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IN our comments on *Jones* v. *Simes*, *ante* p. 327, we find we were in error in saying that there was no Ontario Rule similar to the English Rule 482. It appears that in the Consolidated Rules this omission was supplied by a new Rule, 680, which is in similar terms to the English Rule 482. Even before Rule 680 was passed, it appears that the Queen's Bench Divisional Court in *Stalker* v. *Dunwich*, 15 Ont., 342, held that, following the rule of equity, in the case of continuing damages they should be assessed down to the date of the assessment.

IT does not always follow that because a judge pronounces a certain view of the law on a particular subject to be "unquestionable" that it is really so. In 1870 Strong, V.C., considered it "beyond all question" law, that where a creditor writes a letter to his debtor requesting him to pay the amount of his indebtedness to a third party, such a letter is not a bill of exchange but a good equitable assignment of the debt: *vide Robertson* v. *Grant*, 3 Chy. Ch. R. 331; but twenty years later we have the Court of Appeal coming to a unanimous conclusion that such a letter is not an equitable assignment, but a bill of exchange, and, therefore, not enforceable against the debtor unless accepted by him: *Hall* v. *Prittie*, 17 Ont. App., 306. Such cases exhibit the difficulty a practitioner is often in, when called on to advise a client as to his legal rights.

WILLS AVOIDED BY MARRIAGE.

The first clause of section 20, R.S.O., chapter 109, is a dangerous pitfall, and should be fenced in and marked "Beware, Danger." A person on the eve of matrimony makes a will leaving all to the dear one who is soon to become so near; the marriage follows, and "amazement" is the end, as it is of the Anglican service, for the priestly benediction revokes the will. The wedding journey is begun, the railway collision comes, one—the testator—is taken, the other left; and the survivor finds that the very ceremony, the expectation of which was the reason why the dear departed made such a will, is the very cause of the revocation and destruction of the document, "and becomes the wictim o' connubiality, as Blue Beard's domestic chaplain said, with a tear of pity, ven he buried him."

Surely this was never intended. To revoke a will in any other way the *animus revocandi* must be present, but in the case we put the marriage is merely carrying out the intention in the mind of the testator when the will is made, and

yet "no declaration however explicit and earnest of the testator's wish that the will should continue in force after marriage will prevent revocation." Surely another exception should be inserted in this section allowing the validity of the will, or part of the will, made in favor of the intended husband or wife?

Under the law as it stands now where either of the twain made one flesh has any of this world's goods wherewith to endow the other, a solicitor should be in attendance at the wedding with his pen, ink and paper, and a will, or wills, should be drawn up, signed, published, declared and duly witnessed, before the happy couple leave the church, or even the minister's presence. Delays are dangerous, so it is not safe to wait until after the breakfast or even to kiss the bride.

Warter v. *Warter*, 15 Pro. Div. 152, is an example of how this section may work the ruin of one's hopes and wishes. Colonel DeGrey Warter, R.A., married Mrs. Taylor, in England, on February 3rd, 1880; on the sixth of the same month the Colonel executed a will by which he bequeathed all his property, real and personal, to the lady absolutely, whom he described as "my reputed wife." In the following year the parties went through a second form of marriage. The Colonel died in March, 1889, and when it came before him, the President of the Probate Division, being of the opinion that the marriage of February, 1880, was invalid, held that the will was revoked by the valid marriage of 1881. (See p. 486.)

There is also danger in and from this section in another direction. Although a will made before marriage is by law revoked by marriage, still there is little or no difficulty in obtaining probate of such a will in the Surrogate Courts. Neither the statute nor the rules require any evidence to be adduced to show the judge that the will propounded has not been annulled in this way; and where the testator is unknown to the judge or the solicitor, probate may, without hesitation be granted where it should not be. And what confusion and wrong may result can readily be imagined!

Should not the judges make rules to meet this point and require evidence as to marriage or no marriage, and the date of any marriage, before granting probate or letters with will annexed?

We feel sure that these two difficulties have but to be pointed out to the proper authorities (and of course these all study the pages of the LAW JOURNAL) to be at once remedied.

R.

COMMENTS ON CURRENT ENGLISH DECISIONS.

The Law Reports for September comprise 25 Q.B.D., pp. 325-420; 15 P. D., pp. 149-165; and 44 Chy.D., pp. 501-718.

MARITIME LAW—ACTION IN REM FOR WAGES EARNED IN PORT.

The Queen v. *Judge of London Court*, 25 Q.B.D., 339, was an application for a mandamus to the judge of an Admiralty Court to hear and determine an action; and the legal question involved was whether the mate of a vessel had, or

had not, a maritime lien on the vessel for wages earned by him for services rendered on her while she was in port, during unloading and reloading, and whilst in dock for repairs. The Court (Lord Coleridge, C.J., and Wills, J.) were of opinion, after consulting the judge of the Admiralty Court, that the lien existed, and the action would lie to enforce it.

BILL OF EXCHANGE—NEGOTIABLE INSTRUMENT—ALTERATION OF BILL BY ACCEPTOR—ACCEPTANCE "IN FAVOR OF DRAWER ONLY"—BILLS OF EXCHANGE ACT (45 & 46 VICT., C. 61) S.S. 8, 19, 36—(53 VICT., C. 33, S.S. 8, 17, 19, 36, (D.))

Decroix v. *Meyer*, 25 Q.B.D., 343, was as Lindley, L.J. describes it, "a case of some difficulty." The question to be decided was, however, a comparatively simple one. L. D. Flipo had drawn a bill of exchange on the defendants, payable to "order L. D. Flipo." The defendants accepted the bill "in favor of L. D. Flipo only, payable at the Alliance Bank, London," and struck out the word "order." Flipo indorsed the bill to the plaintiffs for value, and the question was simply whether or not the striking out the word "order" and the acceptance in the terms above mentioned had destroyed the negotiability of the instrument. Cave and A. L. Smith, JJ., were of opinion that the bill was not negotiable, but the Court of Appeal (Lord Esher, M.R., and Lindley and Bowen, L.JJ.) were clear that the striking out the word "order" from the bill and the terms of the acceptance did not have that effect. They were of opinion that the acceptor had no right to strike out the word "order" from the bill, and that the effect of the statute (see 53 Vict., c. 33, s. 8, s.s. 4) was to put it in again; that the acceptor must *prima facie* be presumed to accept according to the tenor, and that an acceptance ought to be construed most strongly against the acceptor, and that here the acceptance did not in express terms vary the effect of the bill (see 53 Vict., c. 33, s. 19, (D)) because the addition of the words "payable at the Alliance Bank" were inconsistent with the idea that the bill was to be payable to Flipo only, though but for the latter words Bowen, L.J., appears to have thought that the acceptance would have had the effect contended for by the defendants.

PRINCIPAL AND AGENT—FRAUD—BRIBE TO AGENT—RECOVERY OF BRIBE FROM AGENT—ACTION AGAINST BRIBER.

The Mayor of Salford v. *Lever*, 25 Q.B.D., 363, was a case of a somewhat unusual character. The plaintiffs were a municipal corporation and proprietors of gas works, of which one Hunter was their manager, and he, in consideration of large bribes received from contractors, induced the plaintiffs to enter into contracts for the supply of coal at prices in excess of the market prices. The fraud having been discovered and an action brought against Hunter to compel him to account for the bribes he had received, he agreed to hand over securities to the amount of £10,000 subject to a proviso that the plaintiffs should proceed against the contractors who had given the bribes, and what they should fail to recover from them within a limited time should be made good out of the £10,000 and the balance thereof refunded to Hunter. £4,000 was recovered against other contractors, and the present action was brought to recover a sum

of over £2,000 after the time limited by the agreement with Hunter had expired. The defendants resisted the action on the ground that the plaintiff's claim was satisfied by the sum recovered from the other contractors, because under the agreement with Hunter they were now entitled to get the difference out of the £10,000 of securities handed over by him; that the plaintiff's claim was in respect of a conspiracy in which Hunter was a joint tort feasor, and that satisfaction by him discharged the defendants. But the Court though divided in their reasons for their decision, were yet unanimous in opinion that the agreement with Hunter was no discharge of the defendants. Denman and Charles, JJ., gave their decision on the ground that it was only a discharge of Hunter's liability to hand over the bribes he had received, and was not intended as a discharge of the tort he had committed jointly with the defendants; and Williams, J., on the other hand says that the agreement, though intended to discharge Hunter from both liabilities, was void as being *ultra vires* and contrary to public policy, because it, in effect, provided that he should retain the whole or some part of the bribes and that the amount of the bribes he retained should be proportioned to the effect of the evidence he gave. On the whole it may be said that though the decision is satisfactory from a moral, it is hardly so from a legal, point of view.

LIMITATIONS—SPECIAL CONTRACT FOR PAYMENT OF MONEY—CONDITIONS PRECEDENT TO CAUSE OF ACTION—ADMINISTRATOR—STATUTE OF LIMITATIONS (21, Jac. 1, c. 16) s. 3.

In *Atkinson* v. *The Bradford Building Society*, 25 Q.B.D., 377, the plaintiff sued as administrator of Thomas Atkinson to recover a loan made by Atkinson to the defendants, 21st March, 1877, with interest. The terms on which the money was advanced were contained in a book called the "Loan pass-book" which, among other things, provided that no money would be paid except on production of the investor's book, and he must either attend personally or send a written authority. In December, 1878, Atkinson gave notice of withdrawal, and was given by the defendants' secretary a form of withdrawal on which it was stated that the sum would be payable on the 14th January, 1879, between 10 a. m. and 5 p.m. or any subsequent day between those hours except Saturday, when the office closed at 1 p.m. Atkinson died on the 14th of January, 1879, but there was no evidence to show at what hour he died. On January 16th, 1879, some unknown person produced the pass-book and form of withdrawal which had been given to Atkinson, and fraudulently obtained the amount payable with interest to that date. The form of withdrawal was not signed, and there was no evidence that any of Atkinson's family knew of the withdrawal. On 3rd May, 1889, the plaintiff obtained letters of administration to Atkinson's estate and thereupon brought this action. The defendants relied on the Statute of Limitations (21 Jac. 1, c. 16). But the Court of Appeal (Lord Esher, M.R., and Lindley and Lopes, L.JJ.), were of opinion that the Statute was no bar, because the cause of action did not arise until the pass-book was produced by Atkinson himself, or by someone with his written authority, and this not having been done in

Atkinson's lifetime no cause of action arose before he died; and that even assuming that the debt was payable to Atkinson on the day of his death, yet there being no evidence that he died after the time fixed for payment, the Statute would not run against his administrator until letters of administration were taken out. Lopes, L.J., however, preferred to rest his decision solely on the former ground. As regards the latter point it may be observed that as regards realty the law in Ontario is modified by Statute (R.S.O. c. 3, s. 7) under which letters of administration for the purpose of the Statute of Limitations (R.S.O. c. 3) relate back to the death of the deceased.

INSURANCE—MARINE—COLLISION—PROXIMATE CAUSE OF DAMAGE.

Pink v. *Fleming*, 25 Q.B.D., 396, was an action to recover on a policy of marine insurance, whereby the defendants insured the plaintiff's cargo against damages occasioned thereto by collision. The vessel in which the cargo was being carried met with a collision; in consequence it had to put into port for repairs, and in order to carry out the repairs it became necessary to unload part of the goods insured, and on the completion of the repairs the goods were re-shipped in the vessel, which proceeded on its voyage. On its arrival at its destination it was found that the goods, which consisted of fruit, had been damaged by the unloading and reloading, and the delay necessitated by the repairs. Under these circumstances it became necessary to determine whether the collision was the proximate cause of the loss. The Court of Appeal (Lord Esher, M.R., Lindley and Bowen, L.JJ.) affirmed the decision of Mathew, J., at the trial, that the collision was not the proximate cause of the loss, that the damage was too remote, and that therefore the action failed.

