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THE vacancy in the Law School caused by the death of Mr. Reeve has been filled by the appointment of Mr. N. W. Hoyles, Q.C., at the increased salary of $5,000 per annum. Mr. Hoyles has many qualifications eminently fitting him for the position. He is a highly-trained and well-read scholar, as well as a sound lawyer; in manner he is courteous, a gentleman by birth and instinct. He has, moreover, combined with force of character and great industry, a strong sympathy for young men, with whom he has always been a favourite. We feel confident he will do his work well, and not be afraid to make or carry out with tact and judgment any suggestions which may seem desirable to improve the system now in force for legal education in this Province.

MORTGAGEE v. *PURCHASER*.

In our issue for September 10 (*ante* p. 490), we published an article by Mr. A. C. Galt on the above subject. Mr. Marsh refers to this article in a letter in our last number, and Mr. Galt takes up the parable again in a letter which appears in the present number at p. 639. As to Mr. Marsh's letter, it is best that he should be his own interpreter.

In dealing with argument No. 1 (referred to in this letter), he says, at pp. 115, 116: "The most complete, concise, and accurate statement of the present equity doctrine on the subject, which the writer has been able to find in any one judgment, is contained in the following extract from the opinion of Allen, J., delivered in the New York Court of Appeals, in the case of *Vrooman* v. *Turner*, 69 N.Y., 284: 'To give a third party who may derive benefit from the performance of the promise an

action, there must be, first, an intent by the promisee to secure some benefit to the third party; and, second, some privity between the two, the promisee and the party to be benefited, and some obligation or duty owing from the former to the latter, which would give him a legal or equitable claim to the benefit of the promise, or an equivalent from him personally. *It is true there need be no privity between the promisor and the party claiming the benefit of the undertaking*, neither is it necessary that the latter should be privy to the consideration of the promise, but it does not follow that a mere volunteer can avail himself of it. A legal obligation or duty of the promisee to him will so connect him with the transaction as to be a substitute for any privity with the promisor, or the consideration of the promise, the obligation of the promisee furnishing an evidence of the intent of the latter to benefit him, and creating a privity by substitution with the promisor. A mere stranger cannot intervene and claim by action the benefit of a contract by other parties. There must be either a new consideration or some prior right or claim against one of the contracting parties, by which he has a legal interest in the performance of the agreement; there must be a legal right, founded upon some obligation of the promisee, in the third party to adopt and claim the promise as made for his benefit.'"

However complete, concise, and accurate the above statement may seem to Mr. Marsh, we must confess it is not so to us. Almost the only clear idea we have been able to extract from it is that it assumes a want of privity between the promisor (*i.e.*, the purchaser) and the party claiming the benefit of the undertaking (*i.e.*, the mortgagee), and seeks to find a substitute for it.

Mr. Marsh's argument No. 2, upon the doctrine of subrogation, is to be found on p. 157, *et seq.*, of 2 C.L.T. The definition of the doctrine which he adopts is to be found on p. 158, and it contains the following distinct averment: "The doctrine does not depend upon privity, nor is it confined to cases of strict suretyship."

Finally, in working out the mortgagee's right under the doctrine of trusts, our learned correspondent says, at p. 223: "In order, therefore, to stamp the money in the hand of the purchaser with an irrevocable trust, it is not necessary that there should be any agreement between the purchaser and the mort-

gagee, but it is sufficient if the existence of the trust be communicated to the mortgagee by or through the mortgagor or purchaser; and it is worthy of consideration whether the existence of such trust would not be so communicated by the registration upon the lands of a conveyance reciting the facts."

We cannot but think that Mr. Marsh only meant to assert that he had contended for the direct liability of the purchaser notwithstanding the want of privity, which is certainly not a specially novel contention. But we see no trace of an argument in his article in favour of the direct privity of the purchaser with the mortgagee; and we may add, in justice to Mr. Galt, that until his paper reached us we had never met with the argument elsewhere.

THE SUPPOSED INCONSISTENCIES OF THE PRIVY COUNCIL.

It has been frequently alleged, but it appears to us on very insufficient grounds, that the Judicial Committee of the Privy Council have, in the construction of the British North America Act, in some instances, arrived at inconsistent conclusions. This has been reiterated in the columns of a contemporary until, no doubt, it is believed to be an almost incontrovertible proposition.

No court is infallible; no court, from the nature of things, can always be composed of the same individuals; and the Judicial Committee being thus both a fallible and a fluctuating body, it would not be very surprising if it were, indeed, a fact, that its decisions were found to be occasionally inconsistent. But when we come to examine some of the cases in which this inconsistency is said to appear, we find that it is not the Judicial Committee that is at fault, but its critics, who are unable to appreciate the reasoning whereby the Judicial Committee have reconciled their supposed conflicting decisions.

Two cases have been recently referred to as illustrating the alleged inconsistencies of the Privy Council, viz., *Russell* v. *The Queen*, 7 App. Cas. 829, and *Hodge* v. *The Queen*, 9 App. Cas. 117, and it is claimed that these decisions are irreconcilable. No court, however high, is, or ought to be, free from criticism. It is one of the privileges we enjoy, as a free people, that we are at liberty to canvass, criticize, and discuss the decisions of the

judges, and the Judicial Committee of the Privy Council is no more exempt from this wholesome discipline than any other court. But while we concede that there is the right to criticize, we think it must be equally admitted that, like all other rights, it has its correlative obligation, and the right in question ought to be exercised, not in a captious or malicious manner, but with the sole and honest desire to advance the cause of justice and truth, and the public good. It can hardly be for the public good to assail a court, however humble it may be, with sneers, or to insinuate that its decisions proceed upon a sort of *rule of thumb*, unless there is a very strong and palpable ground for so doing; still less can it be for the public good to attack the highest court of the empire in such a spirit, where the ground for so doing is neither strong nor palpable; but, on the contrary, to most sensible people will appear to have no foundation whatever.

It is for the purpose of demonstrating the absurdity and utterly foundationless character of this recent criticism of the Judicial Committee of the Privy Council that we propose to ask the attention of our readers to the cases of *Russell* v. *The Queen* and *Hodge* v. *The Queen* above referred to. In the first of these cases the power of the Dominion Parliament to pass what is known as the Canada Temperance Act was called in question. This Act, as is well known, enabled any county or city municipality to bring the Act into force within its limits, and when so brought into force it prohibited the sale of intoxicating liquor within the area of such municipality. The Judicial Committee came to the conclusion that the Act was *intra vires* of the Dominion Parliament. In the case of *Hodge* v. *The Queen* the question for the court was whether the Ontario Liquor License Act was *intra vires* of the Ontario Legislature, and the Judicial Committee determined that it was. Those who see an inconsistency in these two decisions seem to rest their conclusion on the ground that both of these enactments were directed to regulating the sale of liquor, both were of a prohibitive character, and they regard it as utterly impossible that the British North America Act can give to both the Dominion and Provincial Legislatures legislative power over any part of the same domain. According to the view of these critics the Act lays down a rigid line, on one side of which the Dominion has exclusive jurisdiction, and on the other the Provinces, and no subject which is on the Dominion

side of the line can be affected by any Provincial legislation, and *vice versa*. But a careful consideration of the Act will convince any one that it could not be worked at all if it were to be construed on any such plan.

The critics who adopt this view appear to think that the British North America Act is to be construed in a similar manner to that in which Portia construed the bond of Shylock; but, however such a mode of construction may serve the purposes of poetical justice, we need hardly say that, if applied to the actual affairs of men, it would not do at all.

The fact is that he who would construe the British North America Act aright must come to its consideration, not in the spirit of a mere case lawyer, but in that of a lawyer and a statesman. It must be dealt with as Marshall dealt with the Constitution of the United States. The object of every judge who has to construe our Constitutional Act ought to be to so frame his decision as to carry out the true spirit and intention of that Act, and, in doing so, he ought to strive to avoid any construction that will lead to a virtual deadlock in the legislative machinery, or deprive the people of this Dominion of the fullest rights of self-government, which it was the very object of the Act to secure them.

Mr. Clement, in his valuable work on the "Law of the Canadian Constitution" (p. 206), very justly observes that a perusal, the most cursory, of the classes of subjects enumerated in the various subsections of ss. 91 and 92 reveals that if, in every case, the full meaning is to be given to the words employed, the classes must inevitably overlap. There is therefore, plainly, an apparent dilemma created by these two sections, which it became the duty of the judges to surmount, and the Judicial Committee have done it by the exercise of a broad and statesmanlike view of the Act, in a way which is entitled, not only to respect, but to admiration.

In the case of *Russell* v. *The Queen*, the Act was supported as being one for the peace, order, and good government of Canada, and also as regulating trade and commerce. It was contended that it was *ultra vires* because it interfered with property and civil rights, which, by s. 92, is a subject within the exclusive control of the Provincial Legislature. But, on many subjects enumerated in s. 91, it would be impossible to frame any effective

legislation whatever without affecting some of the subjects included in s. 92, and *vice versa*. In order, therefore, to pass any legislation dealing with such subjects, it would be absolutely necessary, if the rigid rule of construction were adopted, to have recourse to concurrent legislation by the Dominion and the Province, which would be, to say the least, an extremely inconvenient mode of dealing with any subject, and would, in effect, be depriving both the Dominion and the Provinces of the plenary power of legislation on the subjects assigned to them respectively which it was intended to confer on them. How, then, have the Judicial Committee solved the difficulty? Before proceeding to state the principle of construction adopted, we may observe, in the first place, that three of the Judicial Committee which decided *Russell* v. *The Queen* were also members of the Board which decided *Hodge* v. *The Queen*, and, in the judgment in the latter case, it is expressly stated that their lordships do not intend to vary or depart from the reasons expressed for the judgment in the *Russell* case, and the key to the decision in this and kindred cases is the principle which the *Russell* case and the case of *Citizens' Insurance Company* v. *Parsons*, 7 App. Cas. 96, illustrate, viz., that subjects which, in one aspect and for one purpose, fall within s. 92 may, in another aspect and for another purpose, fall within s. 91.

This is a perfectly comprehensible and legitimate principle. There may in some cases be difficulties in its application, but its proper and judicious application is the only means whereby the British North America Act can be saved from completely defeating the very object for which it was enacted. It is said, "To hold that the Dominion may prohibit the sale of intoxicating liquor, or permit its sale under highly restrictive regulations, and *at the same time* to hold that the Provinces may license its sale, and so restrict and regulate it, is surely inconsistent." And this is assumed to be the effect of these two cases; but, as a matter of fact, they have decided no such thing. They have not, as seems to be assumed, declared that at the *same time* there may be in force an Act of the Dominion prohibiting the sale of liquor *in toto*, and also an Act of the Provincial Legislature authorizing and regulating its sale. There was no question of conflict between Dominion and Provincial legislation involved in either the *Russell* or the *Hodge* case. The court has simply held that the

Dominion has power to prohibit the sale of liquor altogether, as a matter affecting the peace, order, and good government of Canada, and also as a matter of trade and commerce. And they have also held that, where no such prohibitory Act of the Dominion is in force, the Provincial Legislatures, as a necessary incident of their right to legislate in respect of saloon licenses, have also the right, as a matter of local municipal police, to prescribe the terms on which such licenses shall be granted, and on which they shall be subject to forfeiture, notwithstanding that in doing so they may incidentally affect trade and commerce in liquor. Now, this is perfectly plain from the following passage, which we take from the judgment of the Privy Council in *Hodge* v. *The Queen:* "Their lordships consider that the powers intended to be conferredby the Act in question, when properly understood, are to make regulations in the nature of police or municipal regulations of a merely local character for the good government of taverns, etc., licensed for the sale of liquor by retail, and such as are calculated to preserve, in the municipality, peace and public decency, and repress drunkenness and disorderly and riotous conduct. As such they cannot be said to interfere with the general regulation of trade and commerce, which belongs to the Dominion Parliament, and *do not conflict with the provisions of the Canada Temperance Act, which does not appear to have as yet been locally adopted.*"

From this it would seem to be reasonably clear that if the Canada Temperance Act had, in fact, been in force then, and so long as it continued in force, any Provincial legislation authorizing the issue of licenses to sell liquor would, *pro tempore,* be suspended.

