the terms held out to him, and may then discover that except as against the ignorant or fraudulent official who attended to him, he is left absolutely without redress. It appears, however, that by sec. 25 of the Victorian Act, No. 493, it is provided that "any member or other person depositing or lending money with or to any Society under this Act shall not be bound to see to the application thereof, or that the Society has not exceeded its borrowing limit." This, the *Australian Law Times* considers, would protect depositors in Victoria from the responsibility laid upon by such a state of law as that enunciated in *Chapleo* v. *The Brunswick Permanent Building Society.* Now secs. 41 and 42 of our Act respecting Building Societies, R. S. O. c. 164, limits the amount to which such Societies may borrow money. But neither this act nor the amending acts appear to contain any provision similar to the Victoria enactment above mentioned, and it may be worth the while of our legislature to consider this matter.

SUNDAY LAWS—WORKS OF NECESSITY.

The Judges of the Common Pleas Division have just decided in *Regina* v. *Taylor*, that it is unlawful for an ordinary barber to shave his customers upon Sunday; and this on the ground that he is a workman within the meaning of the Lord's Day Act (R. S. O. ch. 189, sec. 1.), and the shaving is a worldly labour or work done by him in the course of his ordinary calling as a barber, and is not a work of necessity or charity. Their Lordships were not prepared to say that a barber connected with an hotel would not be permitted to shave on the sacred day; for in such a case he might be looked upon as a servant kept in a private family to do work on Sundays as well as other days. The Court considered the Scotch case of *Phillips* v. *Innes*, 4 C. & F. 234, decided in 1837, and in which the House of Lords declared shaving on Sunday by a barber not a work of necessity or mercy, a binding decision.

The subject is not only an important, but also an interesting one. It as been considered by several Courts on the other side of the line. In *Commonwealth* v. *Jacobus*, 1 Penn. Leg. Gaz. Rep. 491, it was held that the business of a barber in shaving his customers on Sunday morning is "worldly employment," not "a work of necessity or charity." The Court said: "It is argued that as the law does not forbid a person to wash and shave himself on Sunday, and thus to prepare himself to attend public worship, or otherwise properly to enjoy the rest and recuperation which it was the purpose of the day to give, therefore, another may do it for him without incurring the condemnation of the law. This view is not sustained by the authorities. * * * It is further contended by the counsel for the defendant, that long-continued usage and customs of society, prove that the business of a barber is by common consent considered a necessity within the meaning of the law. * * * But is it a work of necessity? Many persons shave themselves on that day, who are shaved by a barber on other days of the week, and not one in ten who shave on that day employ the services of a barber." In this case Jacobus shut up his "tonsorial parlour" at ten o'clock on Sunday morning; the Court thought that made no difference, and added, "if the closing of these shops on Sundays is an inconvenience to the public, the remedy rests with the Legislature and not with the Court.

Lord Brougham, by the way, in *Phillips* v. *Innes*, seemed to think that the shaving might be done in Dundee on Saturday, as the Glasgow people did it then. The magistrates of Dundee had held that shaving on the Sabbath was right, although it was "not lawful for the barber to work in the making of wigs on Sunday."

In another case in Pennsylvania, it was held to be illegal for a barber to shave on Sunday, even those who were sick on Saturday and could not come on that day to be cleansed; and the fact that he did not charge for his labour is considered no excuse. (*Commonwealth* v. *Williams*, Pearson's Decisions, p. 61.) Even so late as the middle of the eighteenth century "ministers were sometimes libelled" in Scotland "for shaving" themselves on the Lord's day. (Buckle, vol. iii., ch. iv., note 183.

On the other hand, a barber at Tunbridge Wells was summoned for infringing the Act of Charles II., and he ingenioulsy pleaded that if any of his customers had no money, they were shaved for nothing, thus making "the operation a work of charity," and further, that if a footman or waiter were not shaved on Sundays he would probably be discharged, and to serve him was therefore "a necessity." This satisfied the magistrate and the summons was destroyed. (The *Graphic*, Nov. 27th, 1879.)

And in Tennessee, a couple of years ago, it was held that keeping open a barber's shop

on Sunday is not indictable either as a misdemeanor or a nuisance. It was held not to be a misdemeanor, because a penalty for the violation of the Sunday laws is imposed. The question then was, whether it was a nuisance, and the Court said: "It cannot be said that a barber's shop is something which incommodes or annoys, or which produces inconvenience or damage to others. On the contrary, the business of barbering is so essential to the comfort and convenience of the inhabitants of a town or city, that it may be regarded as a necessary occupation. To hold that it becomes a nuisance when carried on on Sunday, is a perversion of the term "nuisance." All that can be said of it is, that when prosecuted on Sunday it is a violation of the statute, and subject to be proceeded against as prescribed by law, but not subject to be indicted as a nuisance. It may shock the moral sense of a portion of the community, to see the barber carrying on his business with open doors on Sunday, but it produces no inconvenience or damage to others, and, therefore, cannot be regarded in legal contemplation "a nuisance." (*State* v. *Lorry*, 7 Baxt. 95.)

It appears that every State in the union, except Louisiana, has a Sunday law; the original and model of most of them is the English Statute of 1676, passed when Charles II. was king. The laws differ greatly, therefore do the decisions; but the general principal of all is the same; ordinary business and labour is forbidden, except works of necessity and charity. In some of the statutes the laws contain special provisions against what we may assume to be the besetting sins of the inhabitants. The Askansas Statute punishes Sunday indulgence in brag, bluff, poker, seven-up, three-up, twenty-one, thirteen cards, the odd-trick, forty-five, whist, or any other game at cards by a fine of from $25 to $50. California charges from $50 to $500 (in the shape of a fine) for attending any bull, bear, cock, or prize fight, horse race or circus; or for keeping open any gambling house, or any place of barbarous or noisy amusement, or any theatre where liquor is sold on the Lord's day. In ages gone by in England bull-baiting or bear-baiting used to cost three shillings and fourpence, and wrestling and bowling five shillings, upon Sunday, (1 Car. I.) The Florida law enacts that anyone disturbing a congregation of whites, is subject to a penalty of not more than $100; or the offender may be whipped, the stripes not to exceed the orthodox forty save one; or be imprisoned for not more than six months.

South Carolina alone sticks to the old notion of compelling people to go to church. Her statute provides, "that all persons having no reasonable or lawful excuse, on every Lord's day shall resort to some meeting or assembly of religious worship, tolerated and allowed by the laws of the state, and shall there abide orderly and soberly during the time of prayer and preaching, on pain of forfeiture, for every neglect of the same, of the sum of one dollar."

In the original Sunday-go-to-Meeting Act, that of Elizabeth, every person had to repair to his parish church every Sunday, on pain of forfeiting one shilling for each offence; and anyone over sixteen who absented himself for a month, forfeited £20 a month. (Eliz. c. 2. 23 Eliz. c. 1.)

In Indiana the act forbidding working, &c. on the day of rest, applies only to those over 14 years of age.

"Necessity" is a relative term, and the law does not mean that the work to be allowed must be "absolutely necessary." "If nothing but absolute necessity were intended, it would, in general, be unlawful to prepare a meal on the Sabbath, because it might without difficulty be previously prepared, or most people might safely enough fast for twenty-four hours. To supply gas light would be equally unlawful, for people might use candles previously provided, or might retire to bed at twilight."

The great object of all these laws is to make the day a day of rest; but some things

are more important and necessary than even *rest*: and the doing of such things when indispensable is allowed. So, it was held that the seasonable preparation of breakfast for her employer's family was such a work of necessity, as justified a maid-servant in travelling on Sunday morning (*Crossman* v. *Lyon*, 121 Mass. 301); and a servant man may drive his master's household to church in his master's carriage (*Com.* v. *Nesbit*, 24 Penn. St. 398). In fact "the law has never been regarded as applying to the proper internal economy of the family. It does not except the ordinary employment of making fires and beds, cleaning up chambers and fire-places, washing dishes, feeding cattle, and harnessing horses for going to church, because these were never regarded as the worldly business of the family, and therefore not forbidden to the head of the family, or to any of the domestics."

In Pennsylvania it was held unlawful to run street cars on Sunday (*Com.* v. *Jeandell*, 2 Gr. Pa. Cas. 506.), or an omnibus (*Com.* v. *Johnston*, 22 Pa. St. 102), even if the omnibus is used partly by church-goers it will not help the case. Still, "if an invalid, or a person immersed for six days within the close walls of a city, requires a ride into the country as a means of recuperation, which is the true idea of rest; there is nothing in the act of 1794 to forbid the employment of a driver, horses and carriages on Sunday to accomplish it. Equally lawful is the employment of the same means to go to the church of ones choice, or to visit the grave of the loved and lost to pay the tribute of a tear." (*Com.* v. *Johnston*, sup.) In Georgia, however, it was recently decided that the running of street cars in cities and their vicinity is a work of necessity (*Angusta and S. R.R.* v. *Renz*, 55 Ga. 126.)