CONTRACT—CONFLICT OF LAWS—DISCHARGE OF DEBTOR BY FOREIGN BANKRUPTCY—EFFECT OF AN ENGLISH DEBT—STAY OF PROCEEDINGS UNDER JUDICATURE ACT 1873 (36 & 37 VICT., C. 66) S. 24, S.S. 5, (39)—(ONT. JUD. ACT) R.S.O., C. 44, S. 52, S.S. 10.)

In *Gibbs* v. *La Societe Industrielle, etc.*, 25 Q.B.D., 399, an attempt was made to induce the Court of Appeal to overrule the decision of Lord Kenyon in *Smith* v. *Buchanan*, 1 East 6. The action was brought against the defendants, a French Company, to enforce a contract made, and to be performed in England. Proceedings in liquidation had been taken in France to wind up the Company, and it was contended on the part of the defendants that in the first place the effect of those proceedings was to discharge the defendants from liability, and that in the second place, owing to the pendency of the proceedings in the foreign court, this action ought to be stayed under the Judicature Act *(see Ont. Act, s. 52, s.s. 10)*. But the Court (Lord Esher, M.R., and Lindley and Lopes, L.JJ.) were agreed that even assuming the proceedings in France were equivalent to a discharge in bankruptcy in England, yet such discharge was inoperative as regards a debt due under a contract made and to be performed in England. And that such proceedings in the foreign court furnished no ground for staying the action either before or after judgment under the Judicature Act.

WEIGHTS AND MEASURES—SALE OF COAL—REPRESENTATION OF SERVANT NOT REPRESENTATION OF SELLER.

Roberts v. *Woodward*, 25 Q.B.D., 412, was a case stated by a magistrate. The proceeding was brought to recover penalties from the defendant on the ground that contrary to the provisions of a statute he had represented coal he was selling to the plaintiff to be of greater weight than it actually was. The evidence on which the claim was based showed that the coal in question was in a waggon in course of delivery, that it had been, under the provisions in the statute, stopped on the road and the servant in charge was required to state what weight of coal he carried. The coal was then weighed and found to be of considerably less weight; but it was held that the statement of the servant was not a representation of the seller, so as to make the latter answerable for penalties.

PROBATE—GRANT OF ADMINISTRATION OF PERSONALTY ON SUPPOSED INTESTACY.

In the Goods of Hornbuckle, 15 P.D., 149, establishes the rule that where a grant of administration has been made on an erroneous supposition that the testatrix's will only affected realty, probate will not be subsequently granted of the will until the letters of administration have been revoked.

PROBATE—WILL—REVOCATION BY MARRIAGE—DIVORCE—SUBSEQUENT PREMATURE MARRIAGE.

Warter v. *Warter*, 15 P.D., 152, is one of those cases which are constantly arising in which the effect of the Wills Act (R.S.O., c. 109) is found to defeat the presumably obvious intention of the testator. The testator, whose will was in question, had been a correspondent in a divorce case in which a divorce had been granted in India, where the statute law prohibited the re-marriage of the divorcees within six months of the final decree. The testator and the divorced wife came to England and were married within the six months. The testator then made his will by which he bequeathed all his property to his reputed wife. Apparently having doubts as to the validity of this marriage, the parties subsequently went through a second form of marriage; but, the will not having been republished, it was held by the President that the effect of the second marriage was to revoke the will; and that the first marriage was void under the Indian Statute, notwithstanding it was celebrated in England. (See p. 482 *ante*.)

PROBATE—WILL IN FORM OF DEED POLL—INTENTION—EXTRINSIC EVIDENCE.

In the goods of Slinn, 15 P.D., 156, extrinsic evidence was admitted to show that a deed poll, which purported to make a present gift of the grantor's property, was really intended by her as a will, and it was accordingly admitted to probate.

PUBLIC HOUSE—LEASE—RESTRICTIVE COVENANTS—COVENANT RUNNING WITH THE LAND—ASSIGNMENT OF PUBLIC HOUSE AND COVENANT.

Clegg v. *Hands*, 44 Chy.D., 503, is an important decision on the law of restrictive covenants, and was ably argued on the part of the defendant by Henn Collins, Q.C., who, according to Lindley, L.J., has studied this branch of the law probably more carefully than any body living. Several nice points were involved

in it. The material facts of the case were as follows: Clegg & Hands were brewers, carrying on business at Toxteth Park, and were owners of a public house, which they leased to the defendant, subject to a covenant that he should not, during the time, buy, sell, or dispose of, upon the premises any beer other than what should be purchased from the lessors, or either of them, either alone or jointly with any other person or persons who might thereafter enter into partnership with them, provided they should be willing to sell good beer at fair current prices; but the lease defined "lessors" to include their executors, administrators, and assignees. The lessors sold their business and good-will to their co-plaintiff, Cain, who carried on business at Liverpool, and the business at Toxteth Park was closed up. Cain and the lessors sued to enforce the covenant, and several points were raised on behalf of the defendants in answer to the claim. It was argued that the covenant obliged the lessees to buy beer only of the lessors or their partners or assigns, who should carry on business at Toxteth Park; that the covenant was a personal covenant incapable of assignment, and therefore did not run with the land, and that in any case Cain was not entitled to enforce it. But the Court of Appeal (Cotton, Lindley, and Lopes, L.JJ.) decided against all these contentions, and held that where an affirmative covenant of this kind has a negative element in it, or the covenant is partly negative and partly affirmative, the Court in a proper case will enforce the negative covenant, and therefore the injunction granted by Bristowe, V.C., restraining the defendants from purchasing beer elsewhere than from Cain, contrary to the covenant, was properly granted.

MORTGAGE—SOLICITOR—MORTGAGEE—COSTS—PROFIT COSTS.

In *Field* v. *Hopkins*, 44 Chy.D., 524, a mortgage was made to two persons, one of whom was a solicitor, and the other an auctioneer. It contained a stipulation that the mortgagees should be "entitled to make the same charges and receive the same remuneration respectively for all business done by them respectively, in and about these presents, as they would have been entitled to make if they had not been mortgagees," and there was a covenant by the mortgagors to pay the mortgage debt, and "every other sum which may hereafter be advanced or paid by the mortgagees," or either of them. The mortgage money was advanced by the mortgagees as trustees, and prior to the mortgage, which was prepared by the solicitor-mortgagee, a valuation of the property was made by the auctioneer-mortgagee, on the instructions of the solicitor. Notwithstanding the stipulation and covenant above referred to, however, it was held by Kay, J., that the mortgagees could not in a foreclosure action charge against the mortgaged estate: (1) the costs of an order obtained by the solicitor on behalf of the mortgagors, subsequent to the mortgage, appointing trustees under the Settled Land Act, 1882, for the purpose of leasing part of the mortgaged property, (2) nor to costs incurred by one of the mortgagors to the solicitor-mortgagee, subsequent to the mortgage in matters unconnected with it; and (3) nor to a fee paid by the solicitor-mortgageer to the auctioneer-mortgagee for his valuation. This decision was affirmed by the Court of Appeal (Cotton, Lindley, and Lopes, L.JJ.). Kay, J., lays it down that a mortgagee cannot contract for the payment

of profit costs; but Cotton, L.J., says, "It may happen in some cases that there is a bargain between a mortgagee and a mortgagor that certain extra expenses shall be within the mortgage security," from which it might perhaps be inferred that in his opinion a contract for profit costs might be made.

COMPANY—MORTGAGE OF UNPAID CALLS.

In re Pyle Works, 44 Chy.D., 534, a company whose articles of association authorized the mortgaging of all or any of its assets, and also the unpaid calls on the stock, mortgaged the unpaid calls. Before the calls were made, the company was ordered to be wound up, and the question then arose whether the mortgagees were entitled to be paid out of the unpaid calls when collected by the liquidator, in priority to general creditors, and the Court of Appeal (Cotton, Lindley, and Lopes, L.JJ.) held, affirming Stirling, J., that they were; Lopes, L.J., however, *dubitante* on the ground that previous decisions appeared to lay down the rule that in a liquidation all creditors must be paid *pari passu*, and that this right could not be qualified or derogated from by any antecedent contract.

WILL—CONSTRUCTION—GIFT TO PERSONS NAMED, FOR LIFE, AND TO THEIR CHILDREN—RESIDUARY GIFT TO "RELATIVES NAMED" WHO ARE ENTITLED TO A "TRANSMISSIBLE INTEREST"—WIFE'S NIECES—ILLEGITIMATE RELATIVES.

In re Jodrell, Jodrell v. *Seale*, 44 Chy.D., 590, the will of a testator who had left an estate of $1,000,000, came up for construction. By the will the testator had bequeathed certain legacies to persons whom he described as cousins, and to others as his nieces, and after their deaths to their children—and his residuary estate he directed to be equally divided among such of "his relatives thereinbefore named," as by virtue of the provisions of the will should become entitled to a vested transmissible interest in any part of his property. The persons described as the testator's nieces, were his wife's nieces, and not his own; and some of the persons described as cousins were illegitimate relatives. Upon this, two or three questions were raised: (1) What was meant by a "transmissible interest"? did it include the tenants for life? Stirling, J., held that it did not, and that only those took an interest in the residue, who took an interest under the prior clauses of the will, which would be transmissible to their representatives on their death. The other question was (2) Whether the illegitimate relations to whom transmissible interests had been given were entitled to share in the residue? Stirling, J., decided they were not; but on appeal the Court of Appeal (Lord Halsbury, C., and Lindley and Bowen, L.JJ.) reversed his decision on this point. A point was also made as to whether persons who had previously been described as children of persons named, were themselves to be treated as "before named" within the meaning of the will, and both Stirling, J., and the Court of Appeal were agreed that they were.

VENDOR AND PURCHASER—SPECIFIC PERFORMANCE—CONTRACT BY LETTERS—SUBSEQUENT NEGOTIATIONS—WITHDRAWAL—TIME.

Bristol, Cardiff & S. Co. v. *Maggs*, 44 Chy.D., 616, is a case which shows that though a perfect contract may have been made by letters, for the sale and purchase

of land, yet where the purchaser subsequently presents a formal agreement for signature, which includes terms and stipulations not contained in the letters, and this is followed by a correspondence respecting the terms of the memorandum, which culminated in the vendors withdrawing their offer, the Court will not specifically enforce the contract contained in the letters, because the conduct of the purchasers had shown that the agreement was not complete, and that under the circumstances the vendors could withdraw from their offer, even within the time they had limited for its acceptance. In short, as Kay, J., says, (adopting the language of Cairns, L.C., in *Hussey* v. *Horne-Payne*, 4 App. Cas., 311), where a contract of this kind is sought to be made out by letters, you must look at all the correspondence that has passed, and cannot draw a line at any particular point and say, "We will look at the letters up to this point, and find in them a contract or not, but we will look at nothing beyond."

PROMISSORY NOTE, PAYABLE ON DEMAND, MATURITY OF—EXPRESS RENUNCIATION BY HOLDER—BILLS OF EXCHANGE ACT, 1882, SS. 62, S.S. 1, 89 (53 VICT., C. 33, S. 61, D.).