These decisions of the Privy Council on the British North America Act, therefore, seem to lead to the conclusion that a Provincial Legislature may, in the exercise of its jurisdiction under s. 92, exercise a plenary right of legislation in respect of the subject-matters mentioned in that section, even though in doing so they may incidentally affect some of the subjects mentioned in s. 91; but in doing so they cannot override, or run counter to, any express legislation by the Dominion Parliament upon any of such last-mentioned subjects.

So, also, the Dominion, in the exercise of its exclusive legislative powers, may, so far as is necessary to give due and proper

effect to legislation on any of the subjects mentioned in s. 91, encroach on the subjects specifically reserved for the Provincial Legislatures by s. 92; because, so far as may be necessary to give such effect to Dominion legislation, there is an express reservation in favour of the Dominion of a right to deal with the matters included in the class of subjects enumerated in s. 92.

Tennant v. *Union Bank,* (1894) App. Cas. 31, and *Citizens' Insurance Co.* v. *Parsons,* 7 App. Cas. 96, which are said to be "hopelessly in conflict," are perfectly consistent and in agreement with the principle of construction adopted in *Russell* v. *The Queen* and *Hodge* v. *The Queen.* They show that the line which divides the legislative powers of the Dominion from that of the Provinces is not a straight one, but one that pursues a somewhat devious course.

The critics of these decisions are mostly of the destructive sort, and while they regard them as hopelessly in conflict they do not vouchsafe to inform us what they think the court should have decided, or in the supposed conflict of decisions which, if any of them, they think was right, and which was wrong. Those who criticize merely to destroy, without pointing out a better way, do not contribute very much to the formation of a sound opinion.

But assuming that *Russell* v. *The Queen* was rightly decided, and that *Hodge* v. *The Queen* is the case which is considered to be wrong, then we assume that the critics of the Privy Council are of opinion that it would be a more correct interpretation of the British North America Act to have held that, in dealing with the subject of licenses of taverns, the Provincial Legislatures should have been limited simply to the power of imposing the fee to be paid for such licenses, and that they should have been held to have no power to impose any terms regulating the sale of liquor under such licenses, and, having tied up the Provincial Legislature in this way, we presume they would desire that the Dominion should also be denied the power of regulating the sale of liquor under such licenses, on the ground that to do so would be an interference with "property and civil rights," or as being a matter of "a local nature"; so that the people of the Dominion would find, under this method of construing the British North America Act, that they had practically been deprived of the most important rights of self-government, and that that Act, instead

of being the charter of their liberties, was, in fact, a cunningly devised trap to cheat them out of them.

For our part, we are satisfied that the more the decisions of the Privy Council interpreting the British North America Act are studied, and their bearing on our constitution as a whole understood, the more they will approve themselves to the judgment and good sense of the public of the Dominion.

CURRENT ENGLISH CASES.

The Law Reports for July comprise (1894) 2 Q.B., pp. 189-386; (1894) P., pp. 217-225; (1894) 2 Ch., pp. 181-376; and (1894) A.C., pp.

TRAMWAY—COMPULSORY PURCHASE BY COUNTY COUNCIL—VALUATION.

In re London County Council v. *The London Street Tramways Co.*, (1894) 2 Q.B. 1894, has some elements of similarity to the well-known case of *Re the City of Toronto* v. *The Toronto Street Ry.*, 20 Ont. App. 125; (1893) A.C. 511, inasmuch as it turns on the proper construction of an Act authorizing the compulsory purchase of the undertaking of a tramway company by a municipal body. The Act in question (33 & 34 Vict., c. 171, s. 44), amongst other things, provided that the municipal body in question might, after the expiration of twenty-one years, by notice in writing, require the London Street Tramways Co. to sell to them their undertaking upon the terms of paying the value (exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale, or other consideration whatever) of the tramway, and all lands, buildings, plant, etc., of the company, to be determined by arbitration. The arbitrator, in estimating the value, proceeded on the basis of ascertaining what the tramway could, at the date of purchase, be constructed for, and from such he deducted a sum for the depreciation of materials, and the balance thus arrived at he fixed as the value. The company, being dissatisfied, appealed, contending that the rental value of the property, capitalized for twenty years, was the proper mode of ascertaining the amount of purchase money to be paid. The Divisional Court (Mathew and Collins, JJ.) were of opinion that the company's contention was

correct, and that what was to be paid for was the value of "the undertaking," and, to estimate that properly, its profit-earning powers must be taken into consideration; but the Court of Appeal (Lindley, Kay, and Smith, L.JJ.) were of opinion that the arbitrator was correct in his mode of estimating the value, and that the terms of the Act expressly excluded any allowance based on the profit-earning power of the concern.

NUISANCE—POISONOUS TREES—YEW TREE NEAR BOUNDARY OF FIELD—DUTY OF OWNER OF POISONOUS TREE TO PREVENT ACCESS THERETO OF NEIGHBOUR'S CATTLE.

Ponting v. *Noakes*, (1894) 2 Q.B. 281; 10 R. July, 283, was an action brought by the plaintiff to recover damages for the death of a horse, caused by its having eaten of the leaves of a yew tree growing on the defendants' land. The yew tree in question grew near the boundary of the defendants' land, which was separated from the plaintiff's by a fence and a ditch belonging to the defendants, the plaintiff's boundary being on the farther side of the ditch. There was no obligation on the part of the defendants to fence against their neighbour's cattle. The plaintiff's horse ate of the branches of the yew tree, which extended over the fence and partly over the ditch, but not over the plaintiff's land. The Divisional Court (Charles and Collins, JJ.) dismissed the action, holding that there was no liability on the part of the defendants, and that there was no duty on them to take means to prevent the plaintiff's horse from having access to the branches of the tree. It was attempted to bring the plaintiff's case within the doctrine of the well-known case of *Fletcher* v. *Hylands*, 3 H.L. 330, but the court were agreed that it did not apply, because the tree was wholly within the defendants' land. The true test was held to be that pointed out by Gibbs, C.J., in *Deane* v. *Clayton*, 7 Taunt., at p. 533, where he says: "We must ask, in each case, whether the man or animal which suffered had, or had not, a right to be where he was when he received the hurt." If he had not, then (unless the element of intention to injure be present, as in *Bird* v. *Holbrook*, 4 Bing. 628, or of nuisance, as in *Barnes* v. *Ward*, 9 C.B. 392) no action is maintainable. If the obnoxious tree had extended over the plaintiff's land, and the horse had died from the eating of the branches which so extended, then the defendants would have been liable, as was held in *Crowhurst* v. *Amersham Burial Board*, 4 Ex.D. 5.

NUISANCE—BY-LAW—MAKING NOISE IN THE STREETS TO THE ANNOYANCE OF INHABITANTS—EVIDENCE.

Innes v. *Newman*, (1894) 2 Q.B. 292; 10 R. Sept., 269, was a case stated by justices. By a by-law of a town it was provided that if any person should make any violent outcry, noise, or disturbance in the market, or any of the streets or public places of the town, to the annoyance of the inhabitants, he should be liable to a penalty. The defendant, a newsboy, was brought up for contravention of the by-law. It was found that he had shouted the name of a newspaper incessantly for about six minutes. No evidence was given that any of the inhabitants had been disturbed thereby except one Matthews. The justices were of opinion that to justify a conviction it was necessary to prove that more than one inhabitant had been annoyed, but Wright and Collins, JJ., were of opinion that if the evidence showed that the act complained of was of such a character as to be likely to annoy the inhabitants generally it was not the less an offence under the by-law because only one inhabitant was, in fact, annoyed.

SOLICITOR AND CLIENT—RETAINER IN COMMON LAW ACTION—RIGHT OF SOLICITOR TO DETERMINE RETAINER—ACTION FOR COSTS.

Underwood v. *Lewis*, (1894) 2 Q.B. 306; 9 R. June, 222, is a decision which has excited some comment and discussion in the profession. The plaintiffs had been retained by the defendant to conduct his defence in three actions of a common law nature. Before the actions were concluded the plaintiffs gave the defendant reasonable notice that they would no longer act as his solicitor, and brought the present action to recover the costs incurred by them in the three actions up to the time of their ceasing to act. At the trial Grantham, J., gave judgment for the plaintiffs subject to a taxation of their bill; but, on appeal, the court (Lord Esher, M.R., and Smith and Davey, L.JJ.) were unanimous that the action would not lie unless some reasonable ground for the plaintiffs' determination of the retainer were shown; that the contract to defend the defendant in the three actions was one which required the plaintiffs to carry on the defence to the termination of the actions; and that, consequently, the plaintiffs could not retire from the defence except for good cause. A new trial was therefore directed. It may be observed that the Court of Appeal does not dissent from the decision of

Jessel, M.R., *In re Hall & Barker*, 9 Ch.D. 538, to the effect that the same rule does not apply to suits in equity.

PRACTICE—EVIDENCE—WITNESS CALLED BY JUDGE—CROSS-EXAMINATION.

In *Coulson* v. *Disborough*, (1894) 2 Q.B. 316; 9 R. May, 240, two questions are discussed, viz., whether a judge at a trial has a right to call a witness *sua sponte;* and, secondly, to what extent, if any, such a witness may be cross-examined. The Court of Appeal (Lord Esher, M.R., and Smith and Davey, L.JJ.) held that a judge at the trial may rightfully call a witness who has not been called by either party, and that neither party has a right to cross-examine a witness so called; but if the witness, in answer to questions put to him by the judge, gives evidence adverse to either party, the judge ought to allow that party's counsel to cross-examine the witness on that point, but that a general cross-examination ought not to be permitted.

CRIMINAL LAW—CRUELTY TO ANIMALS—DOMESTIC ANIMALS—CAGED LIONS—12 & 13 VICT., C. 92, SS. 2, 29; 17 & 18 VICT., C. 60, S. 3—(CR. CODE, S. 512).

Harper v. *Marcks*, (1894) 2 Q.B. 319; 10 R. Aug., 306, was an information which was laid for alleged cruelty to animals; the animals in question were caged lions, and it was held by Cave and Wright, JJ., that they were not domestic animals within the meaning of the Acts above referred to, and therefore the Acts did not apply.

PRACTICE—WRIT SERVED OUT OF JURISDICTION—AMENDMENT OF—ORD. XXVIII., RR. 1, 6—(ONT. RULES 309, 314).

Holland v. *Leslie*, (1894) 2 Q.B. 346; 10 R. July, 313, was an action on bills of exchange, in which the writ had been served out of the jurisdiction. The defendant appeared and put in a defence; the plaintiff then discovered that in the indorsement of his claim on the writ he had set out a bill which had, in fact, been paid, and he applied for leave to amend by substituting the particulars of another bill, which was granted. The defendant appealed from this order, contending that there was no power to order the amendment, as the writ had been served out of the jurisdiction, and, if such an amendment were allowed, it could only be permitted upon the terms of re-serving the writ. Cave and Collins, JJ., however, upheld the order, being of opinion

that the provisions of Ord. xxviii., rr. 1, 6 (Ont. Rules 309, 314), extended to such cases as well as those in which the defendants were within the jurisdiction.

LIMITATIONS, STATUTE OF—21 JACT., C. 16—4 & 5 ANNE, C. 16, S. 19; (R.S.O., C. 60, S. 5—INTERNATIONAL LAW—AMBASSADOR.

Musurus v. *Gadban*, (1894) 2 Q.B. 352; 9 R. Aug., 243, when before the Divisional Court, has been noted *ante* p. 342; it is only therefore necessary to say here that that decision is affirmed by the Court of Appeal (Smith and Davey, L.JJ.). It would seem from this case that when a defendant is entitled to immunity from suit a writ of summons cannot properly be issued against him, and kept alive by renewal, in the expectation that the immunity may cease.

HABEAS CORPUS—COSTS—JURISDICTION TO ORDER PAYMENT OF COSTS—SUPREME COURT OF JUDICATURE ACT, 1890 (53 & 54 VICT., C. 44), SS. 4, 5—(ONT. RULE 1170).