Apropos, of the labour of domestic servants. A doctor's boy, having declined to wash his master's gig on Sunday, had the pleasure of drawing forth from the judge of the Aberdeen and Kincardine Small Debt Court the following remarks:—"It is essential to bear in mind that in determining what is a work of necessity in a domestic establishment, a great deal must be left to the discretion of the master. Life would be intolerable in a house in which the servants were to refuse to do a certain piece of ordinary work on a Sunday, which their employer thought necessary, on the ground that they were of a different opinion. The Sunday work which a master may insist upon having done, must be reasonbly incidental to work that is necessary. For example, I should hesitate to hold that the master was entitled to insist that Sunday should be the weekly washing day, or the day on which the silver plate, not in daily use, was to have its periodical scrubbing. On the other hand, a servant would be bound to see that such things as are in use at every meal are cleaned, even although that involve the operation of cleaning being done between the first Sunday meal and the second." The judge held that the boy should have obeyed his master, and that he was not excused by having offered on Sunday night to clean it. (*Scottish Law Magazine*, 1880). Even the 29 Car. II. allowed the dressing of meat in families, inns, cook-shops, or victualling houses, and the crying of milk on a Sunday in the morning and evening.

The "necessity" intended is "not a personal necessity, but one arising out of the nature of the thing to be accomplished and the need of the community." Poverty and the need of money is no excuse for working on the Sabbath. What a farmer may do in one State he may not do in another; and what he may or may not do is sometimes very doubtful.

In Indiana a man may lawfully feed his hogs on Sunday; and, if according to the practice of good husbandry, it be necessary for him to gather the feed in the field and haul it to the feeding-place on that day, he may do it all without incurring any pains or penalties (*Edgerton* v. *State*, 67 Ind. 588). An honest yeoman may gather in his grain on the Sabbath day, if by leaving it in the field

until Monday it is likely to be spoiled; progathered his wheat into his garner sooner than he did (*Turner* v. *State*, 67 Ind. 595). In that State, too, he can pick and haul to market his water melons—as a work of necessity—if otherwise they would spoil (*Wilkinson* v. *State*, 59 Ind. 416). (The need of the community for water melons must be great!) It appeared from the evidence in this case that Wilkinson was prosecuted for drawing a load of 100 melons to market on a Sunday. On that day he had over 600 dead ripe and ready for market, and he lost all except the one load he marketed. Judge Hawk, in giving judgment on an appeal from the conviction for Sabbath breaking, said: "It would seem that a kind Providence had crowned the labours of the appellant with a bountiful harvest of melons. They were ripening and decaying much faster than he could get them to the market, twenty-six miles off." The learned judge then gave his ideas on water melons and works of necessity: "A ripe water melon in its season is a luxury; but there is nothing more stale, flat and unprofitable than a decayed or rotten melon. It seems to us that it was his duty as a prudent and careful husbandman to labour diligently to get as many of his melons as he could to market Whatever was his duty to do in the premises, there was a moral necessity for him to do; and in the accomplishment of the main purpose of saving and securing the benefits of his crops, whatever labour he was reasonably required to do on Sunday must be regarded, as it seems to us, a work of necessity." The judge further remarked: "It is no desecration of the Sabbath to garner and secure on that day the fruits of the earth, which would otherwise decay and be wasted. It is not necessary for the protection of the Sabbath that men should abuse or overwork either themselves or their horses by midnight work."

Yet down in Arkansas (see above as to some of the provisions of their Sunday laws) their was a poor farmer named Goff, whose wheat was wasting from over-ripeness; but he had no cradle wherewith to cut it, and he waited to borrow one until Saturday night, as his poverty compelled him to work for his neighbours during the week. On Sunday he cut his own grain with the borrowed implement. The Court decided that there was no general necessity that wheat should be cut on Sunday, therefore no one might do it, and that the poor man was not justified in breaking the Sabbath (*State* v. *Goff*, 20 Ark. 289). The disciples of the Man of Nazareth, who not only gathered but also threshed the wheat for their daily bread on the Sabbath day, would have had small chance of an acquittal before this Court; as little chance as any of them would have had if he had been in the poor shoemaker's boots in Massachusetts. This wretched mortal had a garden patch where ill weeds had grown apace. For days he could not get away from his master's shop; at last he got a two days' holiday—Friday and Saturday. He worked hard at his crops, even by moonlight, until late on Saturday night. When he ceased a few hills remained unfinished, in a very bad condition and suffering from want of hoeing. On Sunday morning, about eight o'clock, he spent half an hour in finishing these hills of corn. He was convicted for breaking the Sabbath, and the Court, on appeal, sustained the conviction. (*Com.* v. *Josselyn*, 91 Mass., 411; see also *Com.* v. *Sampson*, 97 Mass., 407.) The judges in this case must have belonged to that school of the Rabbis which insisted that it was a sin to eat an egg laid upon the seventh day; or have been lineally descended from the members of the Kirk session of Humbie, who cited poor Margaret Brotherstone before them "for that she did water her kaill upon the Sabbath day," and ordered her, she having confessed her sin, "to give evidence in public of her repentance the next Lord's day." (Buckle, vol. iii., chap. iv., note 182).

In Indiana (and even in Vermont, although the latter State is very near the unco' guid of Massachusetts), the Courts have considered

that the collecting and the boiling down of maple sap is a work of necessity on Sunday where the sap is flowing freely and all the troughs are full; the maple sugar man having no way of saving his harvest save by emptying the troughs that are full. (*Morris* v. *State*, 31 Ind. 189; *Whitcomb* v. *Gilman*, 35 Vt. 297.)

Again in liberal Indiana, the brewer is allowed to turn or handle the barley which he is manufacturing into malt for his beer, as twenty-four hours neglect would make it unfit for use. The turning is a work necessary to accomplish the object which the brewer has in view, and as the law authorizes the manufacture of beer the labour necessary to make it is lawful and a work allowable on Sunday. (*Crockett* v. *State*, 33 Ind. 416.)

In Ohio it was held that under special circumstances a miller might grind on that day. The Judge said he thought it would hardly be questioned that a gas company might supply gas, a water company water, and a dairyman milk to their customers on that day; for it is no part of the design of the law to destroy or impose ruinous restrictions upon any lawful trade or business. (*McGatrick* v. *Wason*, 4 Oh. St. 566.

Again in Indiana an inn-keeper sold cigars from a stand which was a part of his establishment, and the Court held that he was not punishable. The Judge said:—There is a daily necessity for putting a house in order, cooking meals, drinking coffee or tea, smoking a cigar by those who have acquired the habit, or continuing any lawful habit on Sunday, the same as there is on a work-day, and whatever is necessary and proper to do on Sunday to supply this constant daily need is a work of necessity within the meaning of the law. It is not unlawful to keep a hotel on Sunday in the same way that it is usually kept on a week-day, and if a hotel keeps a cigar stand, which is a part of its establishment, from which it sells cigars to its guests, boarders and customers on a week-day, to sell cigars from the same stand in the same way on Sunday is not unlawful. There is no difference legally between the act of selling a cigar under such circumstances and the act of furnishing a cup of tea or coffee, a meal of victuals, or supplying any other daily want to a customer on Sunday for pay." (*Carver* v. *State*, 69 Ind. 61.) Smokers, therefore, cannot complain.

In Alabama, as in Ontario, all shooting is forbidden if it is not justified by necessity, and shooting a dog in mere mischief is not a necessity. (*Smith* v. *State*, 50 Ala. 159.) In Missouri, however, a man went out hunting on Sunday. He was prosecuted, but acquitted as the law only forbade working on the Sabbath day; the district attorney argued that "hunting" was "working," but the Judges could not see it in that light. (*State* v. *Carpenter*, 62 Mo. 594.)

In Massachusetts it has been held that cleaning out a wheel-pit on Sunday, to prevent the stoppage of mills employing many hands, is not a work of necessity within the meaning of the law. Nor can one who helped at this work as a matter of kindness protect himself by claiming that what he did was a work of charity. (*McGrath* v. *Merwin*, 112 Mass. 467.) No wonder, when the law is such, that the poet wrote, "Alas for the rarity of Christian charity under the sun."

The consideration of works of charity must be deferred until some future time.

[See also, on above subject, *Seaman* v. *The Commonwealth*, 21 Am. Law Reg. N. S. 256.—Ed. C. L. J.]

RECENT ENGLISH DECISIONS.

The April numbers of the *Law Reports* contain a formidable quantity of cases for review, containing L. R. 7 App., pp. 1-218; 19 Ch. D., pp. 311-519; 8 Q. B. D., pp. 317 444; 7 P. D. pp. 5-20.