In re George, Francis v. *Bruce*, 44 Chy.D., 627, a nice point under the Bills of Exchange Act (53 Vict., c. 33, s. 61, s-s. 1 (D.)), came up before Chitty, J. The holder of a promissory note, payable on demand, which had been given by a relative to secure a loan, on his death-bed desired the note to be brought to him, that it might be destroyed, as he desired to forgive the maker of the note the debt. Search was made but the note could not be found, and the holder then directed his nurse to draw up a written memorandum to evidence his intention. She made a memorandum in writing stating that it was by the holder's dying wish that the cheque *(sic.)* for money lent to the maker of the note should be destroyed soon as found. This memorandum the nurse herself signed, but it was not signed by the holder. The note was discovered after the holder's death, and his executors applied to the Court for a decision of the question of law involved. On the part of the maker it was argued that a note payable on demand does not mature until demand is made, and, therefore, that it was a simple contract which, before breach, might be released by parol, and that what had taken place amounted to a parol renunciation; and, further, it was argued that the memorandum, made by the nurse, was a sufficient renunciation within the Bills of Exchange Act, s. 62, s-s. 1 (53 Vict., c. 33, s. 61, s-s. 1, D.). On the first point, Chitty, J., was of opinion that a note payable on demand, is at maturity the moment it is given; and, on the second point, he held that the memorandum was not a sufficient renunciation within the Act, and that a writing to satisfy the statute must be an actual renunciation in terms, and not merely expressive of a desire or intention to renounce at a future time. And this, apart from the question, whether in any case a memorandum signed by an agent would be sufficient, as to which he declined to express an opinion.

JOINT STOCK COMPANY—WINDING UP—BUSINESS NOT WARRANTED BY CHARTER—VACATING ORDER AFTER IT IS DRAWN UP, BUT BEFORE ENTRY.

In re Crown Bank, 44 Chy.D., 634, was an application by a shareholder to North, J., to wind up a company, on the ground that the company had ceased

to carry on the business for which it was formed, and was engaged in carrying on another business, not contemplated by the articles of association. The learned Judge held that it was just and convenient to grant the application, and so ordered. The order was accordingly drawn up and delivered out, but not passed or entered. Subsequently the petitioner and the respondents effected a compromise, and an application was made, on consent, to dismiss the petition, which was done, the order eventually issued containing a recital of the circumstances under which it was made. See *infra* p. 491 *In re Bristol Joint Stock Bank.*

CONTEMPT OF COURT—NEWSPAPER COMMENTS ON PENDING PROCEEDINGS—FINE.

In re Crown Bank, In re O'Malley, 44 Chy.D., 649, is a matter arising out of the preceding case, and is a decision of North on a motion to commit a newspaper publisher for contempt in publishing comments on the proceedings in that matter. These comments were instigated by the petitioning shareholder, and were to the effect that the "so-called bank" was "a fraudulent concern," and that the examination of the officers of the company would result in interesting revelations. For this the publisher was adjudged guilty of contempt of Court, and sentenced to pay a fine of £50 and costs. The case is also useful for reference as containing a form of the order made.

WILL—CONSTRUCTION—MARRIAGE WITH CONSENT OF TRUSTEE.

In re Smith, Keeling v. *Smith*, 44 Chy.D., 654, personal estate had been bequeathed to the testator's son, from and after his marriage, "with the consent of at least two of the trustees for the time being;" and the question was whether the consent to the marriage, which had taken place, had been duly given. The son, it appeared, had made a verbal request to the trustees for this consent, and they desired him to make his application in writing. He then applied in writing for their consent, and the trustees replied that they were prevented from taking any action, as they had been told the lady had declined his proposal. In this they appeared to have been mistaken, for the marriage took place, and, in the course of the proceedings to determine the question whether there had been a consent within the terms of the bequest, the trustees deposed that at the time of the son's verbal application they had no objection to the marriage, but were of opinion that it was not at that time desirable. Stirling, J., held that the consent had been substantially given within the principle of *Dorley* v. *Des Bouverie*, 2 Atk. 261.

PROPRIETARY CLUB—MEMBER HAVING NO RIGHT OF PROPERTY—EXPULSION—REGULARITY OF EXPULSION—INJUNCTION.

In *Baird* v. *Wells*, 44 Chy.D., 661, the regularity of certain proceedings, which resulted in the expulsion of the plaintiff from the Pelican Club, was called in question, and the plaintiff claimed an injunction to restrain the proprietor and secretary of the club from interfering with his use and enjoyment of the club. It appeared that the club was owned by the defendant, Wells, and that members had no rights of property in it, but merely the right to enjoy the privileges of the

club on paying an annual subscription. Stirling, J., therefore held that notwithstanding he found that the proceedings complained of were irregular, yet there being no rights of property involved, the Court could not interfere by way of injunction, and that the plaintiff's remedy was by action for damages.

INJUNCTION AGAINST USING NAME CALCULATED TO MISLEAD.

The decision of Stirling, J., in *Tussaud* v. *Tussaud*, 44 Chy.D., 678, is an important limitation of the general principle laid down in *Turton* v. *Turton*, 42 Chy.D., 144, that a man cannot be restrained from using his own name for the purpose of carrying on business—namely, that though he may carry on his own business under his own name, and may also sell to others such business and the right to use his name, and that though the business so carried on might be converted into a joint stock company, with the right to use the same name; yet that a man cannot, for valuable consideration or otherwise, confer on any other person the right to use his name in connection with a business which he has never carried on, and in which he has no interest whatever, or in which he is engaged only as a servant or manager, where such use would be calculated to mislead the public into confounding such business with any other prior existing business.

MINERALS WRONGFULLY TAKEN—ACCOUNT—INTEREST.

Phillips v. *Hornfray*, 44 Chy.D., 694, can hardly be considered as having any very direct bearing in this Province, owing to the difference which exists between our practice in the Master's Office and that which prevails in England. Indirectly, however, it is instructive as showing that where an account is directed against defendants for minerals, wrongfully taken by them, the action is not in the nature of an action of trover, but rather one for money had and received, and, therefore, not one to which the maxim *actio personalis moritur cum persona* applies; it was also held that where no adjudication has been asked at the hearing of the cause, on the question of interest, and the account had been taken without interest, interest could not be allowed on the hearing on further directions. Under our practice, however, the Master may take the account with interest, without any special direction, and where interest has not been allowed by the Master, this case would go to show that it could not be granted on further directions, but the question would have to be raised by way of appeal from his report.

COMPANY—RESERVE CAPITAL—WORKING CAPITAL EXHAUSTED—WINDING UP—R.S.O., C. 183, S. 5.

In re Bristol Joint Stock Bank, 44 Chy.D., 703, was an application by a shareholder to wind up a bank under the following circumstances: By the articles of association it was provided that a certain portion of its uncalled capital should not be called except for the purpose of winding up; with the exception of this part of the capital, all the rest except £337 had been exhausted. The company had been in existence for six years, but had never made any profit; it had originally commenced business on a large scale with a considerable staff, but its business was now carried on in small premises, by a single clerk. The petition was

supported by a considerable number, but not a majority, of shareholders. Kekewich, J., granted the application, on the ground that it was impossible to carry on the business with any reasonable hope of success, and in doing so he reviewed the cases in which the principles by which the Court is guided in winding up a company at the suit of a shareholder, are laid down. We may observe that the Winding Up Acts of the Dominion (R.S.C., c. 129), makes no provision for winding up companies at the suit of shareholders. Probably in such cases arising here resort would have to be had to the ordinary jurisdiction of the High Court, see *Harris* v. *Dry Dock*, 7 Gr., 450; the Provincial Act (R.S.O., c. 183) enables the Court to make a winding up order at the instance of a contributory when it is "just and equitable."

Notes on Exchanges and Legal Scrap Book.

CONFLICT OF LAWS.—An interesting point on the conflict of laws in cases of agency was decided by Mr. Justice Day, on the 2nd inst., in the case of *Chatenav* v. *Brazilian Submarine Telegraph Company, Limited* (notes, *ante* page 198). The point is an entirely new one, and raised the question whether a power of attorney given in a foreign county, but put in force in this country, is to be construed according to the law of the country where it was given, or according to the law of the country where it was put in force. Story in his work on the Conflict of Laws says that this point has never, so far as his researches extended, been directly decided either in America or any other country, so that there is no direct authority on the question. The case came before the court under the following circumstances: The plaintiff, who was resident and domiciled in Brazil, executed in Brazil a power of attorney whereby he empowered the attorney, a stockbroker in London, "specially to purchase and sell shares in public companies and public funds, receive the dividends as they may accrue due, and give receipts in conformity with his letters of orders." Armed with this authority, the attorney sold out certain shares which the plaintiff held in the defendant company, and the present action was brought to recover the shares or their value from the defendant company. The plaintiff's right so to recover, it was admitted, depended on the question whether, under the terms of the power, the agent had power to dispose of the shares without the plaintiff's consent, and this again depended on the question whether the document was to be construed, as to the powers conferred on the agent, according to the Brazilian or English law, for it was admitted that if construed according to English law the document would have given the attorney a more limited power than if construed according to Brazilian law. No doubt, if English law had given the agent a wider authority than the Brazilian law, it would have been contended, and would probably have been held, that persons dealing with the agent in England would have been entitled to rely on the wider authority given by English law, and that the foreign principal would have been stopped

from setting up the more limited authority as given by the law of his own country; but the present case was different, as it was a case where the English law gave the more limited authority, and there could not, therefore, be the same hardship upon persons dealing in England with the agent. Mr. Justice Day decided that the document was to be governed by English law, thus adopting the view of Story where he says (paragraph 286): "There is no doubt that where an authority is given to an agent to transact business for his principal in a foreign country it must be construed, in the absence of any counter proofs, that it is to be executed according to the law of the place where the business is to be transacted."—*London Law Times.*

CONVERSATION BY TELEPHONE.—The question of the admissibility in evidence of conversations over the telephone is one upon which there are already several decisions, and owing to the rapid increase of telephonic communication, is of some importance.

Conversations by telephone are like no other communications. For instance, they have been compared to communications made through an interpreter, but, of course, this is grossly inaccurate, for, in the case of a conversation carried on through an interpreter, whatever doubt there may be as to the meaning of the exact words used, there is none as to the identity of the speakers. Again, they have been compared to conversations between blind persons or between persons in neighboring rooms, not in sight of each other. This comes nearer to telephonic conversation, with the difference, however, that the voices of the speakers are not altered, as may be the case over the telephone.

While, however, there are obvious limitations to the reception in evidence of telephonic communications, their admission is in many cases necessary, and the law upon the subject may be considered as reasonably well settled.

The first case on the question, so far as we know, was *People* v. *Ward*, N. Y. (Oyer and Terminer, 1885, 3, N. Y. Crim. Rep., 483), where it was held that it is competent for a witness to testify to a conversation over the telephone, and to statements made by the other party thereto, where the witness called said party to the instrument and recognized his voice in response.

It is to be noted in this case that the instrument was a private telephone. The witness, Fish, testified: "I went to the telephone and rang up Mr. Ward. It was a direct telephone between Grant & Ward's office and the bank. I had conversed with the defendant, Ward, hundreds of times over the telephone, and could recognize his voice very distinctly. I recognized it on this occasion." This was held sufficient to admit testimony of what the defendant Ward said.