The Queen v. *Jones*, (1894) 2 Q.B. 382; 10 R. July, 308, may be referred to briefly, as showing that under the Supreme Court of Judicature Act, 1890 (53 & 54 Vict., c. 44), ss. 4, 5, the English court is held to have acquired a wider jurisdiction over costs than it formerly possessed under the Rules of 1883, Ord. lxv., on which Ont. Rule 1170 is based. That Rule was held not to give the court any jurisdiction over costs in cases where, before the Judicature Act, it had not any statutory or original jurisdiction to award costs; but the Act above referred to is held to have the effect of extending the jurisdiction over costs, and under it the court (Cave and Collins, JJ.) awarded costs against a defendant in *habeas corpus* proceedings. From this decision we therefore infer that, in a like case, there is no power in Ontario to award costs.

WILL—RESIDUARY GIFT TO CHARITY—TRUST TO ACCUMULATE SURPLUS INCOME —THELLUSSON ACT (39 & 40 GEO. III., C. 98)—(52 VICT., C. 10, S. 1 (O.)).

Harbin v. *Masterman*, (1894) 2 Ch. 184; 7 R. April, 65, is an interesting case upon the construction of a will in which the effect of the Thellusson Act (39 & 40 Geo. III., c. 98)—(see 52 Vict., c. 10, s. 1 (O.)), came in question. The testator by his will gave certain annuities, payable out of the annual income of his estate, and he directed the surplus income to be accumulated, and at the death of the last surviving annuitant he directed that the residue

of his estate and accumulations should be divided between five named charities, according to the amounts set after their names; the amount set after each name being £100. The annuitants had no interest in the surplus income, and in no event had any right to resort thereto. After paying the annuities a large surplus of income remained, which had been accumulated for over twenty-one years, some of the annuitants being still alive. The testator died in 1865. In 1871, Wickens, V.C., decided that the charities were entitled to the whole residue which remained after payment of the annuities, including the surplus income, and accumulations, but refused then to order it to be paid to them, and directed the trustees to continue to accumulate the surplus income, which had been done. The next of kin of the testator now claimed to be entitled to the whole of the residue, including the surplus income and accumulations which might remain after payment of the annuities and £500 to the charities, contending that the gifts to the charities were limited to £100 each; or, at all events, that, under the Thellusson Act, they were entitled to all accumulations which had been made subsequent to the expiration of twenty-one years from the testator's death. The charities, on the other hand, claimed the residue and all the accumulations, and contended that those made since the expiration of the twenty-one years should be paid over at once, as the trust for the accumulation beyond that period was void under the Thellusson Act. The Court of Appeal (Lindley, Kay, and Smith, L.JJ.) agreed with Wickens, V.C., that the charities were entitled to the whole of the residue of pure personalty, and they also agreed with Stirling, J., who held that the charities were entitled to all the accumulations, and were entitled now to have the further accumulation of the surplus income stopped, and to be paid the surplus annual income as it accrued. According to the views expressed by the Court of Appeal, it would seem that they went even further, and were also of opinion that the charities were entitled to the immediate payment of all the accumulations of income which had accrued since the testator's death, on the ground that the direction to accumulate the surplus income was altogether invalid, as being an attempt to postpone the enjoyment of the surplus, which was repugnant to the absolute gift of it to the charities, and therefore void, but whether or not such an order was made cannot be gathered from the report.

SOLICITOR—COSTS—TAXATION BETWEEN SOLICITOR AND CLIENT—SEPARATE RETAINERS.

In re Salaman, (1894) 2 Ch. 201, fifteen out of thirty-five persons who had given separate retainers to a solicitor to take proceedings on behalf of all applied for an order to tax the solicitor's bill, without joining or notifying the other twenty persons. Kekewich, J., was of opinion that they should have been notified, and, as some of these parties could not be found, he dismissed the application. The Court of Appeal (Lindley, Kay, and Smith, L.JJ.) thought he was right in requiring them to be notified, or made parties to the application, so as to secure a taxation in presence of all parties interested, but were of opinion that he was wrong in dismissing the application when it was found impracticable to serve them all, and they, therefore, granted the order. The Court of Appeal affirm the rule laid down in *Re Colquhoun*, 5 D.M. & G. 35, that, where separate retainers are given by several persons, each person is entitled to a taxation without serving any one but the solicitor.

COMPANY—DEBENTURE-HOLDERS' ACTION—RECEIVER—EMPOWERING RECEIVER TO BORROW AS A FIRST CHARGE—ORD XVI., R. 9 (ONT. RULE 315).

In *Greenwood* v. *Algesiras Ry. Co.*, (1894) 2 Ch. 205, which was a debenture-holders' action, in which a receiver had been appointed, an application was made for an order authorizing the receiver to borrow money upon the security of a first charge on the undertaking of the company and in priority to the debentures, for the preservation of the property. The Court of Appeal, notwithstanding all the debenture-holders were not actually parties, made the order asked, holding that, under Ord. xvi., r. 9 (Ont. Rule 315), the absent parties would be bound.

PARTNERSHIP—DEATH OF PARTNER—NOVATION—LIABILITY OF DECEASED PARTNER'S ESTATE—BANKERS—TRANSFER OF ACCOUNT.

In re Head, Head v. *Head*, (1894) 2 Ch. 236, the customer of a firm of bankers, after the death of one of the partners, removed money from his current account to a deposit account bearing interest at the same bank, and received a deposit note from the surviving partner. The bank subsequently stopped payment, and the question arose whether the estate of the deceased partner was liable to this customer for the money so deposited. Chitty,

J., decided that it was not, and that the transaction amounted to a novation, and the Court of Appeal (Lindley, Lopes, and Kay, L.JJ.) affirmed his decision.

COMPANY—DIVIDENDS—CAPITAL, DEPRECIATION OF.

Verner v. *General and Commercial Investment Trust*, (1894) 2 Ch. 239; 7 R. May, 76, was a suit by a shareholder to determine whether the directors of the defendant company were authorized to declare a dividend under the following circumstances: The company was formed for the purpose of investing its capital in stocks, funds, shares, and securities of various kinds, and the receipts from such investments were applicable to the payment of dividends. By reason of the depreciation of the securities in which part of the capital was invested, the company had, in effect, lost about £70,000 of its capital, but the income from its other investments yielded about £23,000, which left a considerable surplus after payment of the expenses of the company, and the question raised by the plaintiff was whether the directors could properly pay a dividend out of the £23,000, or were bound to apply the surplus towards restoring the capital which had been lost. It was contended, on the part of the plaintiff, that the payment of a dividend before the restoration of the lost capital was, in effect, to pay the dividend out of capital; but Stirling, J., held, and the Court of Appeal (Lindley, Smith, and Kay, L.JJ.) agreed with him, that there was no law to prevent the payment of the dividend, and that there was no obligation to restore the capital which had been lost, and that the payment of a dividend under the circumstances could not be regarded as a payment out of capital. Lindley, L.J., observes (p. 266): "The law is much more accurately expressed by saying that dividends cannot be paid out of capital than by saying they can only be paid out of profits. The last expression leads to the inference that the capital must always be kept up, and be represented by assets which, if sold, would produce it; and this is more than is required by law," and he goes on to say "that fixed capital may be sunk and lost, and yet that the excess of current receipts over current payments may be divided, but floating or circulating capital must be kept, as otherwise it will enter into and form part of such excess, in which case to divide such excess without deducting the capital which forms part of it will be contrary

to law." By this is meant, it would seem, that capital invested in temporary loans which are repaid cannot be treated as receipts for the purpose of paying dividends.

COSTS—ENFORCING PAYMENT OF COSTS—SEQUESTRATION—ORD. XLIII., RR. 6, 7—(ONT. RULE 618).

In re Lumley, (1894) 2 Ch. 271; 7 R. May, 85, the Court of Appeal (Lindley, Lopes, and Kay, L.JJ.) held that in order to enforce an order for the payment of costs it is competent for a judge, under the English Ord. xliii., r. 7 (of which there is no counterpart in Ontario), to direct the issue of a sequestration without first limiting any time for payment of such costs. The decision proceeds to some extent on a consideration of the old practice of enforcing the payment of costs in Chancery, a practice which did not prevail in Ontario, and it is therefore doubtful whether this case can be considered an authority in Ontario. The case is useful, however, as showing that it is not proper to make a conditional order for a sequestration. In this case the judge (North, J.) had ordered the writ to issue unless the costs were paid in four days. This the Court of Appeal held to be improper. Lindley, L.J., says the judge "ought to exercise his judgment as to whether a sequestration should issue on the facts brought before him at the time when he has to exercise his judgment and discretion," and he considered the proper method to give effect to the judge's desire to give the party an opportunity to pay before the writ issued was to have granted the order absolutely, with a direction that it should not be drawn up, or that it should lie in the office for four days.

WILL—CONSTRUCTION—LAPSE—SETTLEMENT OF SHARES—DEATH OF LEGATEE IN TESTATOR'S LIFETIME.

In re Pinhorne, Moreton v. *Hughes*, (1894) 2 Ch. 276; 8 R. June, 132, was a suit for the construction of a will, whereby the testator devised and bequeathed his residuary estate to trustees in trust for his four sisters in equal shares, with a proviso that the trustees were to retain the share of each of his sisters upon the trusts following, which were, to pay the income to such sister for life, without power of anticipation, but with power to each sister by deed or will to appoint the whole or any part of such income to any husband who might survive her for his life, and after the

death of such sister, and subject to any such appointment, in trust for the children of such sister, who, being male, should attain 21, or, being female, should attain that age or marry, in equal shares, and, in default of children who should attain a vested interest, in trust for the next of kin of such sister. One of the sisters predeceased the testator, leaving a husband and three infant children, and the question was whether her children or the next of kin were entitled to the fourth share of the residue given by the will to her. Chitty, J., determined that there had been no lapse, and that the children of the deceased sister were entitled contingently on their attaining 21, or marriage. His decision proceeds on the ground that all that was given to the deceased sister was a life estate, with a power to appoint in favour of her husband, and that her death consequently did not displace the settlement made by the will in favour of her surviving children.

WILL—CONSTRUCTION—GIFT TO WIFE FOR LIFE "FOR HER USE AND BENEFIT, AND FOR THE MAINTENANCE AND EDUCATION OF MY CHILDREN"—ADULT CHILDREN, RIGHT OF, TO MAINTENANCE.

In re Booth, Booth v. *Booth*, (1894) 2 Ch. 282; 8 R. June, 125, a testator had given the residue of his estate in trust to pay the income to his wife for life, "for her use and benefit, and for the maintenance and education of my children," and after her decease to divide the residue equally between his children. The widow having become bankrupt, North, J., held that the widow was entitled to the income, subject to a trust for the maintenance of the children, and that the trust was not limited to children under 21 or unmarried, and he directed an enquiry whether any, and, if any, which, of the adult children of the testator required maintenance, notwithstanding that the trustee in bankruptcy of the widow claimed the whole income.

SOLICITOR AND CLIENT—COSTS—ORDER FOR TAXATION OBTAINED BY CLIENT—RETAINER, RIGHT TO DISPUTE.

In re Frape, (1894) 2 Ch. 290; 8 R. June, 142, a client obtained a special order to tax his solicitor's bills of costs, "ten in number"; the order contained no reservation of right to dispute the retainer of the solicitor. As to one of the bills the client disputed the retainer *in toto*. The taxing master ruled that he was not entitled to do this, but could only dispute the retainer as to

particular items in the bill. The client appealed, contending that the whole ten bills constituted but one bill in law, and that he was entitled to dispute the retainer as to any of them. North, J., disallowed the appeal, on the ground that the client had accepted the bills as separate bills, and had obtained the order to tax the bills "ten in number" delivered to him, and had thereby admitted the retainer to some extent as to each bill.

SETTLED ESTATE—EQUITABLE TENANT FOR LIFE—POSSESSION OF SETTLED ESTATE—MORTGAGE BY TENANT FOR LIFE—LEASEHOLDS—ONEROUS COVENANTS—TRUSTEES—APPOINTMENT OF NEW TRUSTEE.