INTERPRETATION OF STATUTES—PROVISOES—FROM TIME TO TIME

In L. R. 7 App., pp. 1-218, the first case, *Mullins* v. *Treasurer of County of Surrey*,

contains, at p. 17, a *dictum* of Lord Penzance on the subject of statutory construction, which it may be worth while to note. Speaking of a proviso in the Imp. Prisons Act, 1877, to the effect "that nothing in this Act shall exempt a prisoner from payment of any costs or expenses in respect of his conveyance to prison, or otherwise which he would have been liable to pay if this Act had not passed,"—he says:—"I quite agree that provisoes are constantly inserted in Acts of Parliament to protect particular interests *ex majore cautela*, and that you must not always expect to find that if the proviso had not been there, an effect would have been produced contrary to or different from the effect that is produced by the proviso being there; in other words yon must not always expect to find that the proviso was necessary."

The next case, *Lawrie* v. *Lees*, p. 19, involves several points, one of them (i) having reference to the interpretation of statutes. A certain Private Estate Act, relating to the estate of a certain lunatic, who was partner in a brewery business, provided that the Lord Chancellor might "from time to time" order or direct to be done, in relation to the said business and the affairs or concerns thereof, all and whatsoever the said lunatic, if of sound mind, might do. It was objected that the Lord Chancellor, instead of making a separate order upon every occasion when a public-house had to be let, in the carrying on of the business, had made a compendious order giving power to the committees to execute leases on behalf of the lunatic, whenever those leases were approved of by the other partners in the brewery, and whenever they have received the sanction of the master in lunacy. All the Lords who spoke in the case, held against such a construction. Lord Penzance said: "The words "from time to time," are words which are constantly introduced where it is intended to protect a person who is empowered to act from the risk of having completely discharged his duty when he has once acted, and therefore not being able to act again in the same direction. The meaning of the words "from time to time," is that after he has made one order, he may make a fresh order to add something to it, or take something from it, or reverse it altogether: and as that meaning gives sufficient force to the words and explains the use of them here, it seems to me that your Lordships ought not to go further, and to narrow these words by any construction which would throw impediments in the way of carrying on the business, whereas the object of the Act was to facilitate it."

VENDOR AND PURCHASER—CONDITIONS OF SALE.

Another point, which arose in *Lawrie* v. *Lees*, was as to the proper mode of execution of a deed by committees on behalf of a lunatic, but the principal question was (ii.) the effect of the following condition of sale of a leasehold property: "The production of the last receipt for rent paid shall be taken as conclusive evidence of the due and satisfactory performance of the lessee's covenants, * * or the waiver of any breaches of same covenants up to the time of the completion of the purchase, whether the lessor shall be cognizant of such breaches (if any) or not.' Specific performance of the contract for sale had been decreed, with a reference to enquire (1) whether a good title could be made, and if so. (2) when it was first shewn that such good title could be made. This was not appealed from, but on the Chief Clerk certifying that a good title had not been shewn, the vendor took out a summons to vary the certificate, when the present proceedings arose. The House of Lords held that whatever might be urged as to the inequitable character of the above condition as a reason why the Court should not decree specific performance of the contract, yet, specific performance having been decreed, and not appealed from, all that had to be done was to see that a good title was made under that contract and subject to its conditions. But Lord Penzance took occasion to observe, p. 31, that in what-

ever suit the question arose,—"Where the language is plain and therefore no real question of construction arises, I think the Court is bound to execute the contract as it finds it, and if it presses hardly upon one party or the other the answer is that that party entered into it with his eyes open." And he said that the substance of a condition of the above kind appeared to him to be this:—"In making the bargain the purchaser agrees—'I will not raise any question about broken covenants. I will run my risk of any forfeiture of my lease that may be incurred in respect of them. If there has been any breach I do not think it is likely that it will be pressed, but I will take the chance of that.' I think that is the object with which a vendor inserts these conditions on a sale, and that is the object with which a purchaser agrees to such a condition. He takes upon himself the chance of whether there has been a breach, and if there has whether a forfeiture can be enforced."

FORM OF ORDER FOR SPECIFIC PERFORMANCE.

Another point, which arose in *Lawrie* v. *Lees*, (iii.) concerned the form of order. It was objected that the order directed that the plaintiff should pay, and that upon his paying the defendant should execute an assignment, without directing that these two things should be cotemporaneous. But the House held that the proper way to construe such an order was that these should be reciprocal matters which would have to be done cotemporaneously—that one party wss not bound to pay until the other party was ready to execute the assignment, and that the one was not bound to execute the assignment until the other was ready to pay.

REHEARING AFTER DECREE FOR SPECIFIC PERFORMANCE.

Lastly, Lord Blackburn observes, (iv.) at p. 36, and Lord Watson speaks to the same effect, as follows:—"I think it might happen that, there having been a decree of this kind, (specific performance), whilst investigating the title the parties might discover for the first time that there was really a substantial objection to specific performance; and it certainly would be very reasonable in such a case that it should be said. The Court will give a rehearing and see whether it does go to specific performance or not. Such a case might arise, and if the Court did grant a rehearing the Court would take evidence upon it." And after alluding to the objection that had been raised, that the breach of covenant, which had taken place in this place, was a continuing breach, and that, therefore, though the title would, under the above condition, be good unto completion of the contract, yet the day afterwards there would be an infirmity which might interfere with it, he said:—"I think that point ought to have been brought forward either before the decree was made for specific performance, or if as is suggested it was discovered for the first time afterwards, by getting a rehearing, and I think evidence would be taken on all sides to see whether this was a sort of objection which ought to prevail."

B. N. A. ACT—DISTRIBUTION OF LEGISLATIVE POWER.

The next case requiring notice, *The Citizens Insurance Co.* v. *Parsons*, p. 97, will probably be conceded to be one of the most important decisions yet delivered by the Privy Council with reference to the British North America Act. The judgment first points out that notwithstanding the declarations in sect. 91, that "the *exclusive* legislative authority of the Parliament of Canada, extends to all matters coming within the classes of subject" therein enumerated, and that "any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces," it is obvious from a comparison of the contents of the two sections, that the legislature could not have intended that the rule thus laid down should in all cases apply, for in some cases the powers exclusively assigned to the provincial legislatures in sect.

92, come clearly within one or other of the general classes of subjects expressly assigned in sect. 91 to the Dominion parliament, as *e. g.* "the solemnization of marriage" comes within "marriage and divorce." It then goes on to discuss what is meant by "property and civil rights in the province," in sect. 92, subs. 13, the result come to being that it must not be confined to such rights as flow from the law, *e. g.* the statutes of persons, but includes also rights arising from contract, excepting, of course, that class of contracts specially enumerated in sect. 91, viz. : "bills of exchange and promissory notes." It then proceeds to discuss the meaning of the words "the regulation of trade and commerce" in sect. 91. The conclusion come to is that the context shows that regulations relating to general trade and commerce were in the mind of the legislature, and they were not referring to rules for regulating particular trades. The words rightly understood include "political arrangements in regard to trade requiring the sanction of parliament, regulation of trade in matters of inter-provincial concern, and it may be that they would include general regulation of trade affecting the whole dominion." The immediate result arrived at, is that Ont. 39 Vict. c. 24 requiring certain conditions to form part of policies of insurance entered into or in force in Ontario is not *ultra vires*, no matter whence the insurance company affected may have derived its corporate powers. It only requires that if they choose to make contracts of insurance in Ontario, relating to property in that province, such contracts shall be subject to certain conditions. But the more important result of the reasoning in the judgment would appear to be that it points to three simple propositions with reference to the powers of the Dominion Parliament and the provincial legislatures respectively in reference to the incorporation of companies, viz. : (i.) the Dominion parliament alone has the right to create a corporation to carry on business throughout the Dominion,—and it has this right by virtue of its general power over all matters not coming within the classes of subjects assigned exclusively to the legislatures of the provinces, the only subject on this head assigned to the provincial legislatures being "the incorporation of companies with provincial objects." (ii.) Nevertheless each provincial legislature has the power to regulate the contracts of such Dominion companies, within the limits of its province ; this it has by virtue of its exclusive legislative power over "property and civil rights in the province." (iii.) Each provincial legislature has authority to incorporate companies with power to carry on business within the limits of the province ; this it has by virtue of its power over "the incorporation of companies with provincial objects."

It was also decided in this case that according to the true construction of the said Ontario Act, 39 Vict. c. 24, whatever may be the conditions sought to be imposed by insurance companies no such conditions shall avail against the statutory conditions, and the latter shall alone be deemed to be part of the policy and resorted to by the insurers, notwithstanding any conditions of their own, unless the latter are indicated as variations in the manner prescribed by the Act.