In the case of *Wolfe* v. *Missouri Pacific Ry. Co.* (97 Mo. 473; 10 Am. St. Rep. 331), the court went further, it being held that when a person places himself in connection with a telephone system through an instrument in his office, he thereby invites communications in relation to his business through that channel. Conversations so held are as admissible in evidence as personal interviews by a customer with an unknown clerk, in charge of an ordinary shop, would be in

relation to the business then carried on, and the fact that the voice at the telephone was not identified does not render the conversation inadmissible.

But the Court properly added: "The ruling here announced is intended to determine really the admissibility of such conversations in such circumstances, but not the effect of such evidence after its admission. It may be entitled in each instance to much or little weight in the estimation of the triers of fact, according to their views of its credibility and of the other testimony in support or contradiction of it."

We have always felt doubtful as to whether the court did not go a little too far in this case. It is evident that a clerk in an ordinary shop, in apparent charge thereof, has a somewhat different authority to speak for his employer than an unknown person speaking over a telephone. In each case it is a question of presumptive evidence, but the presumption is very much stronger in the case of the clerk in the store than of the speaker over the telephone. The question as to where is the clerk is absolutely determined; as to where is the speaker over the telephone is only a matter of very great probability.

On the second point, that an identification of the voice of the speaker through the telephone is not necessary to make his declarations admissible, we think the court went to a very great extreme, and we doubt whether this ruling should be followed.

A rather curious case decided some years before the one last cited, (*Sullivan* v. *Kuykenhall* 82 Ky. 483; 56 Am. Rep., 901), was that of a conversation which took place, not directly between the parties over the telephone, but through the operator in charge of a public telephone station. It was held by a divided court that the person who received the message from the operator could state what was told him where there was evidence that the other party did in fact use the telephone at that time. It is evident that the operator could not be expected to remember the conversation. It would seem, however, that this case also goes pretty far, and that the statements of the party who alleges that he receives such a message should be strongly corroborated, at least as to the presence of the other party at the other end of the wire at the time testified.

In a recent case, *Banning* v. *Banning* (80 Cal. 271; 13 Am. St. Rep., 156), it was held that the fact that a married woman is not personally present before a notary at the time he takes her acknowledgment through a telephone, she being three or four miles from him, will not vitiate such deed, because, in the absence of fraud, accident or mistake, the certificate of the notary in due form is conclusive of the material facts therein stated.

In this case it was clearly proved that the acknowledgment was made through the telephone.

These appear to be all the decisions so far on the question.—*New York L. J.*

PET ANIMALS.—The keeping of pet animals has ever been a favorite habit of Englishmen. It manifests itself at an early age. Scarce has the boy assumed the dignity of knickerbockers than he begins to keep white mice, and becomes

the possessor of a hutch of rabbits or a cage of guinea-pigs. A little later he affects the company of a mastiff or a bull pup. Strange, too, are the animals of which pets are made. Tame tigers, lions, bears, foxes, elephants, are not unknown. Now, though an animal *feraæ naturæ* may be gentle and affectionate enough towards its master, it is not necessarily well disposed towards the whole human race; and the savage nature of many animals, though it can under certain circumstances be kept under restraint, is wont occasionally to break forth, and then that animal "runs amuck" and leaves ruin and desolation in its track. The question then arises, is its master liable for damage done by his pet under *all* circumstances, or only in certain cases? Shortly, does a man keep a pet animal at his risk? The answer to the question would appear to depend on the particular kind of animal kept.

The law on the point was clearly enunciated by Lord Esher in the recent case of *Filburn* v. *People's Palace Co.* (38 W.R., 706). "Animals," he said, "may be divided into two classes. The first class consists of those animals as to which, if a person chooses to keep one of them, he does so at his peril, and it is not necessary or material to prove that he knew the particular animal he keeps to be dangerous. The other class consists of animals which are not, as a class, of a dangerous nature, though particular individuals of that class may become dangerous. If a person keeps an animal of this class he is not liable for injury done by it unless he knew that the particular animal was dangerous. How can one determine to which of these two classes any particular kind of animal belongs? Some animals are known by everybody not to be of a dangerous nature in any country. The law accordingly recognizes that such animals are not dangerous. There is another division of animals which the law recognizes as not being of a dangerous nature in England. For instance, there are horses, oxen, dogs, and others which I do not pretend to enumerate. These have come to be recognized by the law as not being of a dangerous nature in England in this way: Though originally wild, in the course of years the whole race has been so tamed in this country that their progeny in England is now known and recognized as not being of a dangerous nature. On account of that universal knowledge, the law in this country recognizes and assumes that these animals as a race are not dangerous in England. Unless an animal can be brought within one of these two divisions —namely, a race of animals that is not dangerous anywhere, or a race of animals which by cultivation, so to speak, in England is recognized as not being dangerous in England—it falls within the first class, and if kept by anyone it must be kept at his peril."

Such, then, is the legal classification of animals. Let us now examine the cases on the subject. First of all let us take the cases which fall within the first class: *i.e.*, of animals so innately dangerous that he who keeps them, keeps them at his risk. There are not many reported decisions in point. It may be taken for granted without express decisions to that effect, that a man who indulges in the luxury of such pets as lions, tigers, wolves, *et id genus omne*, must do so at his risk. The reported cases only deal with bears, monkeys, and elephants.

As to bears: *Besozzi* v. *Harris* (1 F. & F. 93) was a case of a bear, which its owner kept chained up. The plaintiff was walking past, and was seized by the

bear and seriously injured. The bear was proved to be always tame and docile in its habits. But judgment was given for the plaintiff on the ground that he who keeps an animal of a fierce nature is bound so to keep it that it shall not commit an injury, and when such an animal does damage, the owner is liable, though it be shown it never had evinced any fierceness. Crowder, J., said, "Everybody must know that such animals as lions and bears are of a savage nature. For though such nature may sleep for a time, this case shows that it may wake up at any time." It was held, however, that evidence of the bear's gentle disposition was admissible in reduction of damages.

As to monkeys: One of the earliest cases on the subject is, perhaps, *Andrew Baker's case*, alluded to by Hale, where the owner of a monkey, which got loose, was held liable for injuries inflicted by it on a child. Hale himself says (1 P.C. 430): "If the beast which does the damage is *feræ naturæ*, as a lion, a bear, a wolf—yea, an ape or a monkey—if he get loose and do harm to any person, the owner is liable, though he have no particular notice that he did any such thing before; and in case of such a wild beast, or in case of a bull or cow, that doth damage where the owner knows of it, he must at his peril keep him up safe from doing hurt; for though he use diligence to keep him up, if he escape and do harm the owner is liable to answer in damages." And in the leading case of *May* v. *Burdett*, another monkey case, the owner was held liable, for Denman, C.J., said, "Whoever keeps an animal accustomed to attack and bite mankind, with knowledge that it is so accustomed, is *prima facie* liable to any person attacked and injured by the animal, without any averment of negligence or default in securing or taking care of it." "The gist of the action is the keeping of the animal after knowledge of its mischievous propensities."

Elephants formed the subject of the case previously mentioned, *Filburn* v. *People's Palace Co.* There, an elephant which was being exhibited, got loose, and attacked the plaintiff. The Court of Appeal held that an elephant came under the first class, and was kept at the owner's risk. Lord Esher said: "It is clear elephants cannot come under the division of animals not dangerous anywhere. Nor can it be said that elephants have through a long series of years been born and tamed in this country, that their progeny has been recognized in England as not dangerous. Therefore the race is not brought within the second class above mentioned. Accordingly elephants fall within the first class, and whoever keeps an elephant must do so at his peril, and must prevent it from doing any injury; and his knowledge of the dangerous or mischievous character of the particular elephant that he keeps is immaterial. The cases of animals falling within the second class have mostly to do with dogs; but we have one or two other cases in which the injuries were effected by other animals. With reference to this second class, the owner is not liable unless he can be fixed with knowledge that the particular animal which did the injury was of a savage disposition."

Jackson v. *Smithson* (15 M. & W. 563), was a case heard in 1846. There a ram ran at and butted the plaintiff, and it was held he could recover without showing that the defendant *negligently* kept the ram so long as *scienter* was averred. Platt, B., said, "No doubt a man has a right to keep an animal which is *feræ naturæ*,

and nobody has a right to interfere with him in doing so until some mischief happens; but as soon as the animal has done an injury to any person, then the act of keeping it becomes, as regards that person, an act for which the owner is responsible." The Baron must be conceived to be talking of animals which the law does not regard as innately and unsubduably mischievous.

In *Cox* v. *Burbidge* (11 W. R. 435), a child was kicked by a horse whose owner had negligently allowed it to stray on the highway. The owner was held not liable, on the ground that (the injury not being sufficiently closely connected with negligence, and negligence therefore being out of the question) a horse is an animal *mansuetæ naturæ*, and there was no evidence that the owner knew of any propensity to kick or liability to stray. Willes, J., said, "The distinction in the rule between fierce and tame animals is clear. In the former case the owner must take care to keep it under his control, and if he does not do so he is answerable for the mischief it does, unless it is of a wild nature and has returned to the woods. As to an animal of tame nature, he is not liable unless it be shown he knew of its mischievous habits." Again, in *Jackson* v. *Smithson* (15 M. & W. 563), Alderson, B., said there was no distinction between the case of an animal which breaks through the tameness of its nature and is fierce, and known by the owner to be so, and one which is *feræ naturæ*.

Coming now to dogs. It was Lord Cockburn who said that "every dog was entitled to at least one bite." His lordship's statement is, however, not good law. In *Worth* v. *Gilling* (2 C. P. 1) it was distinctly laid down that to make the owner liable it was not necessary to show that the dog had ever before bitten anyone. It was sufficient to show that the dog was ferocious, and that the defendant knew it was.

A very old case on dog bites is *Mason* v. *Keeling* (12 Mod. 332). There the plaintiff was bitten by the defendant's dog while "peaceably going about his business" in the street. The judgment of Holt, J., is worth perusing for its quaint style. "If it had been said that the defendant knew the dog to be *ferox* I should think it enough. The difference is between things in which the party has a valuable property, for he shall answer for all damage done by them; but of things in which he has no valuable property, if they are such as are naturally mischievous in their kind, he shall answer for hurt done by them without any notice; but if they are of a tame nature there must be notice of the ill quality; and the law takes notice that a dog is not of a fierce nature, but rather the contrary, and the presumption is against the plaintiff; for can it be imagined that a man would keep a fierce dog in his family willingly. . . . Nor does it appear here, but it was an accidental fierceness. Or suppose it were an innate one to this dog particularly, and it had been given to the owner but an hour before, shall he take notice of all the qualities of his dog at his peril, or shall he have his action against the giver for bestowing him a naughty dog? In case a dog bites pigs, which almost all dogs will do, a *scienter* is necessary. And I do not doubt but if it be generally laid that a dog was used to bite *animalia*, and the defendant knew of it, it will be enough to charge him for biting of sheep, etc.; and by *animalia* shall not be intended frogs or mice, but such in which the

plaintiff has property." Judgment was given for the defendant. This case then decided, in the language of the headnote, that it was not sufficient to plead that the dog was a "mongrel mastiff, *valde ferox* and not muzzled, and that he *furiose et violenter impetivit et graviter momordit et vulneravit* the plaintiff."