In re Newen, Newen v. *Barnes*, (1894) 2 Ch. 297; 8 R. July, 129, an equitable tenant for life of a settled estate claimed to be entitled to be let into possession of the estate. She had mortgaged her interest, and the mortgage was outstanding, and part of the property in question was leasehold, and subject to onerous covenants. Kekewich, J., was of opinion that the tenant for life was entitled to possession, but subject to proper terms being imposed for the protection of the trustees against the covenants in the leases. He was also of opinion that the mortgagees were necessary parties to the proceedings, and that they had a right to insist that the title deeds should remain in the custody of the trustees so long as their security should be outstanding. The tenant for life had power to appoint new trustees, and had filled a vacancy in the number by purporting to appoint herself, but it was conceded that this was an improper exercise of the power.

WILL—DEVISE—TRUST TO WORK OUT GRAVEL PITS AND THEN SELL—GIFT TO UNASCERTAINED C[illegible] REMOTENESS.

In re Wood, Tullett v. *Colville*, (1894) 2 Ch. 310; 8 R. May, 136, the doctrine of "remoteness" receives a fresh illustration. In this case the testator directed his trustees to carry on his business of a gravel contractor until his freehold gravel pits should be worked out, and then to sell them, and hold the proceeds in trust for such of his children "then living," and such issue living of any deceased child, etc. Kekewich, J., held that the direction to sell and the trusts of the proceeds were both void for remoteness, notwithstanding that the pits were, in fact, worked out within six years of the testator's death. It would seem, therefore, though this is not explicitly stated in the report, that the gravel pits fell into the residue.

VENDOR AND PURCHASER—MEMORANDUM—STATUTE OF FRAUDS—PURCHASER'S NAME FILLED IN BY AUCTIONEER.

In *Sims* v. *Landray*, (1894) 2 Ch. 318, Romer, J., reaffirms the well-settled rule, that upon a sale of land by auction the auctioneer is the agent of the purchaser, and that he has power to sign his name to the memorandum of purchase so as to bind him as purchaser. In this case the auctioneer knocked down the property to the defendant, who gave him his name and address, which the auctioneer filled in in the memorandum of purchase as follows: "I, Joseph Gilbert Landray, of, etc., do hereby acknowledge that at the sale by auction this day I was the highest bidder for, and was declared the purchaser of (*describing the property and stating the price*)." The defendant was then asked to sign the memorandum and pay the deposit, but excused himself from doing so on the ground that he had not his cheque b[illegible] He subsequently refused to sign it or complete the purchase, and relied on the Statute of Frauds as a defence to the action for specific performance. But it was held that the entry of his name in the memorandum by the auctioneer was a sufficient signature within the statute. This case is now reported in 8 R. Oct., 150.

MORTGAGE—CONSOLIDATION—ASSIGNMENT OF—EQUITY OF REDEMPTION PRIOR TO UNION OF MORTGAGES.

Minter v. *Carr*, (1894) 2 Ch. 321; 8 R. June, 118, was an action of redemption in which the short point was whether the defendants, the mortgagees, were entitled to consolidate certain mortgages. The mortgages held by the defendants were on properties A and B; before they became united in one hand, the mortgagor had executed a second mortgage on property A, and a sale of the property subject to the first mortgage had been made under a power contained in the second mortgage, at which the plaintiff, who was a puisne incumbrancer on both properties, had become the purchaser. The plaintiff claimed the right to redeem property A on paying off the prior mortgage on that property alone, and the defendant claimed the right to consolidate the mortgages on the two properties; but Romer, J., following *Harter* v. *Coleman*, 19 Ch.D. 630, ruled that when two mortgages made by the same mortgagor to different mortgagees on different estates become united for the first time in one person after the mortgagor has assigned (by way either of sale or mortgage) the

equity of redemption of one of them, the owner of the two mortgages cannot consolidate them as against the assignee of the equity of redemption, even though both mortgages were created before the assignment; and he was further of the opinion that the fact that the assignee of the equity of redemption in this case was a puisne incumbrancer on both properties made no difference, and could not militate against his right to stand in the place of his vendor.

Pledge v. *Carr*, (1894) 2 Ch. 328; 8 R. June, 122, is another case in which a similar question rose, but in this case the right to consolidate was allowed. The facts in this case were as follows: Banks was the owner of several properties, which he mortgaged in the years 1863-1866 to different mortgagees for distinct sums. In 1868 he made a second mortgage on all the properties to Harrison. In 1871-1873 all the first mortgages but one were assigned to the defendant's testator. In 1885 Harrison assigned his second mortgage to the plaintiff, and in 1890 the remaining first mortgage was assigned to the defendants. The plaintiff, as assignee of the Harrison mortgage, claimed the right to redeem two of the properties on paying the amount due on the first mortgage on them; but Romer, J., following *Tweedale* v. *Tweedale*, 23 Beav. 341, and *Vint* v. *Padget*, 2 D. G. & J. 611, allowed the defendants to consolidate all the mortgages. This case, it will be observed, differs from the last in the fact that here the second mortgage was on all the properties, and not merely on one of them. While allowing the right of consolidation, the learned judge agrees with other judicial commentators in saying that he has "never been able to appreciate the justice or equity of the principle of consolidation of securities." A doctrine which meets with so much judicial disapproval we would think is ready for the legislative pruning knife.

Reviews and Notices of Books.

Real Property Statutes of Ontario. Being a selection of Acts of practical utility. By Alfred Taylour Hunter, LL.B., Barrister-at-Law. Toronto: The Carswell Co. (Ltd.), 1894.

About two years ago, we had pleasure in commending to the favourable notice of the profession a work by Mr. A. T. Hunter on "Power of Sale under Mortgages of Realty," which was, if we mistake not, the author's first venture in the field of legal authorship. We must congratulate him upon the promptitude with which he has brought out another work in the same line as his previous one, though of much wider scope, and involving much greater labour and research. This book on Real Property Statutes presents, as the author tells us, "the results of materials collected and of evenings spent during several years," and we feel sure that our readers will agree with us in thinking that these laborious evenings have been spent to good purpose, and in hoping that they may have a success commensurate with the toil and energy put forth in its preparation. It would be impossible, within our limits, to attempt an adequate review of a work containing over 700 pages, and dealing with whole statutes of such importance as those relating to "The Law and Transfer of Property," "Mortgages of Real Estate," the "Short Forms Acts," "Devolution of Estates," "Real Property Limitation," and the "Registry Act," besides others. We may say, however, that, judging from those portions of the work which we have been able to examine, it appears to be generally accurate and reliable, and to meet the real test of the value of a law book in furnishing a good, practical guide to the student or practitioner grappling with the intricacies of real property law. In this connection, we note with pleasure that the author has not been unmindful of what too many forget, the indispensable necessity of a good index. The table of contents which is prefixed to the work contains nearly forty pages, and is very full and well displayed, and the general index, which contains about ninety pages, is conveniently and logically arranged, and includes separate alphabetical indexes to the various statutes and sections of statutes cited. Matters of this sort may appear too unimportant for particular notice to some inexperienced persons, but without attention to them the most learned of law books is apt, in these busy days, to remain unvalued, unconsulted, and, worst fate of all, unbought.

Correspondence.

MORTGAGEE v. PURCHASER.

To the Editor of THE CANADA LAW JOURNAL:

DEAR SIR,—I have perused Mr. Marsh's letter to you respecting my recent contribution to THE CANADA LAW JOURNAL upon the above subject, published in your recent issue of October 16.

I was fully aware of his very able articles upon the same subject published in *The Canadian Law Times;* but if he means to suggest that my humble contribution was, in any respect, forestalled by his own, I beg to deny it.

As I understand his argument, he based the mortgagee's right upon three grounds, which are stated in 2 C.L.T. 50, as follows:

(1) The right of a third person to sue on a contract made in his favour.

(2) The doctrine of subrogation.

(3) The doctrine of trusts.

In applying the principles involved in this threefold argument, he seeks to fix the purchaser with liability, not by reason of the existence of any privity, but *in spite of an assumed want of privity.*

It would have been more satisfactory if the passage or passages in his article in which (as he gives you to understand) he questioned the want of privity argument had been pointed out in the letter. So far as I am aware, there is no such passage in it, nor have I seen any such contention anywhere.

My learned friend's article and mine were designed for the same purpose. His would not work, as he admits, and he has withdrawn it from the market. Is it not possible that its defect, and its only defect, was want of privity? Mine has only just been offered to the public, and it is unlike a generous fellow-craftsman to discredit the article before it has had time to be tested.

A. C. GALT.

Toronto, October 18.

[We refer to the above in our editorial columns. We regret that, owing to an error in proof reading, the word "priority" appeared instead of "privity" in the fourth line of Mr. Marsh's letter.—ED. C.L.J.]

Proceedings of Law Societies.

LAW SOCIETY OF UPPER CANADA.

MICHAELMAS TERM, 1893.

Monday, November 20th, 1893.

Present: The Treasurer, and Messrs. Moss, Hoskin, Shepley, Riddell, Martin, Meredith, Watson, and Ritchie.

The Legal Education Committee reported that Mr. D. C. Ross was entitled to have his examination allowed.

The committee find that the following candidates who passed the School examination and competed for honours received the requisite number of marks entitling them to honours, their marking being as set forth below: W. E. Buckingham, D. C. Ross, D. I. Grant, F. A. C. Redden, G. Grant, S. Price, R. A. L. Defries, V. A. Sinclair, R. E. Gagen. The committee find that all these gentlemen are in due course, and are entitled to be allowed their first year examination with honours, and that Mr. Buckingham is entitled to a scholarship of one hundred dollars, Mr. Ross to one of sixty dollars, and Messrs. D. I. Grant, F. A. C. Redden, G. Grant, S. Price, and R. A. L. Defries each to one of forty dollars.

Ordered accordingly.

Mr. Moss, from the same committee, reported that the committee approved of the following division of subjects among the examiners appointed in Trinity Term last:

Certificate of fitness: Real Property and Wills, Mr. Galt; Equity, Mr. Moss; Mercantile Law, Pleading, Practice, and Statutes, Mr. Ludwig; Contracts and Sales, Mr. Gwynne.

Call to the Bar: Real Property and Wills, Mr. Galt; Equity, Mr. Moss; Common Law, Criminal Law, and Statutes, Mr. Ludwig; Contracts, Bills, and Evidence, Mr. Gwynne.

The Report was received.

The following gentlemen were called to the Bar: Messrs. Charles L. Dunbar, R. J. Sims, A. E. Shaunessy, Alexander Cowan, H. I. Lyon, J. M. Pike, L. P. Duff, T. J. Anderson, C. E. Gillan, J. J. Coughlin, J. E. Day, W. McFarlane, John Lamont, H. P. Innes, F. M. Brown, A. C. McMaster, A. Y. Blain, F. C. Kerby.

Mr. Shepley, from the Special Committee appointed to examine the papers and proofs of Mr. C. E. Start for call to the Bar under the Rules in special cases, reported. Ordered, that Mr. Start, upon his continuing the publication of his notice in the *Gazette* of November 25th and December 2nd next, be permitted to present himself for call, his papers in other respects being regular.

Moved by Mr. Shepley: That the resolution of September 22nd referring the matter of Mr. Watson's motion with regard to the reporting staff be amended by adding the name of the chairman of the Finance Committee as alternative convener of the Joint Committee therein referred to. Carried.

Mr. Shepley moved: That the applications received, or to be received, for the position of reporter do stand referred to the Reporting Committee, with instructions to consider the same and make recommendations thereon to Convocation. Carrried.

The letter of Mr. J. Neely to the Secretary, complaining of the conduct of Mr. B., a solicitor, was read. The Secretary was ordered to reply that his letter had been received, and that it is not a matter coming within the class of cases in which Convocation should intervene at present, and that Convocation approves of the advice given by the Secretary in his letter of October 13th.

Mr. Martin gave notice that he will, on Friday, December 1st, introduce a Rule to provide that no person who is a member of a firm, of which one or more of the members are Benchers, shall be eligible to hold any offices in the gift of the Society, but this shall not apply to any person now holding any office during the currency of the term for which he holds his present appointment.