The next case requiring notice is also an important case on the British North America Act, viz., *Dobie* v. *The Temporalities Board*, p. 137. The judgment in this case lays down the proposition that the power conferred by section 129 of the B. N. A. Act upon the provincial legislatures to repeal and alter the statutes of the old Parliament of the Province of Canada are made precisely co-extensive with the powers of direct legislation with which these bodies are invested by the other classes of the Act, and therefore in order to ascertain how far any Provincial Legislature has power to alter and amend an Act of the old Parliament of Canada it is necessary to revert to sects. 91 and 92 of the B. N. A. Act. Moreover, at p. 149 we find the following given as principles established by the judgment in *Citizens Ins. Co.* v. *Par-*

sons:—"The first step to be taken with a view to test the validity of an Act of the provincial legislature is to consider whether the subject matter of the Act falls within any of the classes of subjects enumerated in sect. 92. If it does not then the Act is of no validity. If it does then these further questions may arise, viz., whether, notwithstanding that it is so, the subject of the Act does not also fall within one of the enumerated classes of subjects in sect. 91, and whether the power of the provincial legislature is or is not thereby overborne."

B. N. A. ACT, SECT. 108.

The next case calling for notice, *Western Counties Ry. Co.* v. *Windsor and Annapolis Ry. Co.*, p. 178, is also a decision under the B. N. A. Act, but it appears only necessary to say that the principle it establishes is that though sect. 108, which enacts that the public works and property of each Province, enumerated in Sched. 3 to the Act, shall be the property of Canada, had the effect of transferring to the Dominion of Canada all railways which were the property of the separate provinces, yet it had not the effect of vesting in Canada any other or larger interest in those railways than that which belonged to the Province at the time of the statutory transfer.

AMENDING PROBATE—FROM AND AFTER DECEASE OF WIFE—VESTING.

The last case in this number, *Rhodes* v. *Rhodes*, p. 192, is a will case from New Zealand. Two questions arose in it, viz. (i.) whether the plaintiff was entitled to have the probate of the will amended by having certain words contained in it omitted; (ii.) as to the proper construction of certain clauses in the will. As to (i.) it appeared that the person who drew the will, on general instructiosn from the testator, inserted certain words in it for no particular reason, except that he thought they would come in an ordinary will. The effect of these words, it was said was to change the whole effect of the subsequent part of the will, and so defeat the testator's intentions. The will was afterwards read over to the testator, he being then of disposing mind, but very ill, and he executed it, having confidence in the draughtsman, though it was impossible to suppose that he had an intelligent appreciation of the effect of these words at all. Their Lordships, however, held that "there is no difference between the words which a testator himself uses in drawing up the will, and the words which are *bona fide* used by one whom he trusts to draw it up for him. In either case there is a great risk that words may be used that do not express the intention. There probably are very few wills in which it might not be contended that words have been so used. However this may be, the Court which has to construe the will must take the words as they find them." And they distinguish the case where a certain part of an instrument purporting to be a will has been inserted by fraud, and where this part, being "so distinct and severable from the true part that the rejection of it does not alter the construction of the true part, it has been held that, consistently with the statute of wills, the execution of what was shewn to be the true will, and something more, may be treated as the execution of the true will alone." (ii.) The point of construction in question was as follows:—The testator, after making certain dispositions in favour of his wife, and others, not affecting the question at issue, directed that *from and after the decease of his said wife* without leaving issue of his said marriage, his trustees should stand possessed of all the undisposed of residue of his real and personal estate in trust for his daughter for and during the term of her natural life, with further provision in case of her death or marriage. The daughter now claimed that it might be declared that she was entitled, under the will, to the *immediate* possession and enjoyment of the moneys arising and to arise from the residuary estate, though the wife of the testator was still living. As to this the Privy

Council in their judgment, begin by adopting in its integrity the rule as enunciated by Lord Cranworth in *Thelluson* v. *Rendlesham*, 7 H.L. C. at p. 494, as that "universally recognised and acted on," namely, "that words are to be construed according to their plain ordinary meaning, unless the context shows them to have been used in a different sense, or unless the rule, if acted on, would lead to some manifest absurdity or incongruity; indeed, the latter branch of the rule is, perhaps, involved in the former, for supposing that the rule, it acted on, would lead to manifest absurdity or incongruity, the context must be considered to show that the words could not have been used in their ordinary sense." "Lord Cranworth," their Lordships say, p. 205, "seems quite correct when he says that the latter branch of the rule is but a means by the context of shewing that the words were not used in their ordinary sense, as it is not to be presumed that the testator meant an absurdity; but that if it is shewn that it was intended to use them so as to work this absurdity, that intention, if it be not illegal, must be carried out. * * * Starting with this as the rule of law, it seems that the question now raised is whether there is an indication of intention on the whole will that certain interests should be vested immediately on the testator's death sufficiently clear to require the Court which has to construe that will to say that words which, literally understood, would express an intention to postpone the vesting of those interests till after the death of Mrs. Rhodes (the wife), must be construed as expressing an intention consistent with those interests being vested, though that intention is not that which, but for the context, would be understood from the words used in their ordinary sense, and is one which would have been more aptly expressed in other words, or whether the intention to postpone is so clearly and strongly expressed that the Court is required to give the words that effect, notwithstanding the other parts of the will, which tend to the conclusion that the intention was to vest." The Board then proceeds to examine the will at length, arriving at the conclusion that there was enough in it to produce not a mere conjecture that the intention was to make the estates vested, but to produce a conviction that this was intended, and also that the words "from and after the decease of my said wife" must be construed as referring only to property in which the widow took an interest terminable at her death, as to which the daughter's interest vested also, but subject to the life interest.

A. H. F. L.

LAW SOCIETY.

HILARY TERM, 45 VICT., 1882.

The following is the *resume* of the proceedings of the Benchers during Hilary Term, published by authority:—

During this term the following gentlemen were called to the bar, namely:—Edwin Taylour English, with honors, Adam Johnston, with honors, Daniel Johnson Lynch, John Arthur Mowat, George James Sherry, Benjamin Franklin Justin, Thomas Ambrose Gorham, Charles Rankin Gould, James Lane, William James Cooper Robert McGee, Henry Nason, William Johnston, Albert Edward Wilkes, George Frederick Jelfs, Henry Joseph Dexter, Stewart Masson. And the following gentlemen were called to the bar, under the rules in special cases:—Donald McMaster, Henry Gordon McKenzie.

The following gentlemen received certificates of fitness, namely:—Adam Johnston, J. Stanley Hough, J. Travers Lewis, George J. Sherry, G. S. Lynch Staunton, Edwin Taylour English, William Agutter Taylor, A. Stewart, Newenham Parke Graydon, William James Cooper, Albert Edward Wilkes, William Steers, Stewart Masson, Henry Nason, R. A. Pringle, J. C. Alguire, J. B. Humphreys, R. D. Storey, G. F. Jelfs, E. A. Foster.

The following gentlemen passed their first intermediate examination, namely:—C. A. Masten, with honors, J. Y. Criuckshank, with honors, George Weir, F. H. Keefer, S. C. Smoke, G. W. Field, H. H. Collier, A. Darrach, E. Bell, D. Armour, J. T. Sproule, W. J. Church, A. Burwash, E. W. M. Flock, E. C. Cunningham. S. O. Richards, D. W. Saunders, W. Barr, J. D. Hepburn, A. C. Muir, H. B. Elliott, J. M. Macoun, H. L. Ingles, N. McMurchy, H. Cowan, J. M. McNamara.

The following passed their second intermediate examination, namely:—G. Kappelle, with honors, J. Martin, with honors, J. L. Murphy, with honors, A. H. McAdams, T. T. Porteous, G. H. Anderson, A. P. E. Panet, J. S. Mackay, J. Carruthers, C. H. Cline, A. S. Clarke, R. Witherspoon. The case of Mr. W. A. McLean was referred to the Legal Education Committee for report.

The following gentlemen were entered on the books of the Society as Students at Law, namely:

GRADUATES.—Marcus Selwyn Snook, Stephen Johnson Young, Alexander Sheppard Lown, John Earl Halliwell, Patrick M Bankier.

MATRICULANTS OF UNIVERSITIES.—Nelson Sharpe, Stephen Alfred Jones, Frank Burr Mosure, Edward Wesley Bruce, Robert Barry, Alexander Campbell Aylsworth, Thomas Hislop.

JUNIOR CLASS.—Willard Snively Riggins, Allen Napier McNab Daly, George Cooper Campbell, John Elliott, Alexander A. McTavish, John Dawson Montgomery, George Albert Loney.

ARTICLED CLERK.—Frank Ernest Coombe was allowed his examination as an articled clerk.

Monday, February 6th.

Convocation met.

Present—The Treasurer and Messrs. Maclennan, Bethune, Ferguson, Moss, Murray, Foy, Crickmore, Irving, Mackelcan, McCarthy, Cameron, Read, J. F. Smith.