Another old case is *Jenkins* v. *Turner* (1 Ld. Ray. 109). There it was held that if a man keeps an animal after it has within his knowledge done any mischief, if it afterwards does any other mischief, though of a different kind, an action will lie against him. In this case it was argued that if a man keeps a dog which bites a mare, and notwithstanding notice thereof he still keeps the dog, and the dog afterwards bites a man, the owner would not be liable. But the Court held that if the owner of a dog knows that it is mischievous he ought to destroy it, or prevent it doing any more hurt. So that it does not seem necessary to prove that the owner of a dog, which has bitten the plaintiff, knew that the dog had bitten other human beings before. It is sufficient if the owner knew it had a propensity to bite *animalia*, such *animalia* at least as are not *feræ naturæ*, or not such as it is the very nature even of the most well-behaved dogs to bite, *e.g.*, rats, cats, rabbits, etc.

A question arises, must there be proved, in addition to *scienter* of the defendant, negligence on his part in allowing the animal to escape and do damage? This seems to be settled in the negative by *May* v. *Burdett* (9 Q. B. 301). Lord Denman there said: "A person keeping a mischievous animal, with knowledge of its propensities, is bound to keep it secure at his peril, and if it does mischief, *negligence* is *presumed* without express averment. The negligence is in keeping such an animal after notice. As was said by counsel for the plaintiff, 'The *scienter*, not negligence in keeping, constitutes the tort.' And Comyns observes, 'It is sufficient to plead, *Canem ad mordendum consuetum scienter retinuit.*'"

As to what amounts to proof of the knowledge by the owner of the mischievous propensities of the animal he keeps, there have been several cases. Thus a report that a dog had been before bitten by a mad dog is evidence that the owner knew the dog to be mischievous. (*Jones* v. *Perry*, 2 Esp. 482.) It is sufficient to prove that the owner had warned people to beware of the dog, lest they should be bitten. (*Judge* v. *Cox*, 1 Stark 285.) And where a bull gored a man who was wearing a red neckerchief, it was held sufficient evidence of the bull-owner's *scienter* of the bull's disposition that he had stated that he knew the bull would run at anything red. (*Hudson* v. *Roberts*, 6 Ex. 679.) But it is not sufficient merely to show that the dog was of a bad disposition and was usually kept chained up (*Beck* v. *Dyson*), nor that the dog had once bitten cattle. (*Thomas* v. *Morgan*, 2 C. M. & R. 496). And the fact that the defendant had offered to compensate a man bitten by his dog, is only very slight evidence that he has a guilty conscience, and knew the dog was savage. (*Thomas* v. *Morgan*, and see *Beck* v. *Dyson*.) The dog may be brought into Court so that the jury may judge for themselves of its temper and disposition. (*Line* v. *Taylor*, 3 F. & F. 731.)

As a general rule the knowledge of a servant of the owner of the dog that it is savage is knowledge on the part of the owner himself, if the servant were appointed to keep the dog. (*Baldwin* v. *Castle*, L. R. 7 Ex. 325.) But in other cases it must

be shown, if the dog is usually in charge of other persons than the owner and those persons knew of its ferocity, that that knowledge was transmitted to the owner. (See *Applebee* v. *Percy*, L. R. 9 C. P. 647.)

Notice to the wife of the savage nature of the dog will be sufficient evidence of the *scienter* to fix the husband (*Gladman* v. *Johnson*, 36 L. J. C. P. 153); but the converse case does not seem to hold good. (*Miller* v. *Kimbray*, 16 L. T. 360.)

Under some circumstances a person bitten by a fierce dog is not entitled to damages, though he can fix the owner with *scienter*. For no action lies for an injury arising from the defendant letting loose a dog in his own premises for their protection at night (*Brock* v. *Copeland*, 1 Esp. 203); and if the owner of a dog keeps him properly secured, but another person improperly lets him loose, and urges him to mischief, the owner is not liable. (*Fleming* v. *Orr*, 1 W. R. 339.) Again, a party who is bitten by a dog in consequence of being himself on the owner's land, on which he is not entitled to go, cannot sue for injury done him by the dog. (*Sarch* v. *Blackburn*, 4 C. & P. 267.) As to persons rightly on the land of the owner, a mere notice, "Beware of the dog!" will not protect the dog's owner from liability if the person injured could not read, or did not see the notice. (*Ibid;* see also *Curtis* v. *Mills*, 5 C. & P. 489.)

Lastly, it may be remarked that it is not essential that the defendant should be the owner of the dog, for if he harbors the dog, or allows it to resort to his premises, that is sufficient to make him liable for injury done by it. (*McKone* v. *Wood*, 5 C. & P. 1.) We may mention that we have excluded from this article the cases of injury done by dogs to sheep and cattle, including horses, which are regulated by the statute 28 & 29 Vict., c. 60, and in respect of which the owner is responsible, although there is an absence of *scienter* on his part.—*Law Notes.*

Reviews and Notices of Books.

History of the Court of Chancery, and of the Rise and Development of the Doctrines of Equity.—By A. H. Marsh, Q.C. Toronto: Carswell & Co.

This little work depicts the struggle between the Common Law and Equity; and the author has clothed the otherwise dry details, necessary to such a history, with an interest originally intended to be manifested in his lectures before the Law School.

We are carried along a connected chain, link by link, to the present time, from the days of the Curia Regis, whose component parts are now represented by the Privy Council, House of Lords, and House of Commons, as well as the several Benches of judges. On these links we find in succession the Chief Justicier—an Administrator of Justice during the then ofttime absence of the sovereign—; the Chancellor—"the keeper of the king's conscience"—; the rise of the Chancellor's power, first acquired by obtaining Common Law Jurisdiction; the failure of the Statute of Westminster the Second (*in consimili casu*), by which it was sought to adapt the existing writs to the exigencies of each case arising; the popularity of the Chancery, on account of the absence of fines; but, on the other hand, the abuse of the procedure by vexatious suits. Following this, we find many interesting instances of the conflict between the Chancery and the Common Law, notably that between Lord Coke and Lord Ellesmere, the Court of Exchequer—exercising as it did, a certain equity jurisdiction—being especially jealous of the Court of Chancery. An interesting account is given of the form of pleadings, originally commenced by a petition addressed to the Chancellor, without the preliminary issue of a writ. Verbose pleadings, even at that early date, did not find favor, for we are told that a replication of six score sheets was reckoned to be above five score too many, and the offender, with the replication hung around his neck, was led through the courts of Westminster, and, in addition, heavily fined. Such an example as this in the present day could not fail to lighten the burdens of our taxing officers. The author shows how the judges were first paid by fees and afterwards by salary, now, indeed—in Ontario—far too inadequate.

The extraordinary discretion, over-riding the law of the land, which was allowed to the Chancellors, to the intense disgust of the Common Law jurists, is thus tersely referred to by Lord Mansfield, in *Reg.* v. *Wilkes*. "Discretion, when applied to a Court of Justice, means sound discretion guided by law. It must be governed by rule, not by humor. It must not be arbitrary, vague, and fanciful, but legal and regular." A book such as this one, on perusal, shows itself to be, cannot fail to be of benefit to, nay almost a requisite for, the student —and we are all students—as well as entertaining to the general reader.

DIARY FOR OCTOBER.

1. Wed.....County Court Non-Jury Sittings except in York. William D. Powell, 5th C.J. of Q. B., 1816.
5. Sun.....*18th Sunday after Trinity.*
6. Mon.....County Court Sittings for Motions, except in York.
7. Tues....Henry Alcock, 3rd C.J. of Q.B., 1802. R. A. Harrison, 11th C.J. of Q.B., 1875.
8. Wed.....Sir W. B. Richards, C.J. Sup. Ct., 1875.
11. Sat.....County Court Sittings for Motions, except in York, end. Columbus discovered America 1492.
12. Sun.....*19th Sunday after Trinity.* Battle of Queenston, 1812.
13. Mon.....County Court Sittings for Motions in York begin. Sur. Ct. Sittings
15. Wed.....English law introduced into Upper Canada, 1791.
18. Sat.....St. Luke. County Court Sittings for Motions in York end.
19. Sun.....*20th Sunday after Trinity.*
20. Mon.....County Court Non-Jury Sittings in York. Last day for Law Society notices.
21. Tues.....Battle of Trafalgar, 1805.
22. Wed.....Supreme Court of Canada sits.
23. Thur.....Lord Lansdowne, Governor-General, 1888.
24. Fri.....Sir J. H. Craig, Governor-General, 1807.
26. Sun.....*21st Sunday after Trinity.*
27. Mon.....Hon. C. S. Patterson, app. Judge of Sup. Ct., 1888. Jas. Maclennan, app. Judge of Ct. of Appeal, 1888.
28. Tues.....Supreme Courts sits. St. Simon and St. Jude.
29. Wed.....Battle of Fort Erie, 1813.
31. Fri.....All Hallows' Eve.

Early Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE.

Queen's Bench Division.

STREET, J.] [Aug 29.

IN RE MITCHELL *v.* SCRIBNER.

Prohibition—Division Court—Order of Judge setting aside attachment—R.S.O., c. 51, s. 262.

Power over the process of his own court is inherent in the judge of a Division Court as well as of other courts; and, notwithstanding the provisions of s. 262 of the Division Courts Act, R.S.O., c. 51, a judge may set aside an attachment which has been improperly issued.

Douglas Armour for plaintiff.

Swabey for defendants.

Chancery Division.

FERGUSON, J.] [Sept. 4.

ATTORNEY-GENERAL FOR CANADA *v.* CITY OF TORONTO.

Municipal Corporations—By-law as to payment of water-rates—Discount to consumers—Exception as to Government institutions—Taxes—Discrimination.

A by-law of the defendants relating to the payment of rates for water supplied by the defendants to buildings in the municipality, provided that the rates should be subject to a reduction of fifty per cent., if paid within a certain time, "save and except in the cases of Government and other institutions which are exempt from city taxes, in which cases the said provisions as to discount shall not apply."

Held, that the post-office, customs-house, and other buildings vested in the Crown, all of which are exempt from city taxes, were "Government institutions" within the meaning of the by-law.

(2) Having regard to 35 Vict., c. 79, s. 12 (O.); 41 Vict., c. 41, s. 3 (O.); R.S.O., c. 192, ss. 19, 28, that the moneys charged and paid as water-rates, or rent for water, were not taxes, but the price or prices paid for water upon a sale thereof to the consumers.

(3) That the by-law was not invalid as discriminating against the Crown.

James Reeve, Q.C., and *Wickham*, for the plaintiff.

C. R. W. Biggar, Q.C., for the defendants.

MacMahon, J.] [July 21.

TOWN OF MEAFORD *v.* LANG.

Principal and surety—Non-disclosure by creditor—Official bond—Release of surety.

Where in an action brought against sureties to a tax-collector's bond, the said bonds being for the due payment over of taxes collected in 1886 and 1887, it appeared that the plaintiff's corporation, though they knew that the collector had, for some years, a loose way of doing his business, and was dilatory in making his returns, yet had not had it brought home to them that he was actually dishonest, and that they had not informed the defendants, when obtaining the execution of the bonds by the latter, of their causes of complaint against the collector; but it did not appear that they had dealt fraudulently with the defendants:

Held, that the non-disclosure by the plaintiffs to the defendants of the past conduct of the collector, did not relieve the defendants from their obligation under the bonds.

Cassels, Q.C., for the plaintiffs.

Kerr, Q.C., for the defendants.

Common Pleas Division.

Div'l Court.] [June 27.

REGINA *v.* SMITH.

Criminal law—Separate indictments for abduction and seduction.