The petition of Mr. John T. Pierce in relation to the conduct of Messrs. S. and E., solicitors, was then read. Ordered, that the petition be referred to the Discipline Committee for report whether a *prima facie* case is shown.

On motion of Mr. Meredith, the Treasurer left the chair, which was taken by Mr. Meredith.

Mr. Shepley then moved that a suitable portrait of the Treasurer be, with his permission, painted, and hung in a conspicuous place in Osgoode Hall, and that a Special Committee, composed of Dr. Hoskin, Mr. Watson, Mr. Aylesworth, Mr. Ritchie, Mr. Osler, and the mover, be appointed to arrange and see to the carrying out of this direction. Carried.

The Treasurer then resumed the chair.

Mr. Shepley then moved as follows: That it be referred to the committee named in the last resolution to wait upon the Hon. Stephen Richards, Q.C., a former Treasurer of the Society, with a view to making similar arrangements with respect to his portrait, with power to act in the matter. Carried.

Convocation then adjourned.

Tuesday, November 21st.

Present: The Treasurer, and Messrs. Idington, Ritchie, Watson, Mackelcan, Riddell, Hoskin, Barwick, Bruce, Moss, and Shepley.

Mr. Ritchie, on behalf of Mr. Moss, from the Legal Education Committee, reported on the case of R. J. Bonner, recommending that his service be allowed, and that he be called to the Bar, and receive his certificate of fitness. Ordered accordingly.

Mr. Watson, chairman, presented the Report of the Finance Committee.

Mr. Barwick then, in pursuance of the order of Convocation of September 22nd, 1893, moved the second reading of the Rule to amend the Retirement Fund Rule, as follows: That the Rule relating to the Retirement Fund be amended by striking out the first paragraph thereof, and inserting in lieu thereof the following:

On and after the 22nd day of September, 1892, a fund shall be formed for the retirement of each of the officers of this Society, exclusive of the Lecturers and Examiners, subject to the conditions and qualifications herein contained.

The Rule was then read a second time, and it was ordered that the third reading stand to Friday, December 1st, next.

Mr. Ritchie, in the absence of Mr. Martin, in pursuance of notice given on September 22nd, 1893, moved, seconded by Mr. Mackelcan, the following Rule: That the Rules passed on February 17th, 1893, relating to the Retirement Fund be repealed.

The repealing Rule received its first reading, and it was then ordered that the second reading of the said Rule do stand until Friday, 1st December, next.

Mr. Shepley gave notice as follows: That he will move to amend Mr. Martin's draft Rule by adding thereto the words:

No officer or his representative shall, on his ceasing by death, resignation, retirement, or otherwise, to be in the service of the Society, have any claim whatever to any gratuity or retiring or superannuation allowance whatever out of the funds of the Society.

Ordered, that the attention of the Committee on Journals and Printing be called to the order of Convocation of the 10th day of February, 1893, that it is necessary and desirable that the Rules of the Society be revised and reprinted, and that the Committee on Journals and Printing be requested to deal with the matter.

The following gentlemen were then called to the Bar: Messrs. G. M. Vance, J. H. Coburn, N. B. Eagen, and R. J. Bonner.

Convocation adjourned.

Friday, November 24th, 1893.

Present: The Treasurer, and Messrs. Teetzel, Aylesworth, Ritchie, Douglas, Britton, Watson, Barwick, Riddell, Robinson, and Strathy.

Mr. Barwick, on behalf of Mr. Moss, presented the Report of the Legal Education Committee.

Ordered, that Mr. Day and Mr. McFarlane do receive their certificates of fitness.

Mr. Watson, from the Joint Committee to which was referred the question of the reduction of the reporting staff, reported as follows:

The committee are of opinion that a reduction cannot now be made in the reporting staff, but the committee are of opinion that, in view of the fusion of the Single Court and Trial Sittings promised by the Judges, and which may probably enable a reduction to be made, the Rule relating to the appointment of reporters should be suspended until Michaelmas Term, 1894, and that the present number be continued in office until that date.

The Report was read, received, and ordered for immediate consideration and adopted.

Mr. Watson then gave notice that at the next meeting of Convocation he would move that the Rule relating to Tenure of Office be amended by striking out paragraph 5c, and by inserting in lieu thereof the following: "5c. As to Editor and Reporters on the last day of Michaelmas Term, 1894."

Mr. Britton, from the Reporting Committee, presented the quarterly Report on the state of the reporting.

The petition of Mr. Edmund L. Newcombe, a member of the Nova Scotia Bar, who applies for call to the Bar under the Rules in special cases, was read, and referred to a Special Committee, consisting of Messrs. Moss, Ritchie, and Watson, to examine into the papers and proofs submitted by the applicant, and subject him to an examination under the Rules relating to a call in special cases.

Ordered, that the application of Mr. F. B. Fetherstonhaugh, who applies for a certificate of fitness under the Rules passed under 54 Vict., c. 25, be postponed until February, 1894, and that the advertisement already published by him do stand good for that term if otherwise satisfactory, and that his notice do remain in the usual places prescribed by the Rules meanwhile.

Convocation then adjourned.

Friday, December 1st, 1893.

Present: The Treasurer, and Messrs. Moss, Meredith, Martin, Hoskin, Watson, Bruce, Ritchie, Teetzel, Bell, Aylesworth, Riddell, Shepley, Lash, and Barwick.

On presentation by Mr. Moss of the Report from the Legal Education Committee: Ordered, that Messrs. A. E. Shaunessy, Gordon S. Henderson, and W. H. Perry do receive their certificates.

Mr. Moss further reported, in the case of Mr. C. L. Dunbar, a candidate for certificate of fitness at the Law Society examination, recommending that he do receive his certificate. Ordered accordingly.

Ordered, that Mr. H. D. Petrie and Mr. N. H. McIntosh, successful candidates at the third year Law School examination, who have completed their term of service, do receive their certificates of fitness.

Dr. Hoskin, from the Discipline Committee, reported on the complaint of Mr. John T. Pierce against Messrs. S—— and E——.

Ordered, that the complaint be referred to the committee for investigation and report. The Report was adopted.

Mr. Ritchie, from the Reporting Committee, reported: That they recommend that the present staff of reporters be continued in office until Michaelmas, 1894.

Mr. Barwick, for Mr. Watson, in pursuance of notice given at last meeting, moved: That the Rule relating to Tenure of Office be amended by striking out paragraph (5*c*) and inserting (5*c*) as to "Editor and Reporters on the last day of Michaelmas Term, 1894."

The Rule received a first and second reading, and, by unanimous consent, was read a third time and passed.

Mr. Martin, from the County Libraries Aid Committee, reported, recommending:

(1) A loan of $345 to the Peterboro Law Association, under Rule 78.

(2) That the Hamilton and Middlesex Law Associations be each furnished with such students' text-books as have not already been supplied them.

The first clause was adopted.

The second clause was referred to a Joint Committee, consisting of the Finance and County Libraries Aid Committees, with instructions to consider the matter, having regard to the position of the Society's funds, and the probability of other county law associations making applications.

Mr. Martin moved the second reading of the Draft Rule to repeal the Retirement Fund Rule.

Mr. Shepley moved, in amendment, that the following be added to said draft Rule: No officer or his representatives shall, on his ceasing by death, resignation, retirement, or otherwise to be in the service of the Society, have any claim whatever to any gratuity or retiring or superannuation allowance whatever out of the funds of the Society.

The Draft Rule, as thus amended, was read a second and third times, and passed.

It was then ordered that the moneys which had been retained from the

salaries of gentlemen who came within the Rule now repealed be refunded them with interest according to the terms of the said Rule.

Mr. Martin then, in pursuance of notice given on November 30th, moved: No person who is a member of a firm of which one or more of the members are Benchers shall be eligible to hold any offices in the gift of the Society, but this shall not apply to any person now holding any office during the currency of the term for which he holds his present appointment.

The Rule was read a first time, and then ordered for a second and third reading and passed.

The following gentlemen were then called to the Bar: Messrs. M. J. McFarlane, W. D. Petrie, G. S. Henderson.

Convocation adjourned.

Friday, December 8th, 1893.

Present: The Treasurer, and Messrs. Teetzel, Osler, Martin, Watson, Bruce, Hoskin, Meredith, Magee, Shepley, Bell, Robinson, Ritchie, Moss, Kerr, Riddell, Mackelcan, Aylesworth, and McCarthy.

Mr. Moss, from the Legal Education Committee, reported on the cases of certain gentlemen who applied for admission as students-at-law of Trinity Term.

Ordered, that the following gentleman be entered as a graduate: Mr. P. White, jr.; and the following as matriculants: Messrs. H. H. Shaver, A. R. J. Sullens, L. M. Lyon, D. S. Storey, C. C. Hayne, J. W. Lawrason, W. Thornburn, B. W. Thompson, F. L. Smiley, S. A. Hutcheson, A. J. Kappele, G. A. J. Fraser, E. W. Jones, A. A. Miller, S. B. McCully.

The Special Committee, on the application of Mr. E. L. Newcombe for call to the Bar as a special case, reported: That he has complied with the Rules, and has passed a satisfactory examination, and is entitled to be called to the Bar. Ordered accordingly.

Mr. E. L. Newcombe was then called to the Bar.

Mr. Martin, from the Jo[illegible] Committee to whom had been referred the question of students' books, [illegible]ported, recommending: That the Hamilton Law Association and the Middlesex Law Association be supplied, under the existing Rules, with the books under the Law School curriculum which are not included in the books already supplied under the old curriculum. Adopted on a division.

Messrs. C. E. Start (who had since the first day of term complied with the order as to advertising his notice for call) and W. H. Perry were called to the Bar.

Convocation then adjourned.

HALF-YEARLY MEETING.

December 26th, 1893.

Present: The Treasurer, and Messrs. McCarthy, Osler, Riddell, Watson, Shepley, Barwick, Moss, Martin, Ritchie, Aylesworth, and Lash.

Mr. Moss, from the Legal Education Committee, reported on the case of Mr. F. C. Kerby, recommending that his certificate do issue upon proof to the satisfaction of the Secretary of the completion of his services. Ordered accordingly.

The Secretary read Mr. Bartram's letter, charging M. I. with having acted as a barrister, although not actually such.

Ordered, that the matter complained of be referred to the Discipline Committee for enquiry and report.

The Secretary read the letter of R. J. McLellan, complaining of the conduct of Mr. J. G., a solicitor.

Ordered, that the matter be referred to the Discipline Committee to report whether a *prima facie* case is made out.

Mr. Aylesworth, from the Special Committee appointed to procure portraits of the Treasurer and the Hon. Stephen Richards, reported, recommending that Mr. E. Wylie Grier be commissioned to paint for the Society a portrait of the Treasurer, and Mr Dickson Patterson to paint a portrait of the Hon. Stephen Richards. The committee asked leave to sit again to arrange with the artists as to their remuneration.

The Report was adopted.

A message was received from the Judges of the High Court of Justice that they were prepared to receive the Committee on Fusion and Amalgamation of theCourts at 2 p.m.

Convocation ordered that Mr. McCarthy be added to said committee.

At 2 p.m. the Committee on Fusion reported verbally that they had attended the Judges, and it was ordered that the Secretary send messages by telegraph to Benchers resident beyond Toronto, advising that Convocation will stand adjourned to Thursday, 28th inst, at 11 o'clock a.m., to consider the orders intended to be promulgated by the Judges on 1st January next in relation to fusion, circuit business, jury notices, and single court sittings.

Convocation then adjourned to December 28th.

SPECIAL MEETING HELD ON DECEMBER 28TH, 1893.

Convocation met at 11 a.m.

Present: The Treasurer, and Messrs. Moss, Hoskin, Shepley, Macdougall, Magee, McCarthy, Strathy, Hardy, Bell, Mackelcan, Watson, Robinson, Barwick, Kerr, and Guthrie.

Mr. Watson, from the Special Committee on the Fusion and Amalgamation of the Courts, presented the Report of that committee.

The Report was received, and taken up subject by subject and fully discussed, the result appearing hereafter.