The minutes of last meeting were read.

The Committee on Legal Education, reported that Mr. I. F. Hellmuth had duly published in the Gazette the statutory notice, and that he had now complied with all the requirements of the statute and rules of the Society, and that he was entitled to his certificate of fitness on payment of the ordinary fees.

On motion of Mr. Crickmore, it was ordered that Mr. Hellmuth be allowed his certificate of fitness.

The Report of the Finance Committee was presented by Mr. Read, received and read, and is as follows:—

REPORT.

To the Benchers of the Law Society in Convocation.

The Finance Committee beg leave to report as follows:—

1.—On reference to the balance sheet for 1881, signed by the auditor of the Society, and lying on the table, and which shows the receipts and expenditure of the Society for 1881, it may with a little consideration and calculation be seen that the receipts of that year were $49,731.70, and that the expenditure was $71,010.09, of which last mentioned sum $32,865.88 were expended on the new building, and the residue or sum of $38,144.21 was for ordinary expenditure, by which it appears that there was a surplus on the ordinary transactions of the Society of receipts over expenditure of $11,587.49.

2.—The above mentioned expenditure on the new building was made from the balance in the bank at the credit of the Society (with petty cash in hand) on the 31st of December, 1880, of $10,784.72, the funds temporarily deposited at interest of $15,000, and from the above mentioned surplus a sum of $7,081.16, in all $32,865.88, leaving a balance out of the surplus of the year 1881, in the Bank, of $4,506.33 to the credit of the Society on the ordinary operations of the year.

3.—It will no doubt be remarked upon by the members of Convocation, that the surplus upon the ordinary transactions of the past year was much larger than usual, and they might infer that there has been a proportionately larger increase in the yearly revenue of the Society, but upon comparing the receipts of last year with those of 1880 it will be seen that, although the revenue is exceptionally large, the chief reason of the aforesaid surplus consists merely in this, that no part of the sums of $3,060 and $4,050 for the Election Case reports and the Supreme Court reports respectively, provided for in the estimates of last year's expenditure, has yet been paid.

4.—The Committee have had prepared and laid on the table, the estimates of the probable receipts and expenditure for the current year, shewing the different sources of the expected revenue and the different items of the probable expenditure, from which it will appear that the estimated aggregated receipts for the year 1882 will be $42,600, (or $7,131.70 less than those of last year), a diminution partly owing to the excessive receipts of last year, and the estimated aggregate ordinary expenditure, including the cost of an extra volume of Supreme Court reports, of the portraits of the Treasurer and Chancellor Boyd, ordered by Convocation, and the insurance for three years, will be $41,479, shewing a probable surplus of $1,121.

5.—It will appear also upon reference to the same sheet of estimates for the current year that there will be required for extraordinary expenditure the aggregate sum of $16,325, made up of $3,060 for the election case reports and of the sums estimated to be necessary for completing the new building and the heating and lighting appliances in connection therewith, and for completing and furnishing the new Convocation Room and other improvements in the old building, and for making the alteration in and fitting up and furnishing the adjuncts to the Library.

6.—To meet this $16,325 estimated for extraordinary expenditure, there is the sum of $4,506.33, the balance in the Bank and petty cash in hand at the end of the year 1881, and the above mentioned estimated surplus of $1,121 on the ordinary transactions for the current year, the residue will be taken from the $60,000 of capital invested in Dominion Stock, as was contemplated when the decision to construct the new building was reached. The Committee was authorized to withdraw the required amount during the

course of last year, but they have been able to provide for the payments up to date out of other resources, and have therefore postponed the withdrawal.

The Government has given notice to pay off the stock in September next, and it will therefore be necessary to decide on some other mode of investment for the capital before that time.

Signed, D. B. READ,
Chairman.

The estimates and balance sheet therein mentioned are as follows :

ABSTRACT OF BALANCE SHEET FOR 1881.

RECEIPTS.

Certificate and Term Fees	$16,435 75	
Less Fees returned	121 75	
		$16,314 00
Notice Fees		761 00
Attorneys' Examination Fees	6,730 00	
Less Fees returned	840 00	
		5,890 00
Students' Admission Fees	9,189 75	
Less Fees returned	808 00	
		8,381 75
Call Fees	12,310 00	
Less Fees returned	2,210 00	
		10,100 95
Interest and Dividends		4,034 00
Government payment for heating, lighting, etc		4,250 00
Balance		21,278 39
		$71,010 09

EXPENDITURE.

Reporting:—		
Salaries	$7,400 00	
Postage on reports	531 20	
Printing	6,762 13	
Notes of Cases	347 50	
	15,040 83	
Less reports sold	563 44	
		$14,477 39
Examinations:—		
Salaries	2,400 00	
Scholarships	2,220 00	
Printing and stationery	491 51	
Advertising	33 90	
Engrossing diplomas and certificates	5 24	
Dies and medals	589 34	
Examiners for Matriculation	339 00	
Prizes	50 00	
Law Journal account	35 00	
	6,163 99	
Less Fees received for petitions	74 00	
		6,089 99
Library:—		
Books, binding and repairs		3,625 49
General expenses—		
Salaries, Secretary, Sub-Treasurer and Librarian	2,000 00	
Assistants	967 27	
Housekeeper	216 00	
		3,183 27
Lighting, heating, water and insurance:—		
Engineer and assistant	560 00	
Gas	383 16	
Water	943 63	
Insurance	585 33	
Weighing coal	10 00	
Fuel	2,949 28	
Repairs to apparatus	170 40	
Carting coal and cutting wood	152 49	
		5,754 29
Grounds:—		
Gardener and assistant	400 00	
Tools and seed	6 35	
Cartage	4 75	
Labor	193 02	
Snow clearing	37 70	
Repairing side walks	44 89	
		686 71
Sundries:—		
Scrutineers, $360; Auditor, $100.	460 00	
Stationery and Printing	219 12	
Advertising, $143.90; postage, $85.83	229 73	
Law costs	863 92	
Repairs, $46.18; term lunches $529.75	575 93	
County library aid	868 00	
Petty charges	32 42	
Telegraph and telephone operator	158 04	
Attendance on clocks	10 00	
Glass, $5.80; cleaning windows, brasses, etc., $48.95	54 75	
Subsidy Dom. Telegraph Co.	75 00	
Resume, $30; Guarantee Co., $12	42 00	
Ice, $10; oiling floor, $10; Detector, $2	22 00	
Address *re* C. J. Moss	25 00	
Locks, matting, etc	27 03	
Painting Benchers' rooms	41 55	
Bell Telephone Co	45 08	
Langley, Langley & Burke	300 00	
Portrait C. J. Osgoode	260 00	
Judicature Act tariff	17 50	
		4,327 07
		38,144 21
Spent in new building in 1881		32,865 88
		$71,010 09

ESTIMATES OF RECEIPTS AND EXPENDITURE FOR 1882.

RECEIPTS.

Certificate and Term Fees	$16,500 00	
Arrears, fines and costs collected	700 00	
Notice fees	650 00	
Attorneys' Examination fees	4,800 00	
Students' Admission fees	6,000 00	
Call fees	7,000 00	
Interest and Dividends	2,600 00	
Government payment for heating, lighting, etc	4,250 00	
Sundries:		
Fees on petitions, diplomas and certificates	100 00	
		$42,600 00

EXPENDITURE.

Reporting:—		
Salaries	$7,400 00	
Postage	560 00	
Printing	6,220 00	
Supreme Court Reports, 2 vols	4,050 00	
Notes of Cases	350 00	
Advertising	10 00	
	18,590 00	
Less Reports sold	386 00	
		$18,204 00
Examinations:—		
Salaries	3,200 00	
Scholarships	1,600 00	
Printing and Stationery	300 00	
Advertising	50 00	
Engraving Diplomas & Certificates	25 00	
Examiners for Matriculation	325 00	
Law Journal account	100 00	
Medals	100 00	
		5,700 00
Library:—		
Books, Binding, and Repairs		2,900 00
General expenses—		
Salaries		
Secretary, Sub-Treasurer and Librarian	2,000 00	
Assistants	1,100 00	
Housekeeper, $216, $84	300 00	
		3,400 00
Lighting, heating, water and insurance:—		
Engineer and Assistant	860 00	
Gas	500 00	
Water	1,000 00	
Insurance	490 00	
Weighing Coal	10 00	
Fuel	3,300 00	
Repairs to Apparatus	200 00	
Carting Coal and Cutting Wood	100 00	
		6,460 00

LAW SOCIETY, HILARY TERM.