The prisoner was convicted under R.S.C., c. 162, s. 44, the Act relating to offences against the person, for unlawfully taking an unmarried girl, under the age of sixteen years, out of the possession and against the will of her father. On the same day the prisoner was again tried and convicted under R.S.C., c. 157, s. 3, the Act relating to offences against public morals, for the seduction of the said girl, she being of previously chaste character, and between the ages of twelve and sixteen years.

Held, that the offences were several and distinct, and so a conviction on the first indictment did not preclude a conviction on the second one.

A. H. Dymond for the Crown.

No one appeared for the prisoner.

REGINA *v.* WATSON.

Public Health Act—R.S.O., c. 205—Owner or agent, meaning of—Plumber.

By the 6th clause of a city by-law, passed under the Public Health Act, R.S.O., c. 205, it was provided that before proceeding to construct, re-construct, or alter any portion of the drainage, ventilation, or water system of a dwelling, house, etc., "the owner or his agent constructing the same" should file, in the city engineer's office, an application for a permit therefor, which should be accompanied with a specification thereof, etc.; and by the 8th clause, that after such approval of such plan or specification, no alteration or deviation therefrom would be allowed except on the application of the "owner or of the agent of the owner" to the city engineer. By s. 2 of the said Public Health Act, "owner" is defined as meaning the person for the time being receiving the rents of the lands on his own account, or as agent or trustee of any other person who would so receive the same if such lands and premises were let.

Held, that the agent intended by the Act, and coming within the terms of the by-law, meant a person acting for the owner as trustee or in some such capacity, etc., and did not include a plumber employed by the owner to re-construct the plumbing in his dwelling-house.

T. W. Howard for the applicant.

F. Mowat, contra.

REGINA *v.* DOWSLAY.

Transient traders—Proof of by-law—R.S.O., c. 184, s. 289.

On the trial of a charge of being a transient trader without a license, contrary to a municipal by-law, no copy certified by the clerk to be a true copy and under the corporate seal as required by s. 289 of R.S.O., c. 184, was produced, but merely a by-law stated by the solicitor for the complainant to be the original by-law.

Held, that the requirements of s. 289 were not complied with, and the by-law was quashed with costs.

Aylesworth, Q.C., for the applicant.

Marsh, Q.C, contra.

BAKER *v.* FISHER.

Sale of goods—Intention of purchaser to set off a claim against the vendor—Fraud.

The plaintiff, with the intention of parting with the possession and property in certain flour, made an absolute sale of same, on apparently a short term of credit, to the defendant, who withheld from the plaintiff his intention to pay for the flour by setting off a claim he had acquired against the plaintiff.

Held, that this did not constitute a fraud on the defendant's part, so as to entitle the plaintiff to disaffirm the contract and replevy the goods.

Smythe, Q.C., for the plaintiff.

Machar for the defendant.

REGINA *v.* ATKINSON.

Police magistrate—Appointment of—Legality of—Canada Temperance Act.

On the 24th June, 1879, F. was appointed police magistrate for the town of W., in the county of O., and on the 12th January, 1887, H. for the county of O., in the place of one P., deceased. It did not appear whether F. or P. was the prior appointee. It was urged that H.'s appointment for the whole county was illegal by reason of F.'s previous appointment for W., and a conviction made by him for an offence against the Canada Temperance Act, committed in the county of O., but outside of the limits of W., was therefore bad,

Held, that under R.S.O., c. 72, ss. 8, 11, 12, H.'s appointment was legal, and therefore the conviction made by him, good.

Regina v. *Atkinson*, 15 O.R., 110, commented on.

DuVernet for the motion.

Delamere, Q.C., contra.

REGINA *v.* LYNCH.

Justices of the Peace—Absence of police magistrate—Trial of offence under R.S.C., c. 157—Alternative punishment—Imprisonment for more than three months—R.S.C., c. 178.

By s-s. 2 of s. 8 of the R.S.C., c. 157, any loose, idle, or disorderly person or vagrant shall, upon summary conviction before two justices of the peace, be deemed guilty of a misdemeanour, and liable to a fine not exceeding $50, or to imprisonment not exceeding six months, or both. By s. 62, of R.S.C., c. 178, the justices of the peace are authorized to issue a distress warrant for enforcing payment of a fine, and if issued to detain the defendant in custody, under s. 62, until its return; and if the return is no sufficient distress, then, under s. 67, to imprison for three months.

B. and R.J.F., two justices of the peace for the city of Toronto, in the absence of the police magistrate for the said city, convicted the defendant for an offence under said Act, and imposed a fine of $50, and in default of payment forthwith directed imprisonment for six months unless the fine was sooner paid.

Held, that under the said sub-section the justices had jurisdiction to adjudicate in the matter; and that it was not necessary to consider the effect of an agreement entered into between the police magistrate and B., to assist him in the trial of offences.

Held, also, that the conviction was bad, for under c. 157, there was no power to award imprisonment as an alternative remedy for non-payment of the fine, while under R.S.C., c. 178, imprisonment in the alternative can only be awarded after a distress has been directed and default therein; and, furthermore, the imprisonment in such case can only be for three months.

DuVernet for the applicant.

Dymond for the Attorney-General.

Curry for the magistrates.

LAWSON *v.* CORPORATION OF ALLISTON.

Municipal corporations—Obstruction on highway by derrick—Digging well under sec. 489—Negligence—Contributory negligence.

The defendants, for the purpose of sinking a well in one of the public streets of the village to procure water for public purposes, under the power conferred by section 489 of the Municipal Act, had erected a derrick in the said street. The plaintiff had driven into the village past the said derrick without its appearing to affect the horse, the derrick not then being at work, but on attempting to pass it on her way home, while the derrick was at work, the horse took fright, ran away, and threw the plaintiff out of the carriage, causing her to sustain a severe injury. It was found that the derrick was of a nature to frighten horses, and that the defendant had not taken proper precautions to guard against accidents, and that there was no contributory negligence on the plaintiff's part.

Held, that the defendants were liable for the injury sustained by the plaintiff; but as the court considered the damages excessive, a new trial was directed unless the plaintiff consented to a reduction of same.

J. A. McCarthy for the plaintiff.

Lount, Q.C., for the defendants.

ATTORNEY-GENERAL EX REL HOBBS *v.* NIAGARA FALLS WESLEY PARK CO.

Street railway—Operating on Sunday—Right to restrain.

The defendants, by letter patents issued under the Street Railway Act, R.S.O. c. 171, were authorized to build and operate (on all days except Sundays) a street railway in the town of Niagara Falls, and on an information to restrain the defendants operating the railway on Sunday,

Held, ROSE, J., dissenting, that the information would not lie, for no private right or right of property was involved, nor any injury of a public nature done, and the interference of the court would not be exercised merely to enforce performance of a moral duty.

W. M. Douglas for the plaintiffs.

Hill, contra.

HOWARTH *v.* KILGOUR.

Defamation — Publication on privilegea occasion—Malice.

The plaintiff and one S. had been in partnership, S. having retired from the firm and left the country. Subsequently the plaintiff made an assignment for the benefit of his creditors. The defendant was a creditor and was appointed one of the inspectors of the estate. S. wrote a letter to one F. relative to the plaintiff's business, which the plaintiff claimed to be libellous, which F. forwarded to the defendant, who showed it to his co-inspector, to another creditor, and to the plaintiff's late book-keeper. In an action against the defendant for the publication,

Held, that the occasion of the publication was privileged, the letter being only shown to persons equally interested with the defendant in the matter, and being so privileged the onus was on the plaintiff to show malice, if any.

Denovan for the plaintiff.

Wallace Nesbitt and *J. R. Roaf*, contra.

BRYDGES *v.* HAMILTON ROLLING MILLS CO.

Master and servant—Accident– Workmen's Compensation for Injuries Act — Defect in machine—Contributory negligence.

A bolt was used for holding the lower blade of a pair of shears to an iron block called the bed plate, some eight inches thick, upon which the iron or steel to be cut was put, and along the face thereof, where the workman stood, there was a guard about three inches high, under which the iron was put to be cut by the shears, the only danger being when the iron became too short to cause the guard to be any protection. The bolt was too long, projecting outwards about 4½ inches, but there was no evidence to show that it was insufficient for the purpose for which it was used, nor likely to cause injury by reason of its length. The plaintiff, who had previously seen others working at the machine, was put to work at it himself, and had worked at it several times prior to the accident without any injury or apparent fear of any. When the accident happened he was feeding the machine with scrap iron, and a piece becoming too short to hold outside the guard, he held it down by another piece, and while doing so his fingers got jambed and crushed. Evidence was given that the accident could have been avoided by the use of tongs. No instructions were given the plaintiff except being warned not to let his fingers get too close to the shears.

Held, that no defect in the machine was proved, nor any negligence on the defendants part shown, and therefore the defendants were not liable for the injury sustained by the plaintiff.

Quære, whether the plaintiff was guilty of contributory negligence.

Bicknell for the plaintiff.

Wallace Nesbitt for the defendants.

HOWARD *v.* CORPORATION OF ST. THOMAS ET AL.

Municipal corporation — House being moved coming in contact with telephone wire across street, loosening bricks and injuring passer-by.

O. was moving a house, twenty-five feet high, along one of the streets in the city of S., having obtained the authority of the city engineer to do so, when by reason of its coming into contact with a wire, the existence of which O. was fully aware of, stretched by a telephone company, without any authority from the city, across the street, the wire being 19½ feet high, though the company's Act of Incorporation required it to be at least 22 feet, the wire was torn from its fastenings, loosening some bricks, which fell on the plaintiff, a passer-by, and injured him.

Held, that no liability attached either on the city or the telephone company, and that O. was alone liable for the injury sustained by the plaintiff.

W. R. Meredith, Q.C., for plaintiff.

Ermatinger, Q.C., for St. Thomas.

C. Macdougall, Q.C., for defendant Oliver.

Lash, Q.C., and *S. G. Wood*, for Telephone Co.

BOYD, C.] [June 5.

BOYD *v.* JOHNSTON.

Vendor and purchaser—Land subject to mortgage—Liability of purchaser to pay off mortgage.

A purchaser of an equity of redemption is bound as between himself and his vendor to pay

off the mortgage, and this quite irrespective of the frame of the contract between the parties.

When, therefore, lands were conveyed by the plaintiff to the defendant, which were subject to certain mortgages, the defendant was held bound to pay them off, and to protect the plaintiff from liability thereon.

Walter Cassels, Q.C., and *A. Skinner*, for the plaintiff.

Pepler, Q.C., for the defendant.

STREET, J.] [June 23.

ONTARIO NATURAL GAS CO. *v.* SMART ET AL.

Municipal corporations—Mineral gas—Municipal Act, s. 565—Indemnity—By-law, form of.

Mineral gas is a "mineral" within s. 565 of the Municipal Act, R.S.O., c. 184.

The lease under said section should be of the right to take minerals, and not of any portion of the highway itself. The lease here was of a portion of the highway, "for the purpose of boring for and taking therefrom oil, gas, or other minerals." The quantity of land was no more than was necessary for the company's purposes, and the rights of the public were fully protected.

Held, that the practical difference in this case was so small as not to constitute a ground for quashing the by-law.

The Council, before passing the by-law, insisted on an indemnity from the gas company against any costs and damages that might be incurred by reason of the passing thereof.

Held, that, under the circumstances, this could not be deemed to be evidence that the by-law was not passed in the public interest.

The plaintiffs, by first sinking a well on their land near the defendants' well, did not thereby acquire the right to restrain the defendants from using the natural reservoir of gas lying under the land.

Robinson, Q.C., and *H. S. Osler*, for plaintiff.

Aylesworth, Q.C., for defendants other than Walker.

W. H. Blake for defendant Walker.

MACMAHON, J.] [June 23.

REGINA *v.* CLARKE.

Taverns and shops—Selling liquor without license.

The defendant being present in Court on a charge, which was disposed of, was, without any fresh summons having been issued against him, arraigned on another charge, namely, of selling liquor without a license, and the information read over to him, to which he pleaded not guilty. Evidence for the prosecution was given, when defendant obtained an enlargement until the next day, and on his not then appearing, was convicted in his absence and fined $50 and costs, and in default of payment forthwith, imprisonment.

Held, that under the circumstances the issuing of a summons was waived.

Held, also, that the conviction was properly drawn, that distress should not have been awarded as an alternative remedy for non-payment of the fine, for s. 70 of R.S.O., c. 194, under which the conviction was made, gives no authority to award distress.

Jones for the applicant.

Curry, contra.

ROSE, J.] [June 26.

THE TORONTO BELT LINE RAILWAY CO. *v.* LAUDER.

Railways and railway companies—Warrant for possession of land.

The application for a warrant for possession of land required by a railway company under s-s. 23 of s. 20 of R.S.O., c. 170, should be made to the County Court judge, and not to a judge of the High Court.

Part I. of R.S.C., c. 109, only applies to railways constructed or to be constructed under the authority of a Dominion Act, and does not apply to a railway company incorporated by a local Act, as the applicants here are by 52 Vict., c. 82 (O.), though held to be under Dominion control as being a railway for the general advantage of Canada.

Edgar, Q.C., for the railway company.

Delamere, Q.C., for the defendant.

ROSE, J.] [June 24.

RE PARKER.

Extradition—Junior judge of County Court—R.S.C., c. 142, s. 5—Justices, proof as to——State officer's depositions taken in absence of accused—Identity of forged note.

The expression, "all judges, etc., of the County Court," contained in s. 5 of the Extradition Act, R.S.C., c. 142, embraces the junior judge of said court.

On a charge of forgery of a promisory note alleged to have been committed in the State of Kansas, the justices before whom the depositions were made were certified to be justices of the the peace, with power to administer oaths.

Held, that he was a magistrate or officer of a foreign state within s. 10 of the Act; and also that it was not necessary that he should be a federal and not a state officer; and further that the depositions need not be taken in the presence of the accused.

The depositions failed to shew that the note alleged to be forged was produced and identified by the deponents or any of them.

Held, that this constituted a ground for refusing extradition.

R. M. Meredith for prisoner.

Aylesworth, Q.C., and *McKillop*, contra.

The extradition judge has no power to remand the accused to hear further evidence as to the identity of the note.

Shepley, Q.C., for the prisoner.

Aylesworth, Q.C., contra.

MACMAHON, J.] [June 29.

MCPHEE *v.* MCPHEE.

Bills of exchange and promissory notes—Non-negotiable promissory note—Endorsement of—Character in which endorsement made.

Where a non-negotiable promissory note given for money lent to a firm is made by one member thereof and endorsed by the other, the character in which the endorsement is made will be implied from the purposes for which the note is given, the endorsement obtained, and the particular circumstances of the case.

McVeity for the plaintiff.

O'Gara, Q.C., for the defendant.

STREET, J.] [July 4.

JOHNSTON *v.* MCKENZIE.

Executors and administrators—Executor becoming bankrupt and intemperate—Injunction restraining dealing with assets and appointment of receiver.

Where a person named as an executor was at the time of the making of the will in good credit and circumstances, but subsequently became insolvent and made an assignment for the benefit of his creditors, and also apparently intemperate, an injunction was granted restraining the executor from interfering with the estate, and the appointment of a receiver directed.

Hoyles, Q.C., for the plaintiff.

J. Hoskin, Q.C., for the infant defendant.

R. M. Meredith for the defendant McKenzie.

Practice.

BOYD, C.] Sept. 16.]

BROWN v. HOSE.

Costs—Scale of—Rule 1174—"Order as to the costs"—Jurisdiction of taxing officer—Action for goods sold and delivered—Ascertainment of amount—Pleadings—County Court jurisdiction.

Where in an action in the High Court an order was made by a local judge upon consent allowing the plaintiffs to sign judgment for $233, with costs of suit to be taxed:

Held, that full costs were not implied unless it was a case for suing in the High Court; and the jurisdiction of the taxing officer to decide as to the scale of costs was not ousted.

History of Rule 1174.

The claim was $233, the price of furniture sold by the plaintiffs to the defendant, according to prices endorsed on the writ, and duly delivered. By his statement of defence the defendant admitted $160.50, which he paid into Court. As to the balance, he pleaded that it was not payable because the goods ordered in respect thereof were not supplied or delivered, and that there was no agreement therefor within the Statute of Frauds.

Held, that the pleadings only must be looked at to ascertain what was in dispute; that the cause of action was one and indivisible; and that the *whole* cause of action was not for an ascertained amount within County Court competence.

Aylesworth, Q.C., for the plaintiffs.

W. H. Blake for the defendants.

MACMAHON, J.] [Sept. 17.

HESPELER *v.* CAMPBELL.

Time—Notice of appeal—Long vacation—Rule 484—R.S.O. c. 44, s. 71—Extending time—Rule 484.

Upon the true construction of Rule 484 the period of long vacation is not to be reckoned in

the time allowed by s. 71 of the Judicature Act for filing and serving notice of appeal to the Court of Appeal.

Semble, also, that under the circumstances of this case, if the notice had been late, the time would have been extended under Rule 485.

Bain, Q.C., for the plaintiff.

Walter Barwick for the defendants.

BOYD, C.] [Sept. 27.

BREADY *v.* ROBERTSON.

Security for costs—Action against justices of the peace—53 Vict. c. 23—Character of property of plaintiff.

Upon applications under 53 Vict. c. 23, for security for costs in actions against justices of the peace, the rule should not be more, but rather less, onerous than in ordinary applications for security where the plaintiff is out of the country.

S. 2 of the Act provides that it is to be shown that the plaintiff is not possessed of property sufficient to answer the costs of the action.

Held, that the court should be less exacting as to the character of the property where the person is a *bona fide* resident than in the ordinary case of a stranger who seeks to justify upon property within the jurisdiction; the test is, is it such property as would be forthcoming and available in execution.

And where the plaintiff had property, partly real and partly personal, to the value of $800 over and above debts, incumbrances, and exemptions, security for costs was not ordered.

A. D. Cameron for plaintiff.

Bicknell for defendants.

MR. DALTON.] [Oct. 1.

KELLY *v.* WADE.

Order of court—Effect of not issuing—Abandonment.

Where an order was in June, 1889, pronounced by a Divisional Court, upon the application of the defendants, setting aside a judgment recovered by the plaintiff at the trial and directing a new trial, but was never issued,

Held, that the original judgment must be considered to be still in force; and a motion to set aside execution issue thereon was refused.

Aylesworth, Q.C., for defendants.

W. H. Blake for the plaintiff's solicitor.

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Law Students' Department.

EXAMINATION BEFORE TRINITY TERM: 1890.

CERTIFICATE OF FITNESS.

Benjamin on Sales—Smith on Contracts.

Examiner: R. E. KINGSFORD.

1. What is the principal difference between an offer under seal and one not under seal?

2. Will part performance of a contract of a corporation be a good answer to the objection that the contract is not under seal? Why?

3. What difference is there between the 4th and 17th sections of the Statute of Frauds in regard to the necessity that the consideration should appear in the writing?

4. If an action is brought in Ontario on an agreement made in Germany, would the Statute of Frauds apply? Why?

5. What exception to the rule that agreements not to be performed within a year must be evidenced in writing?

6. Will a written acknowledgment of a debt containing a refusal to pay it be sufficient to prevent the operation of the Statute of Limitations? Why?

7. How far is knowledge on the part of the defendant of the falsehood of his representations necessary to be proved in order to establish a case of fraud?

8. In what respect is the title of the assignee of a bill of lading better than the title of his assignor?

9. Will an action lie by the executors of a woman for breach of promise to marry her? Why?

10. What effect, if any, has a verbal understanding by which the operation of a written agreement is made subject to a condition?

Mercantile Law—Practice—Statutes.

Examiner: R. E. KINGSFORD.

1. A. is a member of a trading firm. He draws bills in his own name and discounts them with B. The proceeds of the discount are used for firm purposes. How far can B. charge the firm? Why?

2. Goods are bailed by A. to B. to be kept by the latter. B. bails them to C., who uses and wastes the goods. From whom can A. recover compensation for damages sustained? Why?

3. What is a *General Lien* on goods? How does it arise? How may it be extinguished?

4. A. is travelling by a conveyance owned by a common carrier, and takes with him into the conveyance his satchel, in which he has some jewellery. The satchel and contents are lost, having been left in the conveyance by A. during a stoppage on the road. How far is the carrier liable? Why?

5. What is the present statutory rule as to interest on judgments?

6. "Although a contract may on its face appear to bind only one party, yet there are occasions on which the law will imply corresponding obligations on the part of the other party." Give instances.

7. In case of non-delivery of goods according to contract what is the measure of damages?

8. If a garnishee does not dispute his liability on a return of the garnishing order but contends that the claim or demand is not due, what protection will be given the plaintiff?

9. Under what circumstances may relief by way of interpleader be granted?

10. A plaintiff claims by his writ for a liquidated demand and also for damages, and defendant fails to appear. What steps may the plaintiff take?

Equity.

Examiner: P. H. DRAYTON.

1. What is the rule of equity in regard to dealings between persons in confidential relations such as trustee and cestui que trust, solicitor and client, guardian and ward?

2. Give the general rule as to the liability of trustees for the acts of their co-trustees, and distinguish between such liability in cases of private trusts and those of a public nature respectively.

3. When, if at all, will the Court decree specific performance of an agreement to enter into partnership, and when will a dissolution be decreed of a partnership at the instance of one of the partners before the time has expired?

4. A. owns certain lands, of which he has a plan made, upon which a portion is shewn as a public park, the other portion is divided into lots facing on the park. He exhibits it to B., who purchases one of the lots. Afterwards A. commences to build on the park portion. B. brings an action to restrain same. Who should succeed, and why?

5. A., by his will, directs Blackacre to be sold, and the proceeds divided between C. and D. D. wishes to take his share in land. Can he do so? Why?

6. Distinguish between the duties as to disclosure incumbent respectively upon an applicant for a policy of insurance against fire, and upon a creditor who is procuring a person to become surety for him for payment of a debt.

7. What was, and what is now, the law with regard to contracts of married women binding their separate estate?

8. Distinguish between the relief granted by the Courts in arbitration, (1) where mistake of fact is alleged; (2) where mistake of law is set up.

9. A client of yours comes to you alleging that a certain nuisance is being perpetrated in his neighborhood injuriously affecting his property. State the steps you would take to have the same abated.

10. Explain briefly the rights and duties of a receiver appointed by the Court, and state some cases in which the Court will appoint one.

Real Property.

Examiner: P. H. DRAYTON.

1. What is the effect of destroying a valid conveyance, grantor and grantee assenting thereto?

2. What, if any, statutory provision is there with regard to mortgages under the Short Forms' Act, where the power of sale is to be exercised without notice?

3. How, if in any way, can a contractor, claiming a mechanic's lien, enforce the same without issuing a writ?

4. Explain consolidation and tacking respectively; and state how, if in any way, the same have been affected by Provincial legislation?

5. State to me briefly and concisely the steps you would take where a client brings in a vendor to you of a lot in Toronto which he is buying, from the inception to the close of the transaction, the property in question being subject to a mortgage which is assumed with interest from a certain date by your client.

6. A. dies having bequeathed $10,000 to his brothers and sisters equally; he has a uterine brother and sister, and two half-sisters by second marriage of his father, him surviving. How will the bequest go?

7. What are the four accepted rules to be observed in the construction of wills?

8. At a sale of lands under power of sale in a mortgage are any persons debarred from buying; if so, who, and for what reasons?

9. On the 1st of June, 1890, your client enters into a binding agreement with A. for the purchase of Blackacre. You search the title and find it correct; on closing on the 10th June you find an execution against the lands of A. Would you consider yourself safe in closing the deal; if so, why, if not, why not?

10. Distinguish between 13 Eliz., c. 5, and 27 Eliz., c. 4; and state how, if in any way, both or either have been dealt with by Provincial legislation?

Law Society of Upper Canada.

LAW SCHOOL—HILARY TERM, 1890.

LEGAL EDUCATION COMMITTEE.

CHARLES MOSS, Q.C., *Chairman.*

C. ROBINSON, Q.C.	Z. A. LASH, Q.C.
JOHN HOSKIN, Q.C.	J. H. MORRIS Q.C.
F. MACKELCAN, Q.C.	J. H. FERGUSON, Q.C.
W. R. MEREDITH, Q.C.	N. KINGSMILL, Q.C.

This notice is designed to afford necessary information to Students-at-Law and Articled Clerks, and those intending to become such, in regard to their course of study and examinations. They are, however, also recommended to read carefully in connection herewith the Rules of the Law Society which came into force June 25th, 1889, and September 21st, 1889, respectively, copies of which may be obtained from the Secretary of the Society, or from the Principal of the Law School.

Those Students-at-Law and Articled Clerks, who, under the Rules, are required to attend the Law School during all the three terms of the School Course, will pass all their examinations in the School, and are governed by the School Curriculum only. Those who are entirely exempt from attendance in the School will pass all their examinations under the existing Curriculum of The Law Society Examinations as heretofore. Those who are required to attend the School during one term or two terms only will pass the School Examination for such term or terms, and their other Examination or Examinations at the usual Law Society Examinations under the existing Curriculum.

Provision will be made for Law Society Examinations under the existing Curriculum as formerly for those students and clerks who are wholly or partially exempt from attendance in the Law School.

Each Curriculum is therefore published herein accompanied by those directions which appear to be most necessary for the guidance of the student.

CURRICULUM OF THE LAW SCHOOL, OSGOODE HALL, TORONTO.

Principal, W. A. REEVE, Q.C.

Lecturers: E. D. ARMOUR, Q.C.
A. H. MARSH, B.A. LL.B. Q.C.
R. E. KINGSFORD, M.A. LL.B.
P. H. DRAYTON.

The School is established by the Law Society of Upper Canada, under the provisions of rules passed by the Society with the assent of the Visitors.

Its purpose is to promote legal education by affording instruction in law and legal subjects to all Students entering the Law Society.

The course in the School is a three years' course. The term commences on the fourth Monday in September and closes on the first Monday in May; with a vacation commencing on the Saturday before Christmas and ending on the Saturday after New Year's Day.

Students before entering the School must have been admitted upon the books of the Law Society as Students-at-Law or Articled Clerks. The steps required to procure such admission are provided for by the rules of the Society, numbers 126 to 141 inclusive.

The School term, if duly attended by a Student-at-Law or Articled Clerk is allowed as part of the term of attendance in a Barrister's chambers or service under articles.

The Law School examinations at the close of the School term, which include the work of the first and second years of the School course respectively, constitute the First and Second Intermediate Examinations respectively, which by the rules of the Law Society, each student and articled clerk is required to pass during his course; and the School examination which includes the work of the third year of the School course, constitutes the examination for Call to the Bar, and admission as a Solicitor.

Honors, Scholarships, and Medals are awarded in connection with these examinations. Three Scholarships, one of $100, one of $60, and one of $40, are offered for competition in connection with each of the first and second year's examinations, and one gold medal, one silver medal, and one bronze medal in connection with the third year's examination, as provided by rules 196 to 205, both inclusive.

The following Students-at-Law and Articled Clerks are exempt from attendance at the School.

1. All Students-at-Law and Articled Clerks attending in a Barrister's chambers or serving under articles elsewhere than in Toronto, and who were admitted prior to Hilary Term, 1889.

2. All graduates who on the 25th day of June, 1889, had entered upon the *second* year of their course as Students-at-Law or Articled Clerks.

3. All non-graduates who at that date had entered upon the *fourth* year of their course as Students-at-Law or Articled Clerks.

In regard to all other Students-at-Law and Articled Clerks, attendance at the School for one or more terms is compulsory as provided by the Rules numbers 155 to 166 inclusive.

Any Student-at-Law or Articled Clerk may attend any term in the School upon payment of the prescribed fees.

Students and clerks who are exempt, either in whole or in part, from attendance at The Law School, may elect to attend the School,

and to pass the School examinations, in lieu of those under the existing Law Society Curriculum. Such election shall be in writing, and, after making it, the Student or Clerk will be bound to attend the lectures, and pass the School examination as if originally required by the rules to do so.

A Student or Clerk who is required to attend the School during one term only, will attend during that term which ends in the last year of his period of attendance in a Barrister's Chambers or Service under Articles, and will be entitled to present himself for his final examination at the close of such term in May, although his period of attendance in Chambers or Service under Articles may not have expired. In like manner those who are required to attend during two terms, or three terms, will attend during those terms which end in the last two, or the last three years respectively of their period of attendance, or Service, as the case may be.

Every Student-at-Law and Articled Clerk before being allowed to attend the School, must present to the Principal a certificate of the Secretary of the Law Society shewing that he has been duly admitted upon the books of the Society, and that he has paid the prescribed fee for the term.

The Course during each term embraces lectures, recitations, discussions, and other oral methods of instruction, and the holding of moot courts under the supervision of the Principal and Lecturers.

During his attendance in the School, the Student is recommended and encouraged to devote the time not occupied in attendance upon lectures, recitations, discussions or moot courts, in the reading and study of the books and subjects prescribed for or dealt with in the course upon which he is in attendance. As far as practicable, Students will be provided with room and the use of books for this purpose.

The subjects and text-books for lectures and examinations are those set forth in the following Curriculum :

FIRST YEAR.

Contracts.

Smith on Contracts.
Anson on Contracts.

Real Property.

Williams on Real Property, Leith's edition.

Common Law.

Broom's Common Law.
Kerr's Student's Blackstone, books 1 and 3.

Equity.

Snell's Principles of Equity.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

SECOND YEAR.

Criminal Law.

Kerr's Student's Blackstone, Book 4.
Harris's Principles of Criminal Law.

Real Property.

Kerr's Student's Blackstone, Book 2.
Leith & Smith's Blackstone.
Deane's Principles of Conveyancing.

Personal Property.

Williams on Personal Property.

Contracts and Torts.

Leake on Contracts.
Bigelow on Torts—English Edition.

Equity.

H. A. Smith's Principles of Equity.

Evidence.

Powell on Evidence.

Canadian Constitutional History and Law.

Bourinot's Manual of the Constitutional History of Canada. O'Sullivan's Government in Canada.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to the above subjects as shall be prescribed by the Principal.

THIRD YEAR.

Contracts.

Leake on Contracts.

Real Property.

Dart on Vendors and Purchasers.
Hawkins on Wills.
Armour on Titles.

Criminal Law.

Harris's Principles of Criminal Law.
Criminal Statutes of Canada.

Equity.

Lewin on Trusts.

Torts.

Pollock on Torts.
Smith on Negligence, 2nd edition.

Evidence.

Best on Evidence.

Commercial Law.

Benjamin on Sales.
Smith's Mercantile Law.
Chalmers on Bills.

Private International Law.

Westlake's Private International Law.

Construction and Operation of Statutes.

Hardcastle's Construction and Effect of Statutory Law.

Canadian Constitutional Law.

British North America Act and cases thereunder.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

During the School term of 1890-91, the hours of lectures will be 9 a.m., 3.30 p.m., and 4.30 p. m., each lecture occupying one hour, and two lectures being delivered at each of the above hours.

Friday of each week will be devoted exclusively to Moot Courts. Two of these Courts will be held every Friday at 3.30 p.m., one for the Second year Students, and the other for the Third year Students. The First year Students will be required to attend, and may be allowed to take part in one or other of these Moot Courts.

Printed programmes showing the dates and hours of all the lectures throughout the term, will be furnished to the Students at the commencement of the term.

GENERAL PROVISIONS.

The term lecture where used alone is intended to include discussions, recitations by, and oral examinations of, students from day to day, which exercises are designed to be prominent features of the mode of instruction.

The statutes prescribed will be included in and dealt with by the lectures on those subjects which they affect respectively.

The Moot Courts will be presided over by the Principal or the Lecturer whose series of lectures is in progress at the time in the year for which the Moot Court is held. The case to be argued will be stated by the Principal or Lecturer who is to preside, and shall be upon the subject of his lectures then in progress, and two students on each side of the case will be appointed by him to argue it, of which notice will be given at least one week before the argument. The decision of the Chairman will be pronounced at the next Moot Court, if not given at the close of the argument.

At each lecture and Moot Court the roll will be called and the attendance of students noted, of which a record will be faithfully kept.

At the close of each term the Principal will certify to the Legal Education Committee the names of those students who appear by the record to have duly attended the lectures of that term. No student will be certified as having duly attended the lectures unless he has attended at least five-sixths of the aggregate number of lectures, and at least four-fifths of the number of lectures of each series during the term, and pertaining to his year. If any student who has failed to attend the required number of lectures satisfies the Principal that such failure has been due to illness or other good cause, the Principal will make a special report upon the matter to the Legal Education Committee. For the purpose of this provision the word "lectures" shall be taken to include Moot Courts.

Examinations will be held immediately after the close of the term upon the subjects and text books embraced in the Curriculum for that term.

The percentage of marks which must be obtained in order to pass any of such examinations is 55 per cent. of the aggregate number of marks obtainable, and 29 per cent. of the marks obtainable on each paper.

Examinations will also take place in the week commencing with the first Monday in September for students who were not entitled to present themselves for the earlier examination, or who having presented themselves thereat, failed in whole or in part.

Students whose attendance at lectures has been allowed as sufficient, and who have failed at the May examinations, may present themselves at the September examinations at their own option, either in all the subjects, or in those subjects only in which they failed to obtain 55 per cent. of the marks obtainable in such subjects. Students desiring to present themselves at the September examinations must give notice in writing to the Secretary of the Law Society, at least two weeks prior to the time fixed for such examinations, of their intention to present themselves, stating whether they intend to present themselves in all the subjects, or in those only in which they failed to obtain 55 per cent. of the marks obtainable, mentioning the names of such subjects.

Students are required to complete the course and pass the examination in the first term in which they are required to attend before being permitted to enter upon the course of the next term.

Upon passing all the examinations required of him in the School, a Student-at-Law or Articled Clerk having observed the requirements of the Society's Rules in other respects, becomes entitled to be called to the Bar or admitted to practise as a Solicitor without any further examination.

The fee for attendance for each Term of the Course is the sum of $10, payable in advance to the Secretary.

Further information can be obtained either personally or by mail from the Principal, whose office is at Osgoode Hall, Toronto, Ontario.