J. K. KERR,
Chairman Committee on Journals.

The above closes the proceedings for last year. We have also just received the Report of the proceedings of the Law Society for Hilary, Easter, and Trinity Terms, which will be published as rapidly as possible, and we are assured there will be no delay after this in sending in for prompt publication the proceedings of each term.

DIARY FOR NOVEMBER.

1. Thursday.....All Saints, Day.
2. Friday.......John O'Connor, J., Q.B., died, 1887.
4. Sunday ......*24th Sunday after Trinity.*
5. Monday ......Sir John Colborne, Lieut.-Gov., U.C, 1838. Gunpowder Plot.
6. Tuesday......Court of Appeal sits.
7. Wednesday...T. Galt, C.J. of C.P.D., 1887.
9. Friday ...... Prince of Wales born, 1841.
11. Sunday.......*25th Sunday after Trinity.*
12. Monday.......J. H. Hagarty, 4th C.J. of C.P., 1868; W. B. Richards, 10th C.J. of Q.B., 1868.
13. Tuesday......Court of Appeal sits. Adam Wilson, 5th C.J. of C.P., 1878; J. H. Hagarty, 12th C.J. of Q.B., 1878.
14. Wednesday....W. G. Falconbridge, J., Q.B.D., 1887.
15. Thursday......M. C. Cameron, J., Q.B., 1878.
18. Sunday........*26th Sunday after Trinity.*
19. Monday....... Michaelmas Term begins. J. D. Armour, 14th C.J. of Q.B.D., 1887.
20. Tuesday ......Convocation meets.
21. Wednesday....J. Elmsley, 2nd C.J. of Q.B., 1796.
23. Friday. ......Convocation meets.
24. Saturday.....Battle of Fort Duquesne, 1758.
25. Sunday ......*27th Sunday after Trinity.* Marquis of Lorne, Gov.-Gen., 1878.
27. Tuesday......Frontenac died at Quebec, 1698.
30. Friday........Convocation meets. St. Andrew's. T. Moss, C.J. of Ap., 1877; W. P. R. Street, J., Q.B.D., and H. MacMahon, J., C.P.D., 1889.

Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

COURT OF APPEAL.

OSLER, J.A., In Chambers. [Oct. 20.

RE MACPHERSON AND CITY OF TORONTO.

Arbitration — Municipal Act, s. 487 (1)—Foreign commission— Want of jurisdiction.

An appointment was made by OSLER, J.A., of an arbitrator under s. 487 (1) of the Municipal Act to determine a claim for compensation for land taken by the city. The appointment was made upon notice to the city, on the application of the claimant, Sir David Macpherson.

The arbitration being in progress, an application was made on behalf of the claimant for an order that a commission might issue or an order be made to take the claimant's evidence in Europe.

The motion was argued before OSLER, J.A., in Chambers, on October 19th, 1894.

H. J. Scott, Q.C., for the claimant.

J. B. Clarke, Q.C., for the city corporation.

OSLER, J.A. : On the merits a proper case has been made for such an order ; the doubt is whether I have any power to make it. I am satisfied that it cannot be made under section 49 of the Act respecting References and Arbitrations, R.S.O., c. 53, because the reference is not one by rule, order, or submission within the meaning of that section, the two former words referring to a rule or order to refer made in an action, and the third to submission—to a voluntary submission or reference by consent, which may be made a rule of court. The reference now proceeding is none of these, but a special statutory compulsory arbitration before an arbitrator named by a judge of the Court of Appeal, as *persona designata* to make the appointment.

Mr. Scott argues that I may act under Rule 566, Consolidated Rules, and that the arbitration may be regarded as a matter within the meaning of that Rule. He cites *Re Mysore West Gold Mining Co.*, 37 W.R. 794, where, under the corresponding English Rule, Order 37, Rule 5, an order for a commission was granted to take evidence in an arbitration pending between the liquidator of the company in voluntary liquidation and a dissentient member of the company. But, unfortunately, that case cannot help us, for the question was one arising on a winding up, and the application of the liquidator to the court was expressly authorized by section 138 of the Companies Act of 1862 (Emden on Winding-up, p. 636). There was, therefore, a matter pending before the court within the meaning of the Rule, and so the judge had jurisdiction to make the order.

Further, if Rule 566 could apply, the application would have to be made to a judge of the High Court, not to a judge of the Court of Appeal. Neither I nor any judge of this court take jurisdiction in the matter merely by reason of my having appointed the arbitrator.

The motion must therefore be refused. I can make no order as to costs or otherwise.

HIGH COURT OF JUSTICE.

Queen's Bench Division.

Div'l Court.] [June 21.

WESTBROOK *v.* WHEELER.

WHEELER *v.* WESTBROOK.

Partnership—Assignment of interest of partner—Termination of partnership—Possession of partnership premises—Notice to quit—Tavern license—Transfer of—R.S.O., c. 194, s. 37.

A partnership for a definite term, which has not expired, can be put an end to by the voluntary assignment by one of the partners of his interest in the business, at his own instance or at the instance of his assignee, against the will of the other partner.

And where a partnership is so put an end to, the assignor being the lessee of the premises on which the business is carried on, and assigning the term to

the assignee, the latter is entitled to recover possession of the premises against the other partner without notice to quit or demand of possession.

Where the holder of a tavern license enters into partnership with another person, to whom he assigns an interest in his tavern business, such assignment is not an assignment of his business within the meaning of s. 37 of the Liquor License Act, R.S.O., c. 194, and does not require a transfer of the license. And, upon the construction of the partnership agreement in this case, the new partner did not take an undivided one-half interest in the license.

Judgment of ROBERTSON, J., varied.

Wallace Nesbitt for the Westbrooks.

Brewster and *L. F. Heyd* for the Wheelers.

BOYD, C.] [Oct. 9.

IN RE CUMMINGS AND COUNTY OF CARLETON.

Prohibition—Arbitration and award—Lands injuriously affected—Joint work by city and county—Remedy—Appointment of arbitrator—Powers of county judge—One arbitrator for two municipalities—Municipal Act, 55 Vict., c. 42, ss. 391, 483, 487—Interpretation Act, R.S.O., c. 1, s. 8 (24).

An order of prohibition is an extreme measure, to be granted summarily only in a very plain case of excessive jurisdiction on the part of a subordinate tribunal.

A landowner alleged that by the building of a bridge over a river forming the boundary between a county and city, a joint work undertaken by the two municipalities, his land in the county had been injuriously affected, and he sought damages therefor from both municipalities.

Held, having regard to s. 483 of the Municipal Act, 55 Vict., c. 42, that he had no remedy except by arbitration under the Act.

Pratt v. *City of Stratford*, 14 O.R. 260, 16 A.R. 5, followed.

Held, also, that the case was covered by s. 391 of the Act; the expression "a municipal corporation," by force of the Interpretation Act, R.S.O., c. 1, s. 8 (24), being capable of being read as a plural.

Held, also, that it was competent for the county judge to appoint the same arbitrator for both corporations, upon their making default in naming an arbitrator, and that he could proceed to do so *ex parte*.

Held, lastly, that s. 487 did not apply to the case of a joint claim against city and county.

And prohibition to the arbitrators was refused.

Moss, Q.C., for the city of Ottawa.

H. M. Mowat for the county of Carleton.

W. M. Douglas for the landowner.

BOYD, C.] [Oct. 11.

ROSS *v.* ORR.

Club law—Bicycle race—Protest—Award of challenge cup—Private tribunal—Decision of—Refusal of court to interfere—Injunction.

A bicycle race was entered upon, subject to conditions expressed in a declaration of trust made by the trustees of a challenge cup, which was to be

awarded to the club whose riders scored the greatest number of "points" in the race. By the declaration it was provided that "all arrangements pertaining to the course and race, protests, and matters connected with the welfare of the club, will be decided by the trustees."

The plaintiffs, representing one of the clubs whose riders joined in the race, obtained an *ex parte* interim injunction order restraining the trustees from handing over the cup to another club, on the ground that one of its riders did not turn a post, but went inside of it. A protest had been lodged, but the trustees had not given their decision as to the result of the race.

Held, upon motion to continue the injunction, that the declaration covered the decision of the question as to which was the winning club, which was peculiarly a question for the consideration of the trustees, and, in order to dispose of it satisfactorily, it was not necessary that they should be able to take evidence on oath; and therefore the court ought not to interfere, and the injunction should be dissolved.

Brown v. *Overbury*, 11 Ex. 715; *Ellis* v. *Hopper*, 3 H. & N. 768; and *Newcomen* v. *Lynch*, Ir. R. 9 C.L. 1; Ir. R. 10 C.L. 248, followed.

W. R. Riddell for the plaintiffs.

C. B. Jackes, *Du Vernet*, and *Ryckman* for the defendants.

BOYD, C.] [Oct. 13.

IN RE O'CONNOR AND FIELDER.

Arbitration and award—Reference to three arbitrators—Award by two—Invalidity—Private authority.

It is a general rule, applicable to all cases of private authority, t[illegible] or reference to be exercised by several persons, that, unless the constituent instrument permits action or decision by a majority, the office is regarded as joint, and all must act collectively. Different considerations arise when the duties are of a public nature, but, in transactions between individuals, they make their own bargain, and so become a law unto themselves.

And where a submission to arbitration provided that the award should be made by three arbitrators, an award by two of them, the other dissenting, was set aside upon summary application.

N. F. Davidson for O'Connor.

Haverson for Fielder.

BOYD, C.] [Oct. 15.

REGINA *v.* MINES.

Criminal law—Summary conviction—"Procuring" a weapon with intent—Criminal Code, s. 108—Amended conviction—Information for shooting with intent—Justices of the peace—Substituting new charge—Imprisonment—Habeas corpus—Discharge.

The defendant was brought before justices of the peace on an information charging him with the indictable offence of shooting with intent to murder. The justices, not finding sufficient evidence to warrant them in committing for

trial, of their own motion, at the close of the case, summarily convicted the defendant for that he did "procure a revolver with intent therewith unlawfully to do injury to one J.S." It appeared by the evidence that the weapon was bought and carried and used by the defendant personally.

By the Criminal Code, s. 108, it is matter of summary conviction if one has on his person a pistol with intent therewith unlawfully to do any injury to any other person.

The return to a writ of *habeas corpus* showed the detention of the defendant under a warrant of commitment based upon the above conviction, and, upon a motion for his discharge,

Held, that the detention was for an offence unknown to the law, and, although the evidence and the finding showed an offence against s. 108, the motion should not be enlarged to allow the magistrates to substitute a proper conviction, for it was unwarrantable to convict on a charge not formulated, as to which the evidence was not addressed, upon which the defendant was not called to make his defence, and as to which no complaint was laid, and the prisoner should, therefore, be discharged.

A. H. Marsh, Q.C., for the defendant.

Chancery Division.

Div'l Court.] [Oct. 13.

CRAWFORD ET AL. *v.* BRODDY ET AL.

Will—Devise—Conditional fee—Executory devise.

A testator by his will devised as follows:

"I give and bequeath to my son F. . . . lot No. . . . at the age of twenty-one years, giving the executors power to lift the rent and to rent, said executors paying F. all former rents due after my decease up to his attaining the age of twenty-one years. . . . At the death of any one of my sons or daughters having no issue their property to be equally divided among the survivors."

F. attained twenty-one, and died unmarried and without issue.

Held, (reversing FERGUSON, J.) a conditional fee with an executory devise over.

J. C. Hamilton and *T. Dixon* for the plaintiffs, appellants.

McFadden and *Blain* for the defendants, *contra*.

BOYD, C.] [June 4.

RE SHEPPARD AND COOPER.

Division Courts—Claim for $200 on contract signed by defendant—Evidence required to show performance of conditions on plaintiff's part—Prohibition.

The Division Court has no jurisdiction to entertain a claim for $200 on a contract signed by defendant, where, to entitle plaintiff to recover, evidence *ultra* must be given to show that conditions of the contract on the plaintiff's part have been complied with.

H. M. East for the motion.

C. Miller, *contra*.

STREET, J.] [July 21.

IN RE JENKINS AND TOWNSHIP OF ENNISKILLEN.