Grounds:—		
Gardener and Assistant	400 00	
Tools	10 00	
Carting	5 00	
Labour	200 00	
Snow Clearing	40 00	
		655 00
Sundries:—		
Auditor, $100 ; Stationery, $250.....	350 00	
Advertising, $50; Postages, $50; Telephone $100	200 00	
Petty expenses, $20; Telegraph Operator, $158	178 00	
Clocks, $10; Cleaning Windows, $15;	25 00	
Resume	40 00	
100 copies for Convocation	15 00	
Guarantee Premium, $20 ; Ice, $10 .	30 00	
Oiling Floor, $12 ; Directory, $3 ..	15 00	
Detective, $3 ; P. O. Box, $4	7 00	
Law Costs, $750 ; Repairs, $200	950 00	
Term Lunches	500 00	
County Library Aid, ...	850 00	
Prizes	200 00	
Chancellor Boyd's Portrait and Frame	500 00	
The Treasurer's " " ..	300 00	
		3,300 00
Balance		2,121 00
		$42,600 00

EXTRAORDINARY EXPENDITURE.

Mr. Hodgins' book, (election reports).	$3,060 00	
Additional desks and chairs for new Examination Hall	215 00	
Fitting up adjuncts to Library	800 00	
On new building including lighting and heating	9,750 00	
Completing improvements in old building, including the new Convocation Room and furnishing the same......	1,250 00	
Conversazione	1,250 00	
		$16,325 00

Ordered that the report, balance sheet and estimates be considered on February 7th.

Mr. Montgomery's petition was refused.

Mr. Alguire's petition was refused.

A letter from the City Clerk with enclosures, referring to the Osgoode Hall grounds, was referred to the Finance Committee to consider and report.

A letter from Mr. Hector was read. Ordered that Mr. Hector be allowed to examine the records bearing on the subject of his letter for the indicated purpose.

Mr. Germon's letter referring to his examination fee was referred to the Finance Committee.

The letters of Messrs. Freeman and Goodwillie, on the subject of the service of a law student, were referred to the Legal Education Committee.

Mr. Ferguson gave notice for Saturday, 11th February, of a motion to amend the rules in special cases, so far as they refer to the call to the bar of Ontario of English barristers.

Tuesday, February 7th, 1882.

Present—The Treasurer and Messrs. Wallbridge, McCarthy, Bethune, Irving, Read, Martin, Murray, Crickmore, Mackelcan, J. F Smith, Maclennan, Robertson, Moss, Benson, L. W. Smith, H. Cameron.

The rules as to reporting, which were read first time on the 27th December last, were now read a second time.

Mr. Maclennan laid on the table the resignation of Mr. Tupper as reporter, and gave notice for Saturday, 11th inst., of a motion that Mr. Grant, reporter in the Chancery Division, be transferred to the reportership of the Court of Appeal.

Ordered that notice be given to each bencher, of the intention to appoint a reporter, either to the Chancery Division or the Court of Appeal, on Friday, 17th February, and that an advertisement asking for applications for the office be published.

Saturday, February 11th, 1882.

Convocation met.

Present — Messrs. Crickmore, McMichael, Hoskin, Bethune, Maclennan, Irving, Ferguson, Moss, Foy, Murray.

In the absence of the Treasurer, Mr. Irving occupied the chair. Mr. Tupper's resignation of the reportership of the Court of Appeal was accepted.

Mr. Grant, the reporter of the Court of Chancery, was transferred to the now vacant office of reporter to the Court of Appeal. The rules as to reporting were read a third time and passed.

The report of the Finance Committee, accompanied by the balance sheet for 1881, and the estimates for 1882, were now considered and adopted.

Ordered that the balance sheet be printed and distributed.

Mr. Ferguson pursuant to notice, moved the following resolution, namely :—

Resolved that rules 94 and 97, relating to the call of barristers in special cases, and the admission of attorneys and solicitors in special cases, be amended, by striking out in the first sub-section of rule number 94, all words after the word "Ontario" in the third line down to and inclusive of the word "Scotland" in the seventh line of the said sub-section, and by striking out the second sub-section of said rule 94, and by striking out all words after the word "Ontario," in the second line of sub-section one of rule 97, down to and inclusive of the word "Scotland" in the fourth line of the said sub-section, and by striking out the portion of sub-section two of rule 97, from the beginning of the said sub-section two, down to and inclusive of the word "Scotland" in the sixth line of the said lastly mentioned subsection, and that such amendments take effect, and come into force on the first day of Michaelmas term next.

Resolved, that it is expedient that the said admendment should be adopted, and that a Committee be appointed to consider the powers of convocation, and report upon the best means of carrying out the changes which would become necessary upon the adoption by convocation of the rules cuntemplated by the said motion, and that the Committee be composed of Messrs. Crickmore, Moss, Bethune, Maclennan, and Ferguson.

February 17th.

Present—Messrs. Read, Crickmore, Cameron, Mackelcan, Bethune, Moss, Hoskin, Benson, L. W. Smith, Irving, Maclennan, Britton, Pardee, Hardy, Crooks, Fraser, McCarthy, J. F. Smith, Murray, S. H. Blake.

In the absence of the Treasurer Mr. Read was appointed chairman.

The petition of Thomas Arthur Elliott was granted.

Mr. Hoskin presented a petition relating to the opening of the library at night.

Ordered that it be considered forthwith.

Resolved, that the order adopted in November, 1881, as to the opening of the library at night be continued until 1st July, 1882.

A communication from the Secretary of the Telegraph Co., in reference to the Osgoode Hall office, and a letter from the operator on the same subject, were referred to the Finance Committee with power to act.

Mr. Thomas Percival Galt was appointed reporter of the High Court of Justice Chancery Division.

On the motion of Mr. Mackelcan, seconded by Mr. Moss, it was ordered that Messrs. Maclennan, S. H. Blake, Bethune, and the mover and seconder be a Committee to wait upon the Ontario government, with the view of securing a reduction in the fees charged for short hand notes at the trial and hearing of causes.

The letters of the President of the Osgoode Legal and Literary Society, referring to accommodation for their debates, were read. On the motion of Mr. Moss it was

Ordered that the Legal and Literary Society be granted the use of the great hall for its next public meeting, and that the other matters referred to in the communication of the President of the Society, be referred to the Finance Committee to report to Convocation upon the probable expense.

On the motion of Mr. Murray, seconded by Mr. Mackelcan, it was ordered that the telegraph and telephone operator be allowed forty dollars per month for herself, and four dollars for a messenger boy, from the 1st of February instant until the 1st of July next, and that for the purpose of providing a fund to meet such amounts, the operator be ordered to collect a sum of two cents on every telephone message sent out or received in the office, and that twenty-five per cent on the total of the telegraph business done in this office be collected and applied to the above fund, to meet the payment of the said sums of forty and four dollars a month, and that she do keep a strict account and report state of fund monthly to the Finance Committee at their regular meeting.

Convocation adjourned.

REPORTS

ONTARIO.

(Reported for the Law Journal.)

COUNTY COURT, MIDDLESEX.

BROWN V. MCKENZIE, SOMMERVILLE, Garnishee.

Practice in County Court—Rules 404, 422, 425, Ont. Jud. Act.

This was an application by the garnishee upon notice of motion to set aside an attaching order.

A preliminary objection was taken by the judgment creditor, that the application should have been by summons and not by notice.

Reference was made to Rules 404, 422, 425, and 490, Ont. Jud. Act.

DAVIS, CO. J.—By the above Rules, County Court Judges, in addition to the duties properly belonging to their own Courts, are required to discharge the special duties in relation to matters in the High Court under Rule 422. When exercising such delegated authority it is clear from the language of Rule 425 that all applications (not expressed to be *ex parte*) in High Court proceedings must be by summons. In County Court proceedings it is quite different; there the Judge exercises a power, not delegated but inherent. And therefore, in conformity with the practice of the High Court—made applicable by Rule 490 to the several County Courts—the application must be by notice and not by summone. The objection taken cannot be sustained.

RECENT ENGLISH PRACTICE CASES.

(Collected and prepared by A. H. F. LEFROY, ESQ.)

LAWRIE V. LEES.

Power of Court to vary its orders—Judicature Act.

[Nov. 29; H. L.—L. R. 7 App. 34.

LORD PENZANCE:—"I cannot doubt that under the original powers of the Court, quite independent of any order that is made under the Judicature Act, every Court has the power to vary its own orders which are drawn up

mechanically in the registry or in the office of the Court—to vary them in such a way as to carry out its own meaning, and where language has been used which is doubtful, to make it plain. I think that power is inherent in every Court. * * * Moreover, having regard to the orders made under the Judicature Act, I should myself have thought that it would very well have come under those orders. I recommend your Lordships not to make any variation of this order, but to affirm it as it stands, without prejudice to any such application to the Court below."

TOKE v. ANDREWS.

Imp. Jud. Act, 1873, s. 24, sub-s 3, 7; O. 19, r. 3, 19; O. 20, r. 1.—Ont. Jud. Act, s. 16, sub-s. 4, 8.—Rule Nos. 127, 149, 152.

