Canada Law Journal.

VOL. XX. DECEMBER 1, 1884. NO. 21.

DIARY FOR DECEMBER.

2. Tues .....County Court sittings, York, begin.
4. Thur.....Divisional Court sittings, Chancery Div. H. C. J., begin.
6. Sat.....Michaelmas sittings, Com. Law Div. H. C. J., end. Armour, J., sworn in Q.B., 1877.
7. Sun .....*2nd Sunday in Advent.*
9. Tues.....Gen. Sess. and Co. Ct. (except York) begin.
11. Thur.....Blake, V.-C., sworn in, 1872.
14. Sun.....*3rd Sunday in Advent.*
15. Mon .....Christmas vacation in Supreme Ct. and Exchequer Ct. begin. Morrison, J., sworn in Ct. of Appeal, 1877.

TORONTO, DECEMBER 1, 1884.

OUR English correspondent in his letter published in this issue, alludes, in passing, to the question of precedence of Colonial Queen's Counsel in England, which was recently authoritatively decided, through the very proper stand taken by Mr. Attorney-General Mowat in connection with the argument of the Boundary Case. Those who desire fuller information on the subject may be referred to our article of September 16th: (*supra* p. 299.)

THE decision of Vice-Chancellor Bacon, in England, at the suit of the present Lord Lytton, enjoining Miss Devey, executrix of the late Lady Lytton, from publishing letters written by the late Lord Lytton to his wife, on the ground that though the property in the letters, as pieces of paper, may be in Miss Devey (a point, however, as to which another suit is pending) yet, even so, that does not give her the right to publish them—has called forth a leading article from the *Times*, and is indeed of much interest not only to lawyers, but to all interested in the preservation of *bonos mores*.

LORD BRAMWELL'S bill on the law of evidence proposes to enable any one who is charged with an offence to be a "competent witness" on the hearing at every stage. The wife or husband of the accused is in like manner to be a competent witness. And these provisions are to apply whether the accused is charged solely or jointly with others. But the accused is not to be compellable to be a witness, nor is the wife or husband to be admissible as a witness without the consent of the accused, "unless so compellable heretofore." When an accused person is a witness, he is not to have the right to refuse to answer a question on the ground that it would tend to criminate him as to the offence charged, unless the Court thinks fit to allow it.

IN an article published in this Journal, in the month of May last, we drew attentinn to the doubt which existed as to whether the Master in Chambers has jurisdiction to grant final judgment under Rule 80 (p. 159). There is an old story of a man who, being cast into gaol, sent for his lawyer, who after hearing the facts of the case, and what the man had done, exclaimed: "But they can't put you into prison for that! They can't put you into prison for that!" "But, by heaven, they have," replied the hapless client. In somewhat the same way the Master has again and again met objections to his jurisdiction to order final judgment under Rule 80, by ordering it. Now, however, we are glad to hear the question is likely to receive authoritative decision in a case of *Elliott* v. *Rogers*, recently argued before the Common Pleas Divisional Court and now standing for judgment.

THE *Central Law Journal* for November 21st, 1884, contains a long article on Champertous Agreements, a subject which has been much before the courts of late, in England in the case of *Bradlaugh* v. *Newdegate*, 11 Q. B. D. 1, and here in the matter of the motion to strike out *Langtry* v. *Dumoulin* from the cases standing for rehearing before the Divisional Court. The article illustrates, somewhat strikingly, the importance of a knowledge of the *history* of legal principles to their correct apprehension, by pointing out, as it does at the commencement, that the law of Champerty is a direct product of the feudal law, its *fons et origo* being the desire to prevent the rich and powerful barons from purchasing claims against those who were in debt, and overwhelming the debtor by a prosecution for payment at one time of all of his indebtedness, and also to prevent such magnates from buying up claims, and then, by means of their exalted and influential positions, overawing the courts, and thus securing unjust and unmerited judgments, and oppressing those against whom their anger was directed. For all of which Stubb's Constitutional History, vol. 3, p. 532-541; and Stephen's History of the Criminal Law of England, p. 236-238, are cited as authorities.

IN the case of *Boswell* v. *Cooks*, 51 L. T. 242, the Court laid down the following rules regulating the duty of purchasers of land sold under the authority of a Court of Justice: "A person desirous of buying property which is being sold under the direction of the Court must either abstain from laying any information before the Court in order to obtain its approval, or he must lay before it all the information he possesses, and which it is material the Court should have to enable it to form a judgment on the subject under its consideration. . . . If a party to an agreement obtain the sanction of the Court by withholding information which is material, and is known to him to be so, such withholding amounts to fraud, and the agreement ought not to stand. It is no answer to say that the information given to the Court was true, so far as it went, and that if the Court desired further information, it should have asked for it. The Court is neither buyer nor seller, and it is the duty of everyone laying materials before it for the purpose of obtaining its approval of any transaction, to take care that the materials furnished to guide the Court, shall not be incomplete or misleading. A purchase which has received the sanction of the Court will not be set aside upon slight grounds, but if the approval of the Court has been obtained by misrepresentation, or by the withholding of material information, through the absence of which the information furnished is misleading, the Court will treat such misrepresentation or withholding as fraud, and will act accordingly. The same rule applies to applications to the Master, or other officers of the Court to obtain their approval of sales or compromises, etc. *Brooke* v. *Mostyn*, 2 D. G. J. and S. 373."

SHORTLY before going to press, we have had placed in our hands an alphabetical Index of the Statutes of Ontario, down to and inclusive of the year 1884, including the Revised Statutes, by Edward Norman Lewis, Barrister-at-Law, published by Carswell & Co., Toronto. This has been a work much needed. The original index of the Revised Statutes was in the first instance anything but perfect, and since then there have been great numbers of supplementary statutes, and amending sections. We do not pay our legislators for nothing. They give us our money's worth in the way of legislation, and it is desirable that collections and indices should appear at short intervals. We, therefore, cordially welcome this and

every attempt to supply the dearth of Canadian text-books, almost apart from questions of their individual merit. Of the merits of the present work only a prolonged user can really afford a test. It is an extensive work of four hundred and forty-seven pages, which must comprise many thousands of entries, and that of itself implies that the Statutes have been pretty thoroughly ransacked. One entry indeed we have been somewhat struck with. It occurs at page 361, and is as follows:—"Reside with respectable persons, children may be permitted to. See Industrial Schools, 1884." Indexing is tedious and monotonous work, and we take it Mr. Lewis is not without a sense of humour. Perhaps he had heard of the celebrated entry in an English Digest which consisted of, "Great mind: of Lord——," and which referred to a passage in the body of the work wherein it was stated that "Lord —— stated he had a great mind" to do something or other.

WE also have before us the new triennial Digest by Mr. Christopher Robinson, Q.C., and Mr. F. J. Joseph, which we presume is by this time familiar to all practitioners. It appears to have been compiled with all the care of the former Digest by the same gentlemen. In one marked respect it is an advance upon that. We refer to the "Table of cases affirmed, reversed, or specially considered." The next triennial Digest will no doubt include in this table English cases commented on in our Courts, as well as Canadian. In another respect, on the other hand, this Digest seems to us to be a falling off from the former one, namely, in not comprising the numerous County Court decisions reported during the last three years, which have been published in these pages. Many of these decisions collate with much labour the cases on their respective subjects, and in the necessary dearth of provincial text-books, to which we have already alluded, it seems a pity that they should be allowed to drop out of sight. The compilers of the Digest, or one of them at least, did we believe propose to include them, but the Law Society considered it better to confine the Digest to the regular reports. Possibly they thought that the profession perused this journal with so much care and were so familiar with its pages, that it was unnecessary to include the many valuable decisions which we are enabled to lay before our subscribers, and which do not find their way into any other reports.

RESTRAINTS ON ALIENATION.

For some time past it has been assumed that a devise of land in fee subject to a partial restraint against alienation may be validly made. The restraint if limited in point of time, it was considered, must be reasonable and so as not to offend against the law against perpetuities. In our own Court of Appeal, this point, that a restraint of alienation for a limited time is good, was decided in *Earls* v. *McAlpine*, 6 A. R. 145. In that case a devise made subject to a proviso that the devisee should not sell or transfer the property without the consent of the testator's wife during her life, was held to be valid; and a mortgage made by the devisee, in violation of this restriction, was held to be invalid and to work a forfeiture of the estate, and the heirs-at-law of the testator were held entitled. *In re Winstanley*, 6 O. R. 315, the Divisional Court of the Chancery Division, have also held where a devise in fee was made subject to the restriction that the devisee should "not have power to dispose of it only by will and testament," the restriction against alienation was valid, and binding on the devisee. In the recent case *re Rosher*, *Rosher* v. *Rosher*, 26 Ch. D. 801 Pearson, J., however, seems to

have let in new light on the subject, and going back to first principles he has come to the conclusion that a restraint on alienation limited to the life of another grafted on a devise in fee, is void for repugnancy. He considers the statement of the law which has got into the text-books and has even received the sanction of so learned a Judge as the late Sir Geo. Jessel, to the effect that a restraint on alienation is good if limited to a reasonable time, arises from a misconception of the effect of *Large's Case*, 3 Leon 182, which appears to have been first pointed out in the American case of *Mandlebaum* v. *McDonell*, 18 Am. Rep. 61, 80. The devise in *Large's Case* is stated as follows: "A. seized of lands in fee, devised the same to his wife till William, his younger son, should come to the age of twenty-two years, the remainder when the said William should come to such age, of his lands in D. to his two sons, Alexander and John, the remainder of his lands in C. to two other of his sons, upon condition, *quod si aliquis dictorum filiorum suorum circumibit vendere terram suam* before his said son William should attain his said age of twenty-two years, *in perpetuum perderet eam.*" From which it appears as pointed out by Mr. Justice Christiancy, in the American case, that there was no devise of the fee simple subject to a condition not to alien, but on the contrary only the limitation of a contingent remainder to the sons upon condition that if before they came in possession, (*i.e.*, on William coming to the age of twenty-two) either of them should attempt to sell his land he should lose it; one of the sons having sold before that time it was held he could not qualify himself to take the contingent remainder, and, therefore, that it failed altogether. The case of *re Rosher*, *Rosher* v. *Rosher*, is one in which the property at stake is of large value, and no doubt the opinion of a Court of Appeal will be asked upon the question and we shall watch with interest the future stages of the case.

OUR ENGLISH LETTER.

(From our own Correspondent.)

My silence has not been due to want of application, but to an unprecedented dearth of material. Legal gossip has for some months been an unknown quantity; the law reports in the *Times* have been detailed accounts of the commonest of bankruptcy cases; the judges have been keeping holiday. Never, perhaps, within the memory of the oldest inhabitant of the Temple or Lincoln's inn has vacation business been so weak and rare as in the summer of 1884. One or two leading juniors, men who, as John Bright would say, can almost hear the silk gown rustling upon their backs, tell me that if they had been content to stay up in town throughout August they would have had a good deal of work, but the briefless army are certainly little encouraged by business to face the heat and dust of the autumn. This was formerly their gleaning time, in which they gathered into their bosom the straws which the great men left behind them when they bound up their sheaves. Now great men leave nothing behind, and the highest among the stuff-gownsmen are quite ready to undertake the smallest business. These good gentlemen are passing through an anxious crisis at the present moment. It was, I think, in May or June last that a considerable number of them applied for silk. Very few of the applications, if any, were made by men who had not the best right possible to expect their wishes to be immediately fulfilled. But the Lord Chancellor, good man, has the most rooted objection to creating new silks and prefers to keep all these men in ruinous suspense. For such suspense is ruinous, seeing that solicitors are doubtful whether, when they

give a man work, they are retaining him as a leader and a junior. I do not, however, imagine that a recent suggestion that men should not be compelled to request the honour, but that the Lord Chancellor, should, *sponte sua*, confer it upon them, is likely to be popular. If this rule were adopted several undesirable consequences would ensue, and the most undesirable of all would be that politics would influence the choice. Yet a man is neither a worse nor a better lawyer because he is the hottest of Tories or the fiercest of Radicals.

Among the men whose fate is hanging in the balance just now are Moulton, of scientific renown; Crump, of Bradlaugh fame, whose powers of close argument have recently been made known to the Privy Council in one or two Canadian cases, and Woolf, of the Bankruptcy Bar. There are others of equal celebrity, but these three are the most likely to make their mark. The first is a specialist, the second is an exceedingly subtle lawyer and master of considerable eloquence, and the third is versed in the intricacies of Bankruptcy. Now, in Bankruptcy, there is much need of leaders.

Amongst the few satisfactory topics of the day is the recent decision with regard to the status of colonial Queen's Counsel when circumstances bring them before the English Courts. Englishmen have long desired the settlement of this question. Only last term a young friend of your correspondent was engaged to appear before the Privy Council, together with an eminent member of the New Zealand Bar. It was the very first occasion in which he appeared in Court. No one was more anxious that the real leader should be to the fore. Yet the practice was so unsettled that up to the last moment neither leader nor junior knew what was to be done. This, of course, was an extreme case, but the final settlement of the question is grateful to all. A Canadian lawyer knows at least as much, and probably a great deal more, of Canadian law than an English barrister of equal standing, and it is right and proper that they should rank simply by seniority, and that there should be no other distinction between them.

It is not too much to say that a deadlock in the Queen's Bench Division is inevitable. During the forthcoming assizes there will be only six common law judges left in town to do all the work in Court and Chambers. The Bar regards the prospect with despair, especially when it sees that the merchants of the city are sick and tired of delays and are showing an increasing desire to settle their difficulties by arbitration. A leading shipowner and Member of Parliament told me the other day that he would rather incur any loss or suffer any injustice than submit to the delays of the admiralty courts. But the admiralty courts are not a whit worse off than the Queen's Bench Division.

A recent book, David Dudley Field's Miscellaneous Writings and Speeches makes one's blood boil for Canada. If any one wants his old sores re-opened, he cannot do better, after looking at the map of North America, than read Mr. Field's review of the Oregon question. He will not adopt Mr. Field's conclusions, but will rise with a strong conviction that the apathy of the English Government and its proverbial indecision allowed the sacrifice of a piece of territory which would be of infinite value to us now.

RECENT ENGLISH DECISIONS.

The November numbers of the *Law Reports* consist of 9 App. Cas. p. 595 to 756; 13 Q.B.D. p. 649 to 696; 9 P.D. p. 181 to 217; 27 Ch. D. p. 1 to 361.

Arbitration clauses—Jurisdiction of arbitrator when liability under the Act is bona fide disputed.

The first case in the first of these, *Brierley Hill Local Board* v. *Pearsall*, p.

595, requires some short notice, because, though the decision has immediate reference to a claim for compensation under the English Public Health Act, 1875, the rule it lays down might probably apply to applications for compensation under the arbitration clauses of many of our own acts. The decision lays down that where a claim for compensation is made against a local authority under the said Act for damage caused by them in the exercise of their powers, and the local authority *bona fide* disputes their liability to make compensation at all under the Act, the arbitrator, nevertheless, has jurisdiction to hold his arbitration and make his award as to the fact of damage and the amount of compensation, and the proper course of the local authority is to raise the question of liability in their defence to an action upon the award. Lord Fitzgerald says at p. 603: "In the execution of his duties it is difficult to see how the arbitrators can avoid inquiring whether the acts complained of were matters done in the exercise of the powers of the Act, and as to which the claimant was not himself in default, so as to limit the scope of his assessment of compensation; but his decision, if any, as to the liability of the defendants in point of law would not be binding and would be inoperative. If the damage complained of has been occasioned apparently by reason of the exercise of the powers of the Act, the arbitrator proceeds to assess the amount of compensation limited to such damages, and leaving it open to the defendants, if they think fit, to contest their liability to the amount awarded on any grounds that may be open to them."

Contract by creditor to take less than sum due—Nudum pactum.

In the next case, *Foakes* v. *Beer*, p. 605, the House of Lords proceed upon a doctrine, which Lord Selborne states, at p. 610, "has been accepted as part of the law of England for 280 years." "The doctrine," he goes on to say, "as stated in *Pinnel's* case, 5 Rep. 117, a. is 'that payment of a lesser sum on the day (it would of course be the same after the day), in satisfaction of a greater, cannot be any satisfaction for the whole, because it appears to the judges that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum.'" By the case before the House a judgment creditor entered into an agreement (in writing, but not under seal) with the judgment debtor, that in consideration of the debtor paying down part of the judgment debt and costs, and on condition of his paying to the creditor or his nominee the residue by instalments, the creditor would not take any proceedings on the judgment. In accordance with the agreement the debtor paid the whole amount of the judgment, but the judgment creditor nevertheless took steps to enforce payment of interest upon the judgment, and the Lords held, affirming the decision of the Court of Appeal, that the agreement was *nudum pactum*, being without consideration, and the creditor was entitled to enforce payment of the interest. Lord Blackburn, in a lengthy judgment, points out that the doctrine in *Pinnel's* case is only a *dictum*, and though he admits it has been treated as good law by great judges, yet he says, p. 617: "Notwithstanding the very high authority of Lord Coke, I think it is not the fact that to accept prompt payment of a part only of a liquidated demand, can never be more beneficial than to insist on payment of the whole. And if it be not the fact, it cannot be apparent to the judges." At the end of his judgment he says: "What principally weighs with me in thinking that Lord Coke made a mistake of fact is my conviction that all men of business, whether merchants or tradesmen, do every day recognize and act on the ground that prompt payment of a part of their demand

may be more beneficial to them than it would be to insist on their rights and enforce payment of the whole. . . . I had persuaded myself that there was no such long-continued action on this *dictum* as to render it improper in this House to reconsider the question. I had written my reasons for so thinking, but as they were not satisfactory to the other noble and learned Lords who heard the case, I do not now repeat them nor persist in them." Thus he appears to intimate that were it not for the opinion of the other Lords he would have over-ruled the *dictum* on which the doctrine in question originally rested. The opinion of the rest of the Lords seems expressed in a concluding sentence in Lord Fitzgerald's judgment, when he says: "We find the law to have been accepted, as stated, for a great length of time, and I apprehend it is not now within our province to overturn it."

LIFE ASSURANCE—OF TEMPERATE HABITS.

The next case calling for special notice is *Thomson* v. *Weans*, p. 671, the judgments in which might be read with advantage, possibly, by some temperance lecturers, more remarkable for their zeal than for their breadth of view, as they comprise an endeavour to arrive at a more or less definite idea of what constitutes "temperance." An applicant for life insurance, in answer to the question, "Are you temperate in your habits?" replied, "Temperate;" and to the following question, "Have you always been strictly so?" replied, "Yes." Subjoined to the printed questions was a declaration which A. signed, to the effect that the foregoing statements were true, and that the assured agreed that this declaration should be the basis of the contract, and that if any untrue averment, etc., was made, the policy was to be absolutely void, and all moneys received as premiums forfeited. The policy recited the above declaration as the basis of the contract. The House held, reversing the Court below, that the declaration of A., taken in connection with the policy, constituted an express warranty that the answers to the questions were true in fact; and as the evidence clearly proved A.'s averment as to his temperance untrue, the policy was absolutely null and void. Lord Watson's words, at p. 695, might be read out with advantage in other places than Courts of law: "I believe it to be useless to attempt a precise definition of what constitutes 'temperate habits,' or 'temperance,' in the sense in which these expressions are ordinarily employed. Men differ so much in their capacity for imbibing strong drinks that quantity affords no test; what one man might take without exceeding the bounds of moderation, another could not take without committing excess. In judging of a man's sobriety, his position in life, and the habits of the class to which he belongs must, in my opinion, always be taken into account; because it is the custom of men engaged in certain lines of business to take what is called refreshment, without any imputation of excess, at times when a similar indulgence on the part of men not so engaged would be, to say the least, suspicious. . . . In the present case the evidence clearly establishes that the assured was a most able and estimable man, but that circumstance is not of much weight, because able and estimable men are not necessarily exempt from social failings." The judgment of Lord Fitzgerald, which follows that of Lord Watson, is chiefly remarkable from the fact that it contains two poetical quotations in a single page.

A. H. F. L.

SELECTIONS.

BARON HUDDLESTON ON JUSTIFYING HOMICIDE.

At the Exeter Assizes, on November 3, Baron Huddleston, in charging the grand jury, referred at length to the charge against Dudley and Stephens, captain and mate of the "Mignonette," of murdering the boy Parker when at sea in an open boat. After detailing the circumstances of the case, the learned judge said:—

It seems clear that the taking away of the boy's life was carefully considered, and amounted to a case of deliberate homicide. I must tell you what I consider to be the law as applicable to this case. It is a matter that has undergone considerable discussion, and it has been said that it comes within a class of cases where the killing of another is excusable on the ground of necessity. I can find no authority for that proposition in the recognised treatises on the criminal law, and I know of no such law as the law of England. Baron Puffendorf, in his "Law of Nature and Nations," mentions a case (Bk. II. ch. 6, p. 205, third edition, by Kennet, A.D. 1717) where seven Englishmen, tossed in the main ocean without meat or drink, killed one of their number on whom the lot fell, and who had, as he says, the courage not to be dissatisfied, assuaging in some measure with his body their intolerable and almost famished condition, whom, when they at last came to shore, the judges absolved of the crime of murder. Although he says the men were English sailors, he does not say where the case was tried, nor of what nation were the judges. Ziegler upon Grotius, giving this relation, is of opinion that "the men were all guilty of a great sin for conspiring against the life of one of the company, and (if it should happen) every one against his own." I can find no reliable report of this case, and for reasons which I shall refer to presently, I cannot consider it an authority binding on me. There is an American case, *The United States* v. *Holmes*, March, 1842, which is reported in 1 Wallace Jun. 1, in which sailors threw passengers overboard to lighten a boat, and it was held that the sailors ought to have been thrown overboard first, unless they were required to work the boat, and that at all events the particular persons to be sacrificed ought to have been decided on by ballot, by which, I suppose, they meant by lot. I cannot subscribe to the authority of this case. Besides it would be inapplicable to the present, because here the notion of deciding by lot was rejected. The learned American judge, in giving his reasons, said: "That the selected should be by lot, as it would be an appeal to Providence to choose the victims." Such a reason would seem almost to verge upon the blasphemous. I cannot but consider that the taking of human life by appealing to the doctrine of chance would really seem to increase the deliberation with which the act had been committed. That American case, however, was a charge, not of murder, but of manslaughter on the ground of the failure, on the part of the prisoners, to discharge the statutory duty of preserving the life of a passenger. The question has been considered by the Criminal Code Bill Commissioners in their report, in which, discussing this doctrine, they say:—

"Casuists have for centuries amused themselves, and may amuse themselves for centuries to come, by speculation as to the moral duty of two persons in the water struggling for the possession of a plank capable of supporting only one. If ever a case should occur for decision in a Court of Justice, which is improbable, it may be found that the particular circumstances render it easy of solution. We are certainly not prepared to suggest that necessity should in every case be a justification; we are equally unprepared to suggest that necessity should in no case be a defence. We judge it better to leave such questions to be dealt with when, if ever, they arise in practice by applying the principles of law to the circumstances of the particular case."

And my brother Stephen, in his "History of the Criminal Law," observes that this doctrine is one of the curiosities of the law, and so far as he is aware is a subject on which the law of England is so vague that, if cases raising the question should ever occur, the judge would practically be able to lay down any rule which they considered expedient. I do not derive much assistance from either of the cases, or from the report of the Criminal Code

Commissioners, and I am therefore obliged to tell you what, in my judgment, after careful consideration, I deem to be the law of England. Deliberate homicide can be justifiable or excusable only under certain well recognised heads—cases where men are put to death by order of a legally constituted tribunal in pursuance of a legal sentence; cases where the killing is in advancement of public justice, as, for instance, criminals escaping from justice, resisting their lawful apprehension, and other such cases enumerated by Blackstone, vol. iv. 48. So also where homicide is committed for the prevention of any forcible and atrocious crime; again where men in the discharge of their duty to their country and in the service of their queen kill any of the enemies of their queen and country; and, lastly, where an individual, acting in lawful defence of himself or his property, or in the reasonable apprehension of danger to his life, kills another. It is obvious that this case falls under none of these heads. The illustration found in the writers upon civil law, which is alluded to in "Cicero de Officiis," and mentioned by Lord Bacon in his "Elements of the Law," and which is quoted in some legal works as the ground of the doctrine of necessity, is placed by Blackstone under the latter head—of self-defence. He says: "Where two persons being shipwrecked, and getting on the same plank, but finding it not able to save them both, one of them thrusts the other from it, whereby he is drowned, he who thus preserves his own life at the expense of another man's is excused from unavoidable necessity and the principle of self-defence, since their both remaining on the same weak plank is a mutual though innocent attempt upon and endangering of each other's life. But Sir William Blackstone, in another part of the same volume, points out that under no circumstance can an innocent man be slain for the purpose of saving the life of another who is not his assailant; and he says, therefore, though a man be violently assaulted, and hath no possible means of escaping death but by killing an innocent person, this fear and force shall not acquit him of murder, for he ought rather to die himself than escape by the murder of an innocent; but "in such a case he is permitted to kill the assailant, for there the law of nature and self-defence, its primary canon, have made him his own protector." Bishop, in his "Criminal Law," a high American authority, supports this view, and it is the more important, as he refers to the American case to which I have before alluded. It is impossible to say that the act of Dudley and Stephens was an act of self-defence. Parker, at the bottom of the boat, was not endangering their lives by any act of his; the boat could hold them all, and the motive for killing him was not for the purpose of lightening the boat, but for the purpose of eating him, which they could do when dead, but not while living. What really imperilled their lives was not the presence of Parker, but the absence of food and drink. It could not be doubted for a moment that if Parker was possessed of a weapon of defence—say a revolver—he would have been perfectly justified in taking the life of the captain, who was on the point of killing him, which shows clearly that the act of the captain was unjustifiable. It may be said that the selection of the boy—as, indeed, Dudley seems to have said—was better, because his stake in society, having no children at all, was less than theirs; but if such reasoning is to be allowed for a moment, Cicero's test is that under such circumstances of emergency the man who is to be sacrificed is to be the man who will be the least likely to do benefit to the republic, in which case Parker, as a young man, might be likely to live longer and be of more service to the republic than the others. Such reasoning must be always more ingenious than true. Nor can it be urged for a moment, that the state of Parker's health, which is alleged to have been failing in consequence of his drinking the salt water, would justify it. No person is permitted, according to the law of this country, to accelerate the death of another. Besides if once this doctrine of necessity is to be admitted, why was Parker selected rather than any of the other three? One would have imagined that his state of health and the misery in which he was at the time would have obtained for him more consideration at their hands. However, it is idle to lose one's self in speculation of this description. I am bound to tell you that if you are satisfied that the boy's death was caused or accelerated by the act of Dudley, or Dudley and Stephens, this is a case of deliberate homicide,

neither justifiable nor excusable, and the crime is murder, and you, therefore, ought to find a true bill for murder against one or both of the prisoners. You will perhaps be good enough to say whether, with reference to the mate Stephens, there is evidence which will satisfy you that he was abetting or aiding or sanctioning the conduct of Dudley. If so you will find a true bill against him. In his statutory examination on oath he says that the master (Dudley) selected Parker as being the weakest, that he agreed to this, and the master accordingly killed the lad. Unless you disbelieved him, therefore, you will find a true bill against him as well as Dudley. I may say that Captain Dudley seems to have made no secret of what has taken place, and to have voluntarily furnished all the evidence against himself, although it is quite true that the course taken by the magistrate, very properly, in making Brooks a witness supplies also evidence for the prosecution. The case having taken place on the high seas, and being a case of British subjects, is one which, by statute, is triable here. No person who has read the details of this painful case but must be filled with the deepest compassion for the unhappy men who were placed in this frightful position. I have only in this preliminary stage to tell you what the law is, but if you should feel yourselves bound to find the bill, I shall then take care that the matter shall be placed in a form for further consideration if it become necessary. I think I am bound to do this after the report of the cases I mentioned in Puffendorf and in the American reports, and the report of the Criminal Law Comissioners. The matter may then be carefully argued, and if there is any such doctrine as that suggested, the prisoners will have the benefit of it. If there is not, it will enable them, under the peculiar circumstances of this melancholy case, to appeal to the mercy of the Crown, in which, by the constitution of this country (as a great lawyer points out) is vested the power of pardoning particular objects of compassion and softening the law in cases of peculiar hardship.

The grand jury eventually returned a true bill for wilful murder against Dudley and Stephens.—*Law Journal.*

CANADA REPORTS.

ONTARIO.

COUNTY COURT OF THE COUNTY OF YORK.

CARLETON v. MILLER.

Replevin—Gambling transaction—Imp. Stat. 9 Anne cap. 14.

In an action of replevin to recover a watch worth $100, staked upon a game of cards between plaintiff and defendant, the stakes having been taken by defendant before the alleged event of the game. *Held*, that Imp. Stat. 9 Anne cap 14, is in force in this country, though repealed in England, but that the plaintiff could not rely on sec. 2 of that act "to recover back money or chattels exceeding £10 in value lost at cards," as his action was not founded upon the statute,

Held, further, that independently of the statute, that the illegal contract being executed, and the plaintiff *in pari delicto* with the defendant, he could not recover.

[Toronto, June 30.

This was an action of replevin. It was alleged by the plaintiff that the defendant wrongfully took from him a gold watch and that he wrongfully, etc. detains the same, etc.; and the plaintiff claimed $150 damages for the alleged detention.

MACDOUGALL, J.J.—The case was tried before me with a jury at the last sittings of the County Court, and after hearing the evidence of the plaintiff and his principal witness, I refused to allow the case to proceed further, and dismissed the action with costs.

In term *J. K. Kerr*, Q.C., moved for a rule calling upon the defendant to show cause why a new trial should not be ordered upon the ground that the plaintiff had established his title to the watch in question, and that I should not have withdrawn the case from the jury. A notice of motion for a new trial upon the same grounds was also served upon the defendant's solicitors. I granted the rule and upon the return thereof

James Tilt, Q.C., showed cause.

The facts of the case so far as the evidence given establishes them, certainly reveal a most singular condition of morality in the community where the parties reside.

The plaintiff it appears having met the defendant engaged with him in what is known as a game of pool for money stakes. At the game which is one involving a certain amount of skill, the plaintiff was successful, and won from the defendant $10. Later in the day or evening the defendant, anxious to retrieve his fallen fortunes, (the plaintiff being unwilling to give him his revenge at pool,)

proposed a game of cards. This was ultimately agreed upon and the parties met with some friends at a room in a livery stable, where they played cards, the result of the gambling being that the plaintiff, apparently not too much encumbered with ready money, lost his watch, he having put it up as a stake against $100 in money, put up by the defendant.

It will be somewhat the reverse of edifying to learn of some of the steps taken by the plaintiff and his friends to prepare for the game of cards. The plaintiff's own account of it is charming in its frankness. He says some one came to him and asked him to play cards, but that he objected, because as he puts it, "if he had any money those who were likely to play with him would put up a job on him and take his money." One Simpson it appears was the individual who endeavoured to persuade the plaintiff to play, and he (Simpson) seems to have been ready with a suggestion to meet the difficulty urged by the plaintiff, and said he would arrange it so that the plaintiff would not get the worst of it. These two worthies with the assistance of another man, named Lucas, who possessed apparently similar tastes and instincts retired to a room, and having procured a new pack of cards, sat down together and deliberately set to work and marked these cards, one by one, in such a manner that, if they were played with, the plaintiff would be able to know exactly what cards his opponents or opponent held. This arrangement being successfully completed and the marked cards carefully placed back in their original package, so that they might appear as a pack newly purchased, the plaintiff withdrew all his objections to playing, and equipped for a fresh encounter, he repaired with his two friends, Simpson and Lucas, to the livery stable, where he understood he would meet his former adversary, the defendant, and there and then afford him the revenge for which he (the defendant) was supposed to be thirsting.

The parties met, and it seems that some games were played at first in which other persons joined. It does not appear what was the result of this portion of the evening's entertainment, but the plaintiff having ordered in some liquids to soften the asperities of the game, after a round or two of drinks, speedily found himself face to face with his old antagonist, the defendant, engaged in a game of euchre. The game Simpson says was to consist of ten points, and the stakes were to be $200, or $100 each. The plaintiff not having that amount in ready money with him put his gold watch (with assent of the defendant) to represent his (the plaintiff's) $100. The cards used in playing were the marked cards. Simpson says that it was a rule of the game that whoever cheated lost the game.

The plaintiff and defendant played two games, neither of which decided the question as to who was winner. Simpson says the defendant accused the plaintiff of cheating but after disputing over the matter twice agreed to commence over again, and play a third or final game which it was mutually agreed should be *square*. The defendant —*Simpson and the plaintiff both state this*—was unaware that the cards were marked.

Before the third and final game was concluded the defendant again accused the plaintiff of cheating and gave up playing, claiming the stakes as forfeited to him—and gathering them up from the table—apparently without remonstrance at the time—went out. Both parties had been drinking, and the plaintiff declares, that he was unaware that he had lost his watch until the next day.

Upon these facts the plaintiff seeks to recover his watch or damages for its detention.

The action is not an action brought upon the Statute of 9 Anne, cap. 14. sec. 2, to recover back money or chattels exceeding £10, in value lost at cards. The plaintiff does not found his claim upon the statute at all. He simply claims for a wrongful taking of his goods, and for their wrongful detention. I do not think that he can claim the benefit of this statute (which appears to be in force in this Country though repealed in England by Imp. 8–9 Vict. cap. 109), except in an action founded upon the Statute: *Thistlewood* v. *Cracroft*, 1 M. & S. 500.

The plaintiff and defendant played at an illegal game for money or goods. I think that the money or goods having changed hands upon the event of such illegal game, in which the plaintiff himself was admittedly taking a most atrociously unfair advantage of the defendant by playing with marked cards, he cannot ask a Court to assist him to recover back his money or goods. The illegal contract was executed and the plaintiff *in pari delicto* with the defendant. He cannot therefore recover: *Andree* v. *Fletcher*, 3 T. R. 266; *Taylor* v. *Chester*, L. R. 4 Q. B. 309.

From the plaintiff's own statement his cause of action appears to rise *ex turpi causâ*, and he has no right to be assisted.

It is urged by Mr. Kerr that the game was not finished, and that the defendant therefore possessed himself of the watch improperly by taking it off the table; and that, though perhaps not guilty of stealing, the event never happened—illegal though it was—which gave the right to the defendant to take or claim the watch as his. The answer to this view, it appears to me is most conclusive. The

plaintiff's witness, Simpson, says it was a rule of the game that any cheating lost the game to the party guilty of the cheating; that it was agreed between the defendant and the plaintiff that it should be a *square*—that is an honest—game. Yet notwithstanding this definite compact, the plaintiff was playing with a marked pack of cards—a pack on his own testimony prepared by himself to enable him to win in any event and under all circumstances.

It is to be hoped that Courts of Justice will be seldom occupied in trying cases of this description. The County Court of York shall not be much troubled with them while I am a judge of the Court, where it is within my power, to deal summarily with them.

This exposure of village immorality and corruptness is one of the most startling ever coming under my notice, and one hardly knows whether to be amazed most at the refreshing frankness with which the plaintiff unblushingly details his villainous preparations to defeat the defendant at cards, or at his temerity in bringing such an action in any Court of Justice in the land.

The rule will be discharged and the motion refused both with costs.

ASSESSMENT CASE.

IN RE CANADA LIFE ASSURANCE COMPANY AND THE CITY OF HAMILTON.

Assessment—Taxation—Income—Insurance Company—Money payable to policy holders on the participation scale.

Held, that moneys in the hands of an insurance company for payment to the policy-holders, or to be added to their policies at the next distribution of profits, are not to be considered as part of the income of the company for purposes of assessment.

[Hamilton.

This was an appeal to the County Judge by the Canada Life Assurance Company from the Court of Revision of the City of Hamilton, which held that the moneys in the hands of the Company for payment to policy-holders under the Act 42 Vict. ch. 71 (D.) were a part of the income of the Company for the purposes of assessment.

A. Bruce, for the appeal.

F. Mackelcan, Q.C., contra.

SINCLAIR, Co. J., (after referring at length to the Act of incorporation of the Company, 12 Vict. ch. 168, the objects of the Company and the scope of the amending Act of 42 Vict. ch. 71), continued:—"Since the passing of the Act of the Dominion Parliament, 42 Vict. ch. 71 (D.), no division of profits has been made, that being done according to the by-laws of the Company only once in every five years (except that made in 1880). The profits have not been estimated since the year 1880, and the next estimation and division of profits will be next year (1885). It is admitted that the Company since the year 1880 has been earning large profits in proportion to the amount of their capital. The municipal authorities of Hamilton have made an assessment for the year 1884 of the income of this Company at $40,000, which on appeal to the Court of Revision was confirmed. The Company now appeals against that decision, and I have now to determine upon what principle that income should properly be assessed."

The learned judge then discussed the meaning of the word "income," used in the Assessment Act and amending Acts, as applied to this case, and reviewed the evidence, from which it appears that the profits for the five years ending with 1880 averaged $148,979.30 a year, and that the nearest estimate of the annual net profits of the Company over and above the amount payable to policy-holders is $29,926.84, and says that the Company should have been assessed either for the sum of $148,979.30 or the sum of $29,926.84. He then continued:—"The question therefore remains: What is the income of this Company for the purposes of assessment, and are the moneys which, as the Company contends, remain in their hands for payment to the policy-holders, or to be added to their policies at the next distribution of profits, to be considered as part of their profits for the purposes of assessment? Mr. Bruce argued that these moneys were not those of the Company: that they held them for the policy-holders, to be paid out to them or their representatives on the happening of a certain event, and that the Company as such should not be taxed for them. Mr. Mackelcan would not argue that the policy-holders were not entitled to their share of the profits of the Company, but that such profits being found in the possession of this Company were taxable as income, and that it did not matter what they afterwards did with them or were by law compelled to do with them."

The learned judge then discussed the legal obligation of the Company to pay a proportion of the profits to its policy-holders, citing the Act 42 Vict. ch. 71 (D.); Addison on Contracts, 7th Ed., 266; and *Hodgins* v. *Ont. L. & D. Co.*, 7 O. R. 202, and concludes on this point from the evidence and the reports, circulars, etc., of the Company, that it has been satisfactorily established that the Company has bound itself, apart from the statute, to pay ninety per cent. of its profits to the policy-holders. He then continued:—"The most

difficult point to determine, and one that has given me much anxious consideration, is whether the amounts which the Company returns to the policy-holders every five years can be estimated as part of the income of the Company for the purposes of municipal taxation? Strong reasons can be given on both sides of this question. Many arguments can be advanced in favour of taxing these moneys, but just as many can be urged against it. I have searched in vain for any case in which the same question has arisen in our own Courts. So far as I know or can find out the question has not been up in this Province for judicial decision. The American cases do not assist us much, for in most of the States, so far as I can judge, by their systems of taxation the *corpus* of the fund would be that which would be singled out for taxation; nor do I find any American decision where this question has been before the Courts. Mr. Mackelcan has referred me to some American cases in support of the assessment. In the case of *Sun Mutual Insurance Company* v. *New York*, 8 N. Y., 241, cited to me, where a mutual insurance company was authorized to accumulate from its profits a fund to continue liable for its losses during the term of its existence, it was held that this accumulation was capital, and was liable to taxation as such. I was also referred to a note at page 160 of Cooley on Taxation, in which it is said: "Income means that which comes in and is received from any business or investment of capital, without reference to the outgoing expenditure." In *People* v. *Board*, 20 Barb. 81, it was held in the State of New York that the surplus reserve fund of mutual life insurance companies, incorporated previous to the year 1849, was liable to taxation as capital. None of these cases, it will be seen, touch the question here presented. The nearest approach to the point in dispute will be found discussed in the late English case of *Last* (Surveyor of Taxes), appellant, and the *London Assurance Corporation*, respondents, 12 Q. B. D., 389, decided on the 14th of March, 1884."

The learned judge then stated the facts, arguments and judgments fully in this case and proceeded:—"The junior judge, Mr. Justice A. L. Smith, expressed the opinion that the share going to the policy-holders was taxable and was in favour of giving judgment for the Crown, but as there was a difference of opinion and the Court was evenly divided, he withdrew his judgment and judgment in the case passed for the insurance company. I have searched in vain to find any trace of the case being brought up on appeal. We, therefore, have in that case the decision of the Government Commissioners against the Crown and their view sustained by the decision of the Queen's Bench Division. Had not the Crown officers been satisfied with the correctness of that decision I have no doubt they would have taken the opinion of the Court of Appeal on the question, if that were possible. It may be, however, because there was no appeal."

But I am of opinion that the decision in the case last referred to would, according to the authorities in England, be binding on any Court of co-ordinate jurisdiction. On this point, I refer to the authorities collected in the opinion of Mr. Justice Patterson in our own Court of Appeal *In re Hall*, 7 A. R. 135. It is true that two of the judges give the opinion in that case, that in the Court of Appeal in this Province the same rule in respect to the withdrawal of the opinion of the junior judge should not be observed as is in the House of Lords, and that although disposing of the case such a decision cannot be cited as authority. The case in 12 Q. B. D. may be put thus:—"If there was no appeal from it, then, according to the rule in the House of Lords, the decision is authority; if there was an appeal from it the best evidence of its correctness is the fact, that there was no appeal. If there was a right of appeal, I cannot conceive why (unless satisfied of its correctness) the Crown did not further test the question in a higher Court."

It is laid down by all the writers of authority on the construction of statutes that all statutes imposing a pecuniary burden, whether by way of tax or otherwise, are subject to the rule of strict construction: Maxwell on Statutes, 259; Potter's Dwarris on Statutes, Chap. V., and subsequent chapters. It was laid down by the Court in the cases of *Hull Dock Co.* v. *Browne*, 2 B. & Ad. 59; *Nicholson* v. *Fields*, 7 H. & N. 810, 816; *Parry* v. *Croydon Gas Co.*, 11 C. B. N. S. 579; S.C., 15 C. B. N. S. 568 that such was the correct view to take of statutes imposing pecuniary burdens.

Maxwell lays down the rule in this way:—"The subject is not to be taxed unless the language by which the tax is imposed is perfectly clear and free from doubt. In a case of doubt the construction most beneficial to the subject is to be adopted." The opinion of Lord Lyndhurst in *Stockton Railway Co.* v. *Barrett*, 11 C. C. & F. 602, and per Parke, B., *In re Micklethwaite*, 11 Ex. 456 is cited for the latter proposition.

In this case I might decide the question by saying that the Legislature has not specifically provided for the taxation of that which it is here proposed to tax, and if I have a doubt, I should decide against the assessment. With the strong views advanced in support of both sides of the question, candour compels me to say I have doubts, and

these will only be dispelled by an authoritative decision which I am bound to follow; but using the best judgment I can, in the light of Last's case, from which I have quoted so fully, and which I think is authority for me to follow, I hold that the amount going to the policy-holders is not income subject to assessment. I may say that in principle I see no difference between the English case of tax for general purposes of Government and here for municipal purposes.

Should the decision in Last's case be reversed and a different rule of taxation be declared, I will hereafter be free to follow that as the latest authoritative exposition of the law.

For these reasons I think the assessment for income should be reduced to $29,926.84, the amount agreed on by Counsel in the event of my decision being as it is.

COUNTY COURT OF NORTHUMBERLAND AND DURHAM.

BURNHAM v. WILLIAMS.

County Court Practice—O.J.A., r. 425.

Applications such as in the High Court of Justice are made on notice of motion in Toronto, may be made in the County Court on notice of motion.

Brown v. *McKenzie*, 18 C. L. J. 203, approved to that extent.

But the Court will still allow such applications to be made by summons as under the practice before the Judicature Act.

[Cobourg, Nov.

W. R. Riddell, for plaintiff.

H. F. Holland, for defendant.

CLARK, Co. J.,—This is an application on notice of motion to strike out certain paragraphs of the statement of defence. An objection has been made that the correct practice is that all such applications should, under Rule 425 of the O.J.A., be made by summons. My leanings are all in favour of this latter practice, but I cannot say that the law is clear that the former will not answer. The only reported case, *Brown* v. *McKenzie*, 18 C. L. J. 203, which has been cited to me, is in favour of the practice by notice of motion. I shall, therefore, until corrected, give effect to either practice indifferently.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

CHANCERY DIVISION.

Boyd, C.] [Oct. 22.

GILLEN v. THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF THE DIOCESE OF KINGSTON IN CANADA.

Mortgage—Custody of payments made to a solicitor—Agency—Adoption of payments.

G., a mortgagee left her mortgage in the office of McM., her solicitor and F., the mortgagor, paid the interest and $3.000 on account of principal to McM. who paid over the interest but retained the $3000 without saying anything about it. F. subsequently paid a further sum of $1.500 on account of principal and other sums of interest, all of which were paid over to G. In a mortgage suit by G. the defendants set up that McM. was the duly authorized agent to receive the sums paid him for principal and interest and it was contended that the subsequent receipt of the $1.500 and interest by G. was an adoption of the previous payment.

Held, that the custody of a mortgage confers no right whatever to the custodian to receive any part of the principal or interest secured. A mortgage not only secures money but it affects the land and so for its effectual discharge not only payment but re-conveyance is essential and for this reason the law does not infer a right to receive the money from the mere possession of this kind of security.

The adoption of a later payment of principal cannot be held to ratify a prior unknown payment unless, possibly it could be shown that there was an intention to adopt all the payments or that the position of the mortgagor was altered for the worse.

Cassels, Q.C., for plaintiff.

Moss, Q.C., and *Burdett*, for defendants.

Boyd, C.] [Oct. 22.

WELLS v. TRUST AND LOAN COMPANY.

Mortgagor and Mortgagee—Accounting—Surplus after sale under mortgage—Reasonable expenditure.

Appeal from report of the Master-in-Ordinary.

Mortgagees of lands in Ontario, held a collateral mortgage on lands in Kansas.

Default occurring they sold the lands in Ontario, employing W., a land agent, to effect the sale; W. acted also under a power-of-attorney from the mortgagor, who had agreed to a commission being allowed to him for selling.

Held, on action for an account brought by an execution creditor, who obtained his execution after the power-of-attorney had been given to W., and after the said agreement as to commission, that the payment of the commission was a proper item to allow the mortgagees in their account.

After the mortgage on the Kansas lands had been executed, the mortgagees discovered that the lands comprised in it had been sold for taxes and that there were also several executions against them, and they incurred expenses in staying the executions, and setting aside the tax sale. The mortgagor had approved of these proceedings being taken.

Held, that these expenses ought also to be allowed to the mortgagees in their accounts, for whatever bound the mortgagor, in taking the accounts, bound the plaintiff to the same extent. The plaintiff had no lien on the Kansas lands; his equity was to have the accounts taken as to these lands in order to marshall the defendants' securities for his benefit.

The mortgagees further incurred expenses in prosecuting unsuccessful litigation arising out of a seizure made by them under the power of distraint in their mortgage. The mortgagor did not sanction this litigation, (see *Trust and Loan Company* v. *Lawreson*, 45 U. C. R. 178, 6 A. R. 286).

Held, that this expenditure could not be allowed. The general rule is that the mortgagee is not allowed to add to his mortgage debt the costs of unsuccessful proceedings at law instituted by himself and not undertaken with the approval of the mortgagor.

Boyd, C.] [Nov. 26.

YOST v. ADAMS.

Will—Direction to pay debts—Executor's power to sell lands not devised—R. S. O. ch. 107, sec. 19.

Appeal from the Master's report.

A testator by his will directed his executors to pay his debts, etc., and then proceeded: "The residue of my estate and property which shall not be required for the payment of debts, I give and devise and dispose of as follows." Certain lands were not mentioned.

Held, that, nevertheless, the executors could give a good title to them to a purchaser, for the above words clearly imported an intention that the debts should be paid first out of the estate and property of the testator. This created a charge of the debts upon his lands, and the mere failure of the testator to enumerate all his lands in the subsequent part of the will, by which there was an intestacy as to the part in question in this action, did not detract from the conclusion that all the lands were so charged. The direction that his debts should be paid by his executors, conferred an implied power of sale upon them for the purpose of paying the debts out of the proceeds.

Held, also, that apart from the above, R. S. O. ch. 107, sec. 19, covered the case. The testator had not indeed within the meaning of that section devised the real estate charged in such terms as that his whole estate and interest therein had become expressly vested in any trustee, but he had devised it to such an extent as to create a charge thereon, which the Act in effect transmutes into a trust, and thereupon clothes the executor with power to fully execute that trust by conveying the whole estate of the testator.

Moss, Q.C., for the appeal.

H. J. Scott, Q.C., contra.

QUEEN'S BENCH DIVISION.

[Nov. 21.

HILLIARD v. ARTHUR.

The decision of Rose, J., 10 P. R. 281, was affirmed.

Clement, for the appeal.

Aylesworth, contra.

[Nov. 24.

FRIENDLY v. MEDLER.

The decision of Rose, J., 10 P. R. 267, was affirmed.

Walter Read, for appeal.

Wallace Nesbitt, contra.

COMMON PLEAS DIVISION.

Rose. J.] [July 23.

QUEEN v. NUNN.

Conviction — Certiorari — Return — Recognizance — Negativing exception—By-law—Ultra vires—Evidence.

Writs of *habeas corpus* and *certiorari* having been issued under R. S. O. c. 70, sec. 8, and returns made, a motion was made to file the returns.

Held, that the return to the *certiorari* is made for the assistance of the court, and that it is not necessary to enter into a recognizance. The returns having been filed, a motion was made for the discharge of the prisoner.

The conviction was for, "that the said Nunn, etc., did at London, etc., beat a drum on a public street called Dundas Street in said city, contrary to a by-law of said City of London, No. 179, etc."

The by-law provided (sec. 2) that "no person shall in any of the streets, or in the market-place of the City of London blow any horn, ring any bell, beat any drum, play any flute, pipe or other musical instrument, or shout, or make, or assist in making any unusual noise, or noise calculated to disturb the inhabitants ot the said City."

"*Provided* always that nothing herein contained shall prevent the playing of musical instruments by any military band of Her Majesty's regular army, or any branch thereof, or of any militia corps, lawfully organized under the laws of Canada."

Held, that it was not necessary to negative, in the conviction or commitment, the exception contained in the above proviso.

The statutory provision under which the above by-law was passed, (47 Vic. ch. 32, sec. 14, sub-sec. 12 O.), gives power to municipal councils to pass by-laws "for regulating or preventing the ringing of bells, blowing of horns, shouting and other unusual noises, or noises calculated to disturb the inhabitants."

No evidence was given on behalf of the prosecution to shew that the noise made by beating the drum was unusual and evidence on behalf of the prisoner was refused.

Held, that, as beating a drum is not mentioned in the statute, the by-law, so far as it seeks to prohibit the beating of drums simply, without evidence of the noise being unusual or calculated to disturb is *ultra vires* and invalid.

Held, also, that the evidence should have been received on the prisoner's part.

Prisoner discharged.

McMichael, Q.C., and *R. M. Meredith*, for motion.

Osler, Q.C., and *T. G. Meredith*, contra.

PRACTICE.

Boyd, C.] [Nov. 17.

BINGHAM v. MCKENZIE.

Changing venue—County Court action—Jurisdiction of Master in Chambers.

On an appeal from the order of the Master in Chambers, his jurisdiction to make an order changing the venue in a County Court action was doubted, and the order of the Master was also reversed on the merits.

Morson, for the appeal.

Shepley, contra.

Boyd, C.] [Nov. 17.

FUCHES v. HAMILTON TRIBUNE COMPANY.

Winding up order—Preferential claim for rent.

On a reference for winding up the defendants under the Act 45 Vic., (D.) cap. 23, the local Master at Hamilton disallowed a claim made by the landlords of t e defendants to be paid preferentially for nine months' overdue rent.

On appeal from the local Master, *Held*, that the rent having been overdue at the date of the commencement of the winding up proceedings and no steps having been taken by the landlords to assert their lien for rent till after that date, the Court will not aid the landlord.

Decision of the Master affirmed with costs.

Walker, for the appeal.

Carscallen, contra.

Boyd, C.] [Nov. 17.

LANGTRY v. DUMOULIN.

Appeal from taxing officer—Certificate—Objections—Filing.

An appeal from a taxing officer. The taxation was completed and the officer signed his certificate of the result on the 14th October. This certificate was not filed. On the 15th of October the officer issued a certificate to the appellant of the objections which had been made to his taxation upon which the appeal was based.

On objections taken to the appeal,

Held, that until the certificate was filed no proceedings could be taken under it or for the purpose of complaining of it. The officer erred when he certified *ex parte* after he had signed the certificate, as he was *functus officio* after making that certificate. The proper course was for the officer to include in his certificate the points of objection to his taxation.

Arnoldi, for the appeal.

Alfred Hoskin, Q.C., and *E. Douglas Armour*, contra.

Boyd, C.] [Nov. 18.

SWEETMAN v. MORRISON.

Interpleader—Sheriff's costs—Security.

Held, (on appeal by the claimant in an interpleader matter from the order of the Master in Chambers) that sec. 10 of the Interpleader Act, R. S. O. 50, authorizes security to be ordered for the sheriff's costs only in circumstances where it would be ordered as between ordinary litigants. The circumstances that the claimant was a married woman and in straitened circumstances, are not sufficient to warrant an order for security for the sheriff's costs from her.

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

Aylesworth, for the sheriff, and *Shepley*, for the ex-creditor, contra.

Boyd, C.] [Nov. 19.

RE ARMOUR, MOORE v. ARMOUR.

Administration—Representation in this Province—Real estate—Necessary application.

Upon a summary application for an order for the administration of the real and personal estate of the testator who died in Michigan, and whose will was proved there.

Held, that the practice of the Court is opposed to granting administration where representation has not been obtained in this country to the estate sought to be administered, unless, for one thing, it is very clearly established that there is no personal estate of the deceased within the jurisdiction in respect of which auxiliary letters probate could be obtained.

It is possible in this country to have an administration of the real estate without a general administration in a very special case, but that should be made upon pleadings and not by way of summary application.

Justin, for the motion.

Masten, contra.

Boyd, C.] [Nov. 19.

LAVERY v. WOLFE.

Production of papers on examination for discovery.

A motion to commit the plaintiff for not producing certain papers on his examination before a special examiner under the Chancery General Orders still in force, 138, 140. The plaintiff was served with a subpœna *ad test.* with a special clause therein requiring him to produce certain letters, books and documents at the time and place appointed for examination, but failed to produce the required papers.

Held, that the endeavor to combine the two methods of discovery (examination of parties and production of documents) by means of an examination and a subpœna *duces tecum* is not to be encouraged by treating non-production as a contempt. The proper course was to have had the examiner direct what should be produced and to have adjourned the examination for the purpose of procuring the documents.

O'Heir, for the motion.

Clement, contra.

Osler, J. A.] [Nov.

QUEEN v. WALKER.

Holman, moved on behalf of David Walker for leave to put in recognizance *nunc pro tunc*. It appeared that no recognizance had been entered into before the return of the writ of *certiorari* by the Clerk of the Peace. An order *nisi* to quash the conviction had been granted and issued but not served. The affidavit in support of the motion showed that before writ of *certiorari* had been applied for the convicting magistrates had refused to take the recognizance of the defendant.

OSLER, J.A., referred to the case of *King* v. *The Inhabitants of Abergale*, 5 A. & E., page 795, and ordered "that the return of the writ of *certiorari* be enlarged, and the writ sent back to the Clerk of the Peace in order that it might be duly returned after the defendant shall have entered into a proper recognizance with sufficient sureties pursuant to the Statute in that case made and provided."

FLOTSAM AND JETSAM.

IT is announced that the Queen has been pleased to confer upon the Right Honorable Sir John Macdonald the distinction of Knight Grand Cross of the Order of the Bath, in recognition of his eminent services to Canada and the empire. The *Gazette* (Montreal) says: "The occasion selected for the bestowal of this mark of great honor is most fitting, the fortieth anniversary of Sir John's entrance into public life. The dignity is an exalted one. The Order of the Bath is one of the most ancient and honorable in heraldry, and though it fell into disuse for a time in the seventeenth century, it was revived by George I. in 1725, and is now the second order in rank in England, the first being the Garter. By the statutes then framed for the government of the order, it was declared that besides the sovereign, a prince of the blood, and a great master, there should be thirty-five knights. The order was exclusively a military one down to 1847, when it was placed on its present footing by the admission of civil knights, commanders and companions. The order is divided into three classes, and it is to the first of these, that of the grand cross, that Sir John Macdonald has been raised, he having previously been decorated with the second class, that of Knight Commander. The civil list of the first class is limited to twenty-five, and Sir John's promotion leaves still one vacancy in the number. Among those upon whom the honor has been conferred in recent years are such distinguished men as Lord Dufferin, Sir Edward Thornton, Sir Bartle Frere, the Earl of Lytton, Sir Stafford Northcote, Lord John Manners, Sir Robert Peel, the Marquis of Hertford, Earl Sydney, and Viscount Halifax.

Law Society of Upper Canada.

OSGOODE HALL.

TRINITY TERM, 1884.

During this term the following gentlemen were called to the Bar:—Samuel Clement Smoke, William Durie Gwynne, Stephen Frederick Washington, Thomas Thomson Porteous, Alexander Duntroon McIntyre, Matthew Munsell Brown, William Grant Thurston, Thomas Edward Williams, John Stewart, Napoleon Antoine Belcourt, George Washington Field, Francis Henry Keefer, Douglas Armour, Flavius Lionel Brooke, Alexander Carpenter Beasley. The names are arranged in the order in which the candidates were called.

The following gentlemen were admitted as students-at-law:—Graduates, James Morris Balderson, Alexander Robert Bartlett, Joseph Hetherington Bowes, Samuel William Broad, George Filmore Cane, John Coutts, George Henry Cowan, Robert James Leslie, Archibald Foster May, John Mercer McWhinney, James Albert Page, Horatio Osmond Ernest Pratt, Thomas Cowper Robinette, Robert Karl Sproule, Ernest Solomon Wigle, James McGregor Young, Roderick James Maclennan, George Frederick Henderson, Samuel Walter Perry, Richard S. Box, William Wallace Jones, William Louis Scott, Edmund Kershaw. Matriculants: Henry Herbert Johnston, Albert E. Baker, Herbert Holman, Charles D. Macaulay, George Albert Thrasher, John Williams, Seymour Corley. Junior Class: Henry Elwood McKee, Edward Lindsey Elwood, Walter Scott MacBrayne, Edwin Owen Swartz, Joseph Frederick Woodworth, Owen Richards, William Allan Skeans, Richard Lawrence Gosnell, Frederick Ernest Chapman, Nathaniel Mills, James McCullough, jun'r., John McKean.

The following gentlemen passed the examination of Articled Clerks:—John Alfred Webster, Alexander William McDougauld.

BOOKS AND SUBJECTS FOR EXAMINATIONS.

Articled Clerks.

1884 and 1885.
- Arithmetic.
- Euclid, Bb. I., II., and III.
- English Grammar and Composition.
- English History—Queen Anne to George III.
- Modern Geography—North America and Europe.
- Elements of Book-Keeping.

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

Students-at-Law.

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

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

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

Translation from English into Latin Prose.

MATHEMATICS.

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

ENGLISH.

A Paper on English Grammar.

Composition.

Critical Analysis of a Selected Poem:—

1884—Elegy in a Country Churchyard. The Traveller.

1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

HISTORY AND GEOGRAPHY.

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

Optional subjects instead of Greek:

FRENCH.

A paper on Grammar,

Translation from English into French prose.

1884—Souvestre, Un Philosophe sous le toits.

1885—Emile de Bonnechose, Lazare Hoche.

or NATURAL PHILOSOPHY.

Books—Arnott's elements of Physics, and Somerville's Physical Geography.

First Intermediate.

Williams on Real Property, Leith's Edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and cap. 117, Revised Statutes of Ontario and amending Acts.

Three scholarships can be competed for in connection with this intermediate.

Second Intermediate.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Gov-

ernment in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three scholarships can be competed for in connection with this intermediate.

For Certificate of Fitness.

Taylor on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

For Call.

Blackstone, vol. 1, containing the introduction and rights of Persons; Pollock on Contracts; Story's Equity Jusisprudence; Theobald on Wills; Harris' Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law and Pleadings and Practice of the Courts.

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

1. A graduate in the Faculty of Arts, in any university in Her Majesty's dominions empowered to grant such degrees, shall be entitled to admission on the books of the society as a Student-at-Law, upon conforming with clause four of this curriculum, and presenting (in person) to Convocation his diploma or proper certificate of his having received his degree, without further examination by the Society.

2. A student of any university in the Province of Ontario, who shall present (in person) a certificate of having passed, within four years of his application, an examination in the subjects prescribed in this curriculum for the Student-at-Law Examination, shall be entitled to admission on the books of the Socity as a Student-at-Law, or passed as an Articled Clerk (as the case may be) on conforming with clause four of this curriculum, without any further examination by the Society.

3. Every other candidate for admission to the Society as a Student-at-Law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this curriculum.

4. Every candidate for admission as a Student-at-Law, or Articled Clerk, shall file with the secretary, six weeks before the term in which he intends to come up, a notice (on prescribed form), signed by a Bencher, and pay $1 fee; and, on or before the day of presentation or examination, file with the secretary a petition and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The primary examinations for Students-at-Law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity and Michaelmas Terms.

7. Graduates and matriculants of universities will present their diplomas and certificates on the third Thursday before each term at 11 a.m.

8 The First Intermediate examination will begin on the second Tuesday before each term at 9 a.m. Oral on the Wednesday at 2 p.m.

9. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

10. The Solicitors' examination will begin on the Tuesday next before each term at 9 a.m. Oral on the Thursday at 2:30 p.m.

11. The Barristers' examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2:30 p.m.

12. Articles and assignments must be filed with either the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

13. Full term of five years, or, in the case of graduates of three years, under articles must be served before certificates of fitness can be granted.

14. Service under articles is effectual only after the Primary examination has been passed.

15. A Student-at-Law is required to pass the First Intermediate examination in his third year, and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second year, and his Second in the first six months of his third year. One year must elapse between First and Second Intermediates. See further, R.S.O., ch. 140, sec. 6, sub-secs. 2 and 3.

16. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive certificates of fitness, examinations passed before or during Term shall be construed as passed at the actual date of the examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

17. Candidates for call to the Bar must give notice, signed by a Bencher, during the preceding Term.

18. Candidates for call or certificate of fitness are required to file with the secretary their papers and pay their fees on or before the third Saturday before Term. Any candidate failing to do so will be required to put in a special petition, and pay an additional fee of $2.

FEES.

Notice Fees	$1 00
Students' Admission Fee	50 00
Articled Clerk's Fees	40 00
Solicitor's Examination Fee	60 00
Barrister's " "	100 00
Intermediate Fee	1 00
Fee in special cases additional to the above.	200 00
Fee for Petitions	2 00
Fee for Diplomas	2 00
Fee for Certificate of Admission	1 00
Fee for other Certificates	1 00

Copies of Rules can be obtained from Messrs. Rowsell & Hutcheson.