Drainage—New outlet—Municipal Act, 1892, ss. 569, 585—Petition—Township by-law—Adjoining townships—Agreement as to proportion of costs—Report of engineer—Description of lands.

A township council, finding that a government drain in the township did not carry off the water, by reason of the natural flow being in another direction, accepted a report made by their engineer and passed a by-law adopting a scheme for a new drain leading from the middle of the government drain into an adjoining township, where it was to find an outlet.

Held, that the proposed drain properly came within the description of a new outlet, although not at the end of the government drain, and although the former outlet remained to serve to carry off a part of the water; and, so long as the proposed drain was designed merely as an outlet for the water from the government drain, it might, under s. 585 of the Municipal Act of 1892, be provided for without any petition under s. 569, even although it should incidentally benefit the locality through which it should run, nothing being included in the plan beyond what was reasonably requisite for the purpose intended.

Although a township council is not powerless with regard to the drainage report of their engineer, it is contrary to the spirit and meaning of the Act that two adjoining councils should agree upon a drainage scheme and upon the proportion of its cost to be borne by each, and that the engineer of one of them should be instructed to make a report for carrying out the scheme and charging each municipality with the sums agreed on; for that would interfere with the independent judgment of the engineer, and pledge each township in advance not to appeal against the share of the cost imposed upon it, to the possible detriment of the property owners assessed for the portions of that share.

And where such a course was pursued, a by-law of one of the councils adopting the engineer's report was quashed.

In describing the lands for assessment, "the northeast part," even with the addition of the acreage, is an ambiguous description; and, *quære*, as to the effect upon the validity of the by-law.

Aylesworth, Q.C., and *Shaunessy* for the motion.

McCarthy, Q.C., and *Moncrieff*, Q.C., *contra*.

ARMOUR, C.J.] [Aug. 29.

RE DOMINION PROVIDENT, BENEVOLENT, AND ENDOWMENT ASSOCIATION.

Local legislature—Powers of—Insurance—Powers of Master—Creditors' schedules—Contributories' schedules.

The Local Legislature has power to confer upon the Master the powers conferred by The Insurance Corporations Act of 1892.

The Master has power to settle schedules of creditors, and that implies power to adjudicate upon the claims of creditors to ascertain whether they

should appear as creditors in the schedules, but he is not empowered to adjudicate upon the question whether they had been guilty of such conduct as deprived them of their right to claim as creditors.

The Master has also power to settle schedules of contributories, but is not empowered to adjudicate upon the question whether they had been guilty of such a breach of duty as made them liable for any loss by reason of their breach of duty. All such matters can only be determined by action.

W. D. McPherson for Hessin.

E. Sidney Smith, Q.C., for Barnsdale and Robertson.

J. M. Clark for Baker.

J. H. Loscombe for the directors.

J. P. Mabee for the certificate-holders.

G. G. McPherson for the receivers.

John Idington, Q.C., for the infants.

STREET, J.] [Sept. 28.

BROUN *v.* BUSHEY ET AL.

Highway—Closing of—Adjoining owner—Rights of mortgagee—Con. Mun. Act, 1892, s. 550, s-s. 9.

A mortgagee of land adjoining a highway is one of the persons in whom the ownership of it is vested for the purposes of s-s. 9, s. 550, of The Consolidated Municipal Act, 1892.

Where a part of a highway was being closed up,

Held, that the plaintiff as mortgagee of the adjoining land was entitled to insist upon a right to have the part closed up sold to her as mortgagee, subject to the rights of the mortgagor to redeem it along with her mortgage, or to have it sold to the mortgagors, subject to her mortgage, if the mortgagors so preferred.

G. M. Macdonell, Q.C., for the plaintiff.

Dr. Smyth, Q.C., for the defendant McIver.

No one for the other defendants.

ROSE, J.] [Sept. 28.

HART v. THE ONTARIO EXPRESS AND TRANSPORTATION CO.
THE DIRECTORS' CASE.

Company—Appointment of directors as officers—Their right to salaries.

Held, on appeal from the Master in Ordinary, that where a director of a company is appointed an officer of the company he does not hold such appointment as director, and therefore, where an Act of Incorporation enacted that no by-law for the payment of the president or any director should be valid or acted upon until the same had been confirmed at a general meeting of the shareholders, this applied only to the payment of money for the services of a director *qua* director, and of the services of the president as presiding officer of the board of directors, but that the company having appointed the directors to various sal-

aried offices, and there being in this case no contract with the company upon which they could recover remuneration, they were nevertheless entitled to a *quantum meruit* for services rendered to the company during the time they discharged the duties of their respective offices.

F. A. Hilton and *W. M. Smythe* for the claimant.

Hoyles, Q.C., for the liquidator.

BOYD, C.] [Oct. 15.

IN RE FERGUSON, BENNETT *v.* COATSWORTH.

Will—Construction—"Right heirs"—Period of ascertainment—Distribution of estate—"Equally"—Per capita and not per stirpes.

Upon appeal from the Master's report on a reference for the administration of the estate of the testator whose will was construed in *Coatsworth* v. *Carson*, 24 O.R. 185,

Held, having regard to the judgment in that case, that the "right heirs" were to be ascertained at the date of the death of the testator's daughter, and among them the whole of the estate was to be divided equally, share and share alike.

The expression "*per stirpes*" in the former judgment was improvidently used, due weight not having been given to the word "equally."

W. M. Clark, Q.C., *Starr*, and *A. J. Boyd* for the descendants of Jane Ball.

Macklem for the descendants of Eliza Purdy.

F. E. Hodgins for the executors.

BOYD, C.] [Oct. 15.

DODDS *v.* THE ANCIENT ORDER OF UNITED WORKMEN.

Life insurance—Infants—Payment to executors—Security—Discharge—R.S.O., c. 136, ss. 11, 12.

Moneys payable to infants under a policy of life insurance may, where no trustee or guardian is appointed under ss. 11 and 12 of R.S.O., c. 136, be paid to the executors of the will of the insured, as provided by s. 12, without security being given by them, and payment to them is a good discharge to the insurers.

Totten, Q.C., for the executors and the insurers.

A. J. Boyd for the infants.

Common Pleas Division

Div'l Court.] [June 23.

MIDDLETON *v.* FLANAGAN.

Work and labour—Horses—Plant—Meaning of.

By one of the clauses of a railway contract for rock, etc., excavation, "all machinery and other plant, materials, and things whatsoever," provided by the

contract were, until the completion of the work, to be the property of the company, when such as had not been used and converted into the works, and remained undisposed of, were to be delivered over to the contractor, but in other clauses the words teams and horses were respectively used as well as the word "plant."

Held, under the contract, that horses were not included in the word "plant," and that expert evidence was not admissible to explain its meaning, but in any event the plaintiff must fail, for the evidence showed that the horses in question did not belong to the contractor, and so did not come within the contract.

B. B. Osler, Q.C., for the plaintiff.

Aylesworth, Q.C., for the defendants.

Div'l Court.] [June 23.

HELLEMS *v.* CORPORATION OF ST. CATHARINES.

Municipal corporation—Officer holding office during pleasure—Removal of officer.

Section 27 of the Municipal Act, 55 Vict., c. 42 (O.), enacts that officers appointed by the council shall hold office until removed by the council.

Held, that the fact of this was that all such officers held their office during the pleasure of the council, and might be removed at any time without notice or cause shown therefor, and without the council incurring any liability thereby.

Where, therefore, a city commissioner was appointed by a resolution of the council, and shortly afterwards another resolution was passed rescinding the former one, the appointment was held to be rescinded without the council having incurred any liability.

Watson, Q.C., and *Lancaster* for the plaintiff.

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

Div'l Court.] [June 23.

SCOTT *v.* REBURN.

False arrest—Constable—Notice of action—Necessity for—Requisites of.

Where in an action against a constable for false arrest it is found by the jury that the defendant acted in the honest belief that he was discharging his duty as a constable, and was not actuated by any improper motive, he is entitled to notice of action, and such notice must state not only the time of the commission of the act complained of, but that it was done maliciously.

Fullerton, Q.C., for the plaintiff.

J. B. Clarke for the defendant.

Div'l Court.] [June 23.

REGINA *v.* WITTMAN.

Criminal law—Keeping a common gaming house—Offence in the United States.

In a betting game called "policy," the actual betting took place in the United States, all that was done in Canada being the happening of the chance on which the bet was staked.

Held, that there was no offence under s. 198 of the Criminal Code of 1892 by keeping a common gaming house within that section.

Cartwright, Q.C., for the Crown.

Osler, Q.C., *contra.*

Div'l Court.] [June 23.

JONES *v.* GODSON.

Arbitrators—Excessive charge for fees—Penalty in treble the amount of overcharge—Liability.

The liability imposed on arbitrators by s. 29 of R.S.O., c. 53, in case of an overcharge of fees, to pay treble the amount of the fees charged, is penal in its nature, and arises only where there has been a refusal or delay to make, execute, or deliver an award after a previous demand made unless such excessive charges are paid.

Taxation of the fees is not a condition precedent to maintaining an action for the penalty.

W. R. Smyth for the plaintiff.

Wallace Nesbitt and *A. Munro Grier* for the defendants.

Div'l Court.] [June 25.

REGINA *v.* FRAWLEY.

Criminal law—Conspiracy—Failure to complete fraud—Indictment of one of two conspirators.

A conspiracy to defraud is indictable, even though the conspirators are unsuccessful in carrying out the fraud.

One of two conspirators can be tried on an indictment against him alone, charging him with conspiring with another to defraud, etc., the other conspirator being known in the country.

Cartwright, Q.C., for the Crown.

McBrady for the defendant.

MACMAHON, J.]

CHRISTIE *v.* CORPORATION OF TORONTO.

Assessment and taxes—Assessment Act, 55 Vict., c. 48, s. 124 (O.)—Goods subject to distress—Occupancy.

Section 124 of the Consolidated Assessment Act, 55 Vict., c. 48 (O.), only authorizes a distress for non-payment of taxes of the goods of the person who ought to pay the same, or of any goods in his possession, etc., or of any goods found on the premises, the property of or in the possession of any other occupant of the premises, and not to goods on the premises which were not the goods and chattels of the person who ought to pay the taxes, or of any occupant thereof.

Hall for the plaintiff.

Chisholm for the corporation of Toronto.

W. R. Smyth for Farquhar.

STREET, J.] [May 8.

EDWARDS *v.* FINDLAY.

Will—Codicil—Revocation of bequest.

A testator, by the third clause of his will, bequeathed to S. the sum of $3,000 for life, and after his death to his children, etc., and by a subsequent clause directed his executors to deduct out of the $3,000 all payments made to S. after the date of the will. By a codicil he directed that the bequest number three, bequeathing to S. the interest on $3,000, be revoked, and in lieu thereof the sum of $300 be paid to him, or his heirs, and that the direction as to payments made after the date of the will should apply thereto.

Held, that the effect of the codicil was to revoke the whole of the third clause.

Clarke, Q.C., for the plaintiff.

S. H. Blake, Q.C., and *Canniff* for certain residuary legatees.

Dr. Hoskin, Q.C., for the infants and certain adults.

BOYD, C.] [Oct. 13.

IN RE REID *v.* GRAHAM BROTHERS.

Prohibition—Division Court—Judgment summons—Examination—Refusal of evidence—Partnership—Judgment against firm—Parties—Members of firm—Commitment.

An order having been made in a Division Court upon judgment summons, committing a defendant under s. 240, s-s. 4 (*c*), of R.S.O., c. 51, for having made away with his property,

Held, that it was not a ground for prohibition that the judge refused to allow the defendant under examination to make explanations as to his dealing with money lent by and repaid to him after judgment. The refusal of evidence is not ground for prohibition.

The members of a firm sued in the firm name are parties to the litigation; and when judgment is obtained in a Division Court against a firm as such, though execution can go only against the goods of the firm and against the individual goods of one who is sued as and found to be a partner, yet a judgment summons may be issued against another member of the firm, if only to get discovery of goods of the firm available for execution, and, if he makes wilful default in attendance, he is liable to be committed as for contempt of court.

D. Armour for the plaintiff.

R. S. Neville for the defendants.

Practice.

ROBERTSON, J.] [Oct. 2.

NOYES *v.* YOUNG.

Consolidation of actions—Application of common defendant—Identity of cause of action.

Two separate actions were brought by a husband and wife against the same defendant for damages for injuries received by each of the plaintiffs owing to the alleged negligence of the defendant in permitting a pair of horses to run away and run into a vehicle in which both plaintiffs were seated, causing them to be thrown out and trampled on. The husband alleged greater injuries than the wife and claimed $3,000 damages, while she claimed $2,000. The defences were the same, with the addition in the wife's action of a paragraph stating that such action was unnecessary; the main defence in both was contributory negligence.

Held, upon an application made by the defendant at the trial, that both claims should have been joined in one action; and an order was made consolidating them.

Smurthwaite v. *Hannay*, 10 Times L.R. 649; *Westbrook* v. *Australian, etc., Navigation Co.*, 23 L.J.N.S. (C.P.) 42; *Williams* v. *Township of Raleigh*, 14 P.R. 50, distinguished.

A. G. Chisholm for the plaintiffs.

Love for the defendant.

Chy. Div'l Court.] [Oct. 13.

BALDWIN *v.* QUINN.

BALDWIN *v.* MCGUIRE.

Costs—Taxation between solicitor and client—Agreement to pay costs of two actions—Separate sets of costs—Affidavits on production—Motion for summary judgment—Defective endorsement on writ of summons.

Two actions were brought by the same plaintiffs against different defendants to recover rent for different parcels of land. The defences were not identical, and, though one solicitor acted for both defendants, he did not respond to overtures of the plaintiffs to have one action abide the result of the other. A compromise was effected, and it was agreed between the parties "that judgment shall be entered in each of the said actions for the amounts claimed therein by the plaintiffs, with costs of suit between solicitor and client," and judgments were entered accordingly.

Held, that the plaintiffs were entitled to tax a separate set of costs for each action.

The plaintiffs made six affidavits on production, either prompted by the action of the defence, or by way of voluntary supplement to the original affidavit.

Held, per Boyd, C., in Chambers: That they were entitled to tax the costs of one affidavit only, with extra folios for the additional matter contained in the subsequent affidavits.

Held, also, *per* Boyd, C.: That, upon the taxation "between solicitor and client" of the plaintiffs' costs, they were not entitled to the costs of a motion for summary judgment under Rule 739, which was useless, and not according to the practice, and was refused because the indorsement on the writ of summons claimed "interest on arrear.. of rent," and was, therefore, not a good special indorsement.

J. T. Small for the plaintiffs.

C. Millar for the defendants.

Boyd, C.] [Oct. 15.

RYAN *v.* CAMERON.

ATTORNEY-GENERAL FOR CANADA *v.* ONTARIO AND WESTERN LUMBER COMPANY.

Consolidation of actions—Application by plaintiffs—Identity.

The practice at law was not to consolidate actions unless the plaintiffs were the same, the questions the same, and the evidence the same, and, as a matter of form, actions could only be consolidated at the instance of the defendants; but the court may give relief, in proper circumstances, even to a plaintiff, where the actions are so germane that one may serve as a test for all.

Where the plaintiffs were different, the defendants different, and the relief sought entirely different, though part of the evidence in the one action might be available in the other, an application by the plaintiffs conjointly for an order consolidating the two actions was refused.

Semble, the defendants would be entitled to an order to have the actions tried together in case the plaintiffs were bringing them on at different courts.

W. R. Riddell for the plaintiffs.

Hoyles, Q.C., for the defendants.

Rose, J.] [Oct. 16.

IN RE SOLICITOR.

Solicitor—Striking name off roll—Procedure—Order for payment over—Court or Chambers—Subsequent application—Costs.

Where a client applies to strike the name of a solicitor off the roll for misconduct in neglecting to pay over the client's money in his hands as solicitor, the first application should be made to a judge in court, whereupon, in a proper case, an order will be made requiring the solicitor to pay over the money by a named day, and, in default, that his name be struck off. Upon default, no further application is necessary, except an application to have the roll brought into court for the purpose of having the name struck off, and this should be on notice to the solicitor.

Ruling of a taxing officer that costs of the first application should be taxed as of a Chambers motion only reversed on appeal.

H. M. Mowat for the appellant.

W. H. Blake for the solicitor.

FERGUSON, J.] [Oct. 17.

CONMEE *v.* WEIDMAN.

Libel—Candidate for public office—R.S.O., c. 57, s. 5—Notice of action—Summary dismissal for want of—Rule 387—Security for costs.

The plaintiff was a candidate at an election of a member of the Legislative Assembly of Ontario, and brought this action in respect of several libels alleged to have been published by the defendant in his newspaper, some of them before the date of the writ for the election, and some after that date, but before the election.

Held, that the plaintiff was not a candidate for a public office in this Province within the meaning of R.S.O., c. 57, s. 5, s-s. (2) (*a*), before the date of the writ for the election; that as to the libels alleged to have been published before that date, a notice before action, under the statute, was necessary, but the paragraphs of the statement of claim charging these libels could not, on the ground that the notice was not given, be struck out under Rule 387, nor the action as to them summarily dismissed; and as to the libels alleged to have been published after that date, security for costs could not be ordered under the statute, because the plaintiff was then a candidate for a public office within the meaning of s. 5, s-s. (2) (*a*), and the statute did not apply.

D. Armour for the plaintiff.

D. W. Saunders for the defendant.

FERGUSON, J.] [Oct. 16.

SCHMIDT *v.* TOWN OF BERLIN.

Discovery—Examination of officer of municipal corporation—Caretaker of building.

In an action for damages for negligence in keeping a building in such a dangerous condition that the plaintiff was injured while in it,

Held, that the caretaker of the building, an employee of the defendants, was an officer examinable for discovery under Rule 487.

F. E. Hodgins for the plaintiffs.

W. H. P. Clement for the defendants.

MANITOBA.

COURT OF QUEEN'S BENCH.

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

THOMPSON *v.* DIDION.

Fraudulent judgment—Husband and wife—Loan to husband—Evidence—Burden of proof—Possession by husband of wife's separate estate.

This was a suit in equity to set aside, as fraudulent and void, a judgment recovered by the defendant, Mrs. Didion, against her husband, the other defendant. The plaintiffs were creditors of the husband, and contended that the husband really did not owe his wife the money for which she sued him.

The husband, in giving his creditors statements of his affairs, from time to time, never informed any of them of the alleged indebtedness to his wife. The instruction for the suit of the wife against the husband were given by the husband, and judgment in the suit was signed for want of a plea within nine days after the issue of the writ. The defendants in their answers swore to the existence of the alleged indebtedness of the husband to the wife, and that the money lent to him had been derived by the wife from her father's estate. They also denied the charges of fraud in the bill, and gave particulars of the amounts advanced to the husband. The only evidence in support of the plaintiffs' case was that of two of the creditors to whom the husband had made statements of his affairs, in which he never mentioned any claim of his wife.

One of the witnesses testified as to what took place at an interview with the debtor respecting the wife's suit against him, in which he stated that he had borrowed money from his wife, and that she had sued to secure her claim. Another witness stated that Didion had said that a man had sued him, and that he had got his wife to sue, that he might dictate to his creditors.

Held, that the statements made by the husband were not evidence against his wife, and that there was no evidence to displace the sworn statements of the defendants in their answers.

Held, also, that the defendant, Mrs. Didion, was not bound to give evidence in court in denial of an alleged statement of her husband, proved by one of the witnesses, that her judgment was got for a cloud, although she was present in court. *Barber* v. *Furlong*, (1891) 3 Ch. 184, distinguished. Such a rule as was applied in that case should not, in any view, be applied in the present case, where the defendant, although sitting in court, did not understand the language spoken by the witnesses, but only French.

While there may be a presumption that the income of a wife's separate property received by the husband is to be regarded in the light of a gift, there is no such presumption where he receives the corpus. See R.S.M., c. 95, s. 5.

The cases of *Scales* v. *Barber*, 28 Beav. 91; *Carnegie* v. *Carnegie*, 30 L.T.N.S. 460; *Re Curtis, Hawes* v. *Curtis*, 52 L.T.N.S. 244; and *Re Blake, Blake* v. *Power*, 60 L.T.N.S. 663, show that the wife can, without any evidence of a

bargain or agreement for a loan, recover back the corpus of her separate estate, even after it gets into the husband's possession.

Bill dismissed with costs.

***Howell*, Q.C., and *Darby* for the plaintiffs.**

***Bradshaw* and *Chaffey* for the defendant, the wife.**

***Baker* for the defendant Didion.**

TAYLOR C.J.] [Aug. 14.

FULLERTON *v.* BRYDGES.

Conveyance of land subject to mortgage—Implied undertaking to indemnify grantor—Taking deed as security for debt—Evidence—Recitol in deed not always an estoppel.

This was a suit in equity, in which the plaintiff sought to compel the defendants to indemnity him in respect to a mortgage upon certain land, which he had conveyed to two of the defendants, subject to the mortgage, under the following circumstances:

Plaintiff being indebted to the three defendants in the sum of about $16,000, in November, 1892, executed a bill of sale to them of a large amount of personal property, and assigned all book accounts, debts, or sums of money owing to him.

This bill of sale contained a recital that the plaintiff had contracted and agreed with the defendants for the absolute sale to them of the same, and of the equity of redemption in the land in question granted by him to them, by deed of even date, in consideration of the release by the defendants of the plaintiff from his indebtedness to them. The conveyance of the equity of redemption in the lands was made to the defendants, Brydges and W. R. Allan, the name of the defendant Andrew Allan having been struck out of the conveyance before execution. Plaintiff contended that this had been fraudulently done for the purpose of preventing him from resorting to his remedy against Andrew Allan on the implied covenant to pay off the mortgage. Plaintiff also gave some evidence to show that the defendants, or one of them, had verbally agreed to indemnify him against the mortgage.

The learned judge, however, dismissed the charges of fraud, finding no evidence to support them, and he also found upon the evidence against the alleged verbal agreement to indemnify, and that the defendants had not "purchased" the land in the ordinary sense of that word, but had merely taken the conveyance of the equity of redemption as security, intending to make good to plaintiff any surplus which they might realize out to the property transferred to them, and at the same time to release the plaintiff from all his liability to them.

Plaintiff's counsel then contended, on the authority, of *Waring* v. *Ward*, 7 Ves. 332, and Dart on Vendors and Purchasers, 6th ed., p. 628, that the defendants were bound to indemnify him against the mortgage, even without any express stipulation to that effect.

Held, that the right of indemnity under such circumstances, there being no express stipulation on the subject, arises from the sale of the incumbered land,

and not from the mere conveyance, and that such right does not arise where a conveyance is taken merely as security for a debt, and the grantee does not go into possession and receipt of the profits of the land. It is only as between a real vendor and a real purchaser, in the ordinary sense of the words, that such right of indemnity arises: *Fraser* v. *Fairbanks*, 23 S.C.R. 96; *Walker* v. *Dickson*, 20 A.R. 96; *Beatty* v. *Fitzsimmons*, 23 O.R. 245; *Corby* v. *Gray*, 15 O.R. 1.

Plaintiff's counsel also further contended that the defendants were estopped by the recital in the bill of sale from denying the fact of their having purchased the property, and that evidence should not be received to contradict the formal, solemn statements of such recital.

Held, that to make a recital operate as an estoppel one essential is that there must be either an action directly founded on the instrument containing the recital, or one which is brought to enforce the rights arising out of such instrument: Taylor on Evidence, 8th ed., p. 120; and that as the present suit was founded upon an obligation arising, if at all, from the sale of the land, and not founded on anything contained in the conveyance, the defendants could not be estopped from giving evidence of the actual circumstances occurring.

The business of the defendants being that of the bankers,

Quære: Whether the other partners would have had any authority to bind Andrew Allan by such an agreement as was alleged by the plaintiff to have been entered into with him?

Bill dismissed with costs.

Wilson and *Vivian* for the plaintiff.

Tupper, Q.C., and *Phippen* for the defendants.