Pleading—Counter-claim and set-off in reply.

Defendant having set-up in his defence by way of counter-claim matter arising since the commencement of the action, plaintiff may in his reply set up by way of counter-claim other matter arising since the commencement of the action, (but at the same time and out of the same transaction as the counter-claim of the defendant), although said matter arose before the delivery of the statement of defence.

[Feb. 23—L. R. 8 Q. B. D. 428.

The plaintiff in the above action issued a writ on August 26th to recover rent in arrear at midsummer, 1881, in respect of a tenancy about to determine on September 29th following. He did not, however, deliver any statement of claim until November 29th. Meanwhile the last quarter's rent became due, and the tenancy being determined, pursuant to notice to quit, the defendant became entitled to an out-going valuation, which he claimed by a counter-claim in his statement of defence. In answer to this counter-claim the plaintif, "by way of set-off and counter claim," claimed for his last quarter's rent and also a sum for title rentcharge left unpaid by the defendant on his quitting and necessarily paid by the plaintiff.

This was a motion to rescind an order of Williams, J., dismissing an application to strike out these matters alleged by the plaintiff in his reply, as embarrassing to the fair trial of the action within Imp. O. 27, r. 1, (Ont. Rule No. 178).

G. Denman, for the defendant.

R. V. Williams, for the plaintiff.

FIELD, J., delivered the judgment of the Court, which is lengthy, but divides itself conveniently into three parts.

The plaintiff did not take any objection to the defendant's pleadings, and therefore the Court observed that the only question for it to decide was whether the plaintiff was to be defeated in his action by matter of defence arising subsequently to the commencement of it, without the opportunity of setting up any defence he might have. As to this the Court said :—

(i.) As was clearly pointed out by Mr. Denman in his argument for the defendant, a counter-claim by a plaintiff in answer to a defendant's counter-claim is not mentioned or referred to in terms either in the Jud. Act or in O. 20. r. 1, (Ont. Rule 152), or any other order framed under them. * * * But if there be no rule or order either in terms or by necessary implication prohibiting the bringing forward of the matter alleged by way of counter-claim, and the right to raise it is given to the party pleading by the Jud. Act, it will be impossible for us to hold that the plaintiff is not entitled on setting up such matter to claim relief within s. 24, sub-s. 3, (Ont. s. 16, sub-s. 4); and if relief can be given upon it the pleading cannot be held to be embarrassing within the meaning of O. 27, r. 1, (Ont. Rule 178). In order to see how this is we must look to the Jud. Acts. * * * Looking at this most beneficial provision (Imp. s. 24, sub-s. 3 and 7, Ont. s. 16, sub-s. 4 and 8), how is it possible to say that a matter upon which, if well founded, the plaintiff is clearly entitled to relief as against the defendant's counter-claim, is not within the very words and still more within the spirit of this large enactment, or to hold that such a matter is not properly brought forward at the only stage and in the only manner in which it can be raised.

(ii.) Further it is not, perhaps, altogether clear that the right to plead as the plaintiff has done is not within a fair construction of O. 19. r. 3 (Ont. Rule 127) by which alone the defendant has acquired the right he has exercised.

(iii.) There is another way of looking at it, pointed out by Mr. Vaughan Williams. The efendant's co unter-claim in the present case, over-topping as it does the amount of the plaintiff's claim, is in substance a cross-action in which the defendant is the plaintiff, and there is no great violence in construction in holding that

the plaintiff for the purpose of litigating the counter-claim is in substance a defendant, and so well within rule 3 (Ont. Rule 127) justifying a counter-claim.

Order affirmed.

[Note.—*The Imp. and Ont. sections are identical respectively. Imp. O. 19 r. 3 and 19 are identical with Ont. Rules 127, 149 respectively; Imp. O. 20, r. 1 is not identical with Ont. Rule 152.*

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

CHANCERY DIVISION.

Ferguson, J.] [May 3.

THE CONSOLIDATED BANK V. WALLBRIDGE.

Motion for Judgment—Rule 318.

Motion for judgment upon the report of the Master in this cause.

The point in question in this action was whether an alleged partition in the pleadings mentioned was binding upon the parties thereto. On October 17th ult., BOYD, C., made a decree referring it to the Master to enquire as to this. On March 15th ult., the Master reported that the alleged partition was conclusive and binding upon the parties.

Held, rule 318 met the case, and judgment must be according to the report and be so entered.

Dickson, Q.C., for the motion.
Watson, contra.

Boyd, C.] [May 10.

VANKOUGHNET V. DENISON.

Restrictive covenant—Evidence.

In this case the defendant Denison, in effecting a sale of a portion of his real estate covenanted with the purchaser that he would retain a certain square unbuilt upon, with the exception of one residence, with the necessary out-buildings, including a porter's lodge; the purchaser on his part covenanting that he or his assigns would not allow any business of a public nature, such as a tavern, requiring a license to make it allowable in the eye of the law, to be carried on upon the portion conveyed to him. The bill was filed by an assignee of the purchaser alleging that the defendant Denison, and the defendant E. W., who resided with him, were, in violation of the covenant, erecting a house upon such square not within the exception in the covenant.

Held, the benefit of the restriction passed to plaintiff as one of the advantages and privileges appurtenant to the land, though the word "assigns" was not there, and although the benefit of it was not formally transferred to him.

Semble, evidence of reputation was admissible to show what was meant by "Bellevue Square" in the restrictive covenant, for the question of the locality and extent of this square was of a *quasi* public nature, in which a class of people in the neighbourhood would be concerned.

Where it is clearly intended to give some tangible benefit to the grantee by a restrictive covenant in the conveyance to him, and the restriction is part of the consideration which induced his purchase, there the Court will go far to give effect to the language, whatever hardship may be occasioned to the party who has entered into the engagement.

It would be unsafe to proceed judicially upon the evidence, however clear and satisfactory, of any one who, having executed an instrument, seeks to lessen its force or effect by his own unsupported parol testimony.

A person holding under an agreement for a lease is not in the same position as an innocent person holding for value under a completed instrument.

Maclennan, Q.C., for the plaintiff.
Blake, Q.C., (with him *Black*), for the defendant.

[This case was previously heard on demurrer as reported 28 Gr. 485.]

Boyd, C.] [May 10.

REID V. SMITH.

Specific performance—Partnership property—Parol evidence.

In this case the plaintiff sought specific performance of an agreement for the sale of timber limits to him under the following circumstances. The timber limits were really partnership property, though they stood in the name only of the

partner who signed the agreement referred to. Both partners were anxious to sell, but the agreement in question, which referred only to a portion of the timber limits owned by the partnership, was entered into by the one partner only. It was, however, forthwith communicated to his co-partner who did not object to it or dissent from it, but, indeed, shortly afterwards furnished nformation to the purchaser which he was only entitled to ask for in pursuance of the agreement to sell.

Held, so far as authority to contract was concerned, the agreement to sell was, under the above circumstances, binding upon the partnership, though as a matter of precaution the joining in the conveyance by both the partners was desirable.

Semble, the language of Lord Mansfield in *Fox* v. *Hanbury*, Cowp. 445 "each partner has a power singly to dispose of the whole of the partnership effects," is too broadly put in view of the present state of the law.

Held, also, though the written agreement sued on imported a down payment of the purchase money, yet extrinsic evidence was admissible to show that this was not the real agreement, and to prove that terms of credit were to be given as set forth in memoranda put in evidence signed by the firm name.

Held, also, it was competent for the managing partner and the purchaser to subsequently put an end to the terms of credit, and agree to a cash payment, thus reverting to the terms of payment contained in the contract set forth in the statement of claim.

W. Cassels, (with him *Brough*) for the plaintiff.

Bethune, Q.C., for defendant Macdougall.

Moss, Q.C., for defendant R. C. Smith.

W. Cassells, *Brough*, and *Plumb*, for defendants T. & P. C. Smith.

Boyd, C.] [May 10.

SANDERS V. MALSBURG.

Conveyance from wife to husband—R. S. O. c. 109, sect. 2.

Where by anti-nuptial settlement the intended husband and wife mutually agree that each of them shall separately hold, use, and enjoy the real and personal property which either may acquire during the marriage, whether by donation, succession, legacy, bequest, or by any title or way whatever, as his or her own separate and respective property and estate in every respect, and each is to have the whole and sole absolute management, disposal and administration of his and her separate and respective property and estate, without the let or hindrance of the other, the effect is to vest the land then and subsequently held or acquired by the wife in her as proper separate estate to all intents and purposes.

Where then the wife in such case gives a mortgage of property so held by her, she retains power to deal with the equity of redemption and and to alienate it as a *feme sole*. This power she has as of right by virtue of the equitable quality of the estate without the aid of the statutes relating to married women, and without the concurrence or joinder of her husband, and therefore there is no incongruity in the husband being the grantee of the wife; on which ground *Ogden* v. *McArthur*, 36 U. C. R. 246, is distinguishable.

