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IN our first number for this year (*ante* p. 2), we noted a judgment of the learned Judge of the County of York in reference to some question left to his decision on a dispute between the City of Toronto and the Toronto Railway Company, under an agreement by which the city was entitled to a certain percentage upon the "gross receipts from all passengers, freight, express, and mail rates, and all other sources of revenue derived from the traffic obtained by the operation of the street railway."

The learned judge held that the city was only entitled to their percentage upon the daily receipts at the fare boxes of