Though the technical learning as to the legal unity of husband and wife, may require at law the intervention of trustees in their dealings *inter se*, yet the course of the Court of Equity is to give effect to such transaction by holding the one a trustee for the other: and there is no reason why the rule applied to the husband, should not apply conversely to the wife when dealing with her separate estate, so as to convert her into a trustee for her husband.

Where an agreement in writing has been executed, in the province of Quebec, it must be assumed in the absence of any evidence to the contrary, that its legal effect is such as would be given to it if entered into in this province.

Semble, that R. S. O. c. 109, sect. 2, is retrospective so as to cast the *onus* of disproving the payment of the consideration on the party impeaching a conveyance as voluntary, even though the transaction took place prior to that enactment.

G. Morphy, for plaintiff.

T. S. Plumb, for defendant.

Boyd, C.] [May 10.

COURT V. WALSH.

Statute of Limitations—Mortgage—Insolvency.

Where the right of action for entry or foreclosure is ken away. by virtue of the R. S. O., c

108, sect. 15, the title itself of the mortgagees is extinguished, and the right of action wholly disappears. Hence the result is not merely a bar of the claim, but a divesting of the title or a transfer of the whole right, title, estate and interest of the mortgagee to the mortgagor, or those claiming under him. *Dawkins* v. *Lord Penryhn*, L.R., 6 Ch., D. 318; L.R., 4 App. 51; *Heath* v. *Pugh*, L.R., 6 Q.B.D. 345, followed.

Where, moreover, a mortgagee has suffered the title to run before he asserts his right of entry he cannot by getting possession of the property revive his title to it, but he is in as a mere trespasser. *Bryan* v. *Cowdal*, 21 W.R. 693; and *Sanders* v. *Sanders*, L.R. 19 Ch, D. 373, followed.

Nor does the insolvency of the mortgagor and the appointment of an assignee in insolvency suspend the running of the Statute of Limitations, so as to preserve the lien and security of the mortgagee on the land mortgaged, and enable him to claim the benefit of sect. 84 of the Insolvent Act, and insist on valuing his security as if the mortgage still subsisted on the land. *Henderson* v. *Kerr*, 22 Gr., 91 followed.

Maclennan, Q.C., for the plaintiff.

Bethune, Q.C., for the defendant.

Boyd, C.] [May 10.

BRIGHT V. MCMURRAY.

Conveyance—Mortgage—Statute of limitations.

Where mortgagees in fee in possession executed a deed purporting to "convey, assign, release, and quit claim" to the grantees "their heirs and assigns forever all and singular" the mortgaged lands, "to have and to hold the same as and for all the estate and interest" of the grantors "in and to the same."

Held, a sufficiently definite description to pass the fee to the grantees, inasmuch as the technical word "assign" was coupled with the proper words of limitation to heirs and assigns, and with the habendum to hold the land for all the "estate' of the mortgagees in possession. Hence the benefit of the possession held by the mortgagees, without any written acknowledgment of the title of the mortgagor, passed by the above deed to the grantees and coupled with their own subsequent possession for the necessary period conferred on them an absolute title to the land by virtue of R. S. O. c. 108, sects. 15 and 19.

Moss, Q.C., (with him *J. E. Robertson*) for the plaintiff.

H. J. Ferguson, for the defendant.

Boyd, C. [May 10.

MUNSIE V. LINDSAY,

Will—Doctrine of election.

Where, by a will, land is devised to an attesting witness, there is an intestacy as to this devise by virtue of 26 Geo. II., c. 6, sect 1, and, therefore, the doctrine of election does not apply, for since the beginning of this century it has been treated as settled law, that the doctrine of election is not applicable where real property is assumed to be devised by a will not executed so as to pass it, and by the same will a legacy is given to the heir.

W. Cassels, for plaintiff.

Bethune, Q.C., (with him *W. Barwick*), for defendant Lindsay.

C. A. Brough, for other defendants.

ARTICLES OF INTEREST IN COTEMPORARY JOURNALS.

Rights and liabilities arising through the promotion and formation of a corporation.—*American Law Review*, April, May.

Constructive total loss.—*Ib.*, May.

The rights of *bona fide* purchasers of under-due negotiable paper secured by mortgage.—*Southern Law Review*, April.

Chance verdicts.—*Central L. J.*

Re-issued patents. —*American Law Review*, April.

Unification of the law.—*Ib.*

Legality of cremation.—*London L. J.*, March 18.

Clubs and the outside world.—*Ib.*

Liability of solicitors for partners.—*Ib.*, April 8.

Charging the jury.—*Virginia L. J.*

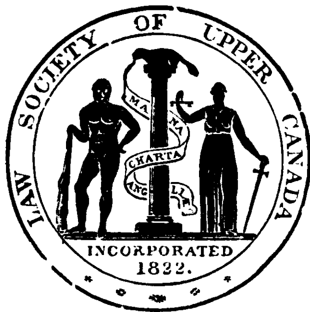
Justices interested—Undue influence.—*Irish L. T.*, March 25. (From *Justice of the Peace.*)

Severability of insurance.—*Albany L. J.*, March 25.

FLOTSAM AND JETSAM.

STRANGE APPLICATION OF A STATUTE.—A quack doctor in Chicago, who was recently sued for malpractice in the treatment of a female patient, called to his assistance a limb of the law, who bore a similar relation to that profession that the doctor did to his. He astonished his opponent, the Court, and attorneys, by pleading the Statute of Frauds, by which, without a writen contract, "no person shall be held to answer for the debt, default or miscarriage of another."—*American Law Magazine.*

Law Society of Upper Canada.



OSGOODE HALL.

HILARY TERM, 1882.

The following gentlemen passed their examination and were called to the Bar:

Edwin Taylour, English Honors and Gold Medal; Adam Johnston, Honor and Silver Medal; Daniel Johnson Lynch, John Arthur Mowat, George James Sherry, Benjamin Franklin Justin, Thomas Ambrose Gorham, Charles Rankin Gould, James Lane, William James Cooper, Robert McGee, Henry Nason, William Johnston, Albert Edward Wilkes, George Frederick Jelfs, Henry Joseph Dexter, Stewart Masson; the names are in order of merit.

The following gentlemen were called to the Bar under the Rules in Special Cases:—

Donald McMaster, Henry Gordon McKenzie.

The following gentlemen were entered on the books of the Law Society as students at law:—

GRADUATES.

Marcus Selwyn Snook, Stephen Johnston Young, Alexander Sheppard Lown, John Earl Halliwell, Patrick Macindoe Bankier.

MATRICULANTS OF UNIVERSITIES.

Nelson Sharp, Stephen Alfred Jones, Frank Burr Mosure, Edward Wesley Bruce, Robert Barry, Alexander Campbell Aylesworth, Thomas Hislop.

JUNIOR CLASS.

Willard Snively Riggins, Allan Napier McNab Daly, George Cooper Campbell, John Elliott, Alexander A. McTavish, John Dawson Montgomery, George Albert Lorcy.

Frank Ernest Coombe was allowed his examination as an Articled Clerk.

RULES

As to Books and Subjects for Examination.

PRIMARY EXAMINATIONS FOR STUDENTS 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.

1881.
- 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, N. America and Europe.
- Elements of Book-keeping.

In 1882, 1883, 1884, and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil at their option, which are appointed for Students-at-law in the same year.

Students-at-Law.

CLASSICS.

1882.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. VI.
- Cæsar, Bellum Britannicum, B. G. B. IV., c. 20-36, B. V. c. 8-23.
- Cicero, Pro Archia.
- Virgil, Æneid, B. II., vv. 1-317.
- Ovid, Heroides, Epistles. V. XIII.

1883.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. VI.
- Cæsar, Bellum Britannicum.
- Cicero, Pro Archia.
- Virgil, Æneid, B. V., vv. 1-361.
- Ovid, Heroides, Epistles, V. XIII.

1884.
- Cicero, Cato Major.
- Virgil, Æneid, B. V., vv. 1-361.
- Ovid, Fasti, B. I., vv. 1-300.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. IV.

1885.
- Xenophon, Anabasis, B. V.
- Homer, Iliad, B. IV.
- Cicero, Cato Major.
- Virgil, Æneid, B. I., vv. 1-304.
- Ovid, Fasti, B. I., vv. 1-300.

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

Translation from English into Latin Prose.

MATHEMATICS.

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

ENGLISH.

A paper on English Grammar.
Composition.
Critical Analysis of a selected Poem:—

1882—The Deserted Village.
The Task, B. III.
1883—Marmion, with special reference to Cantos V. and VI.
1884—Elegy in a Conntry Churchyard.
The Traveller.
1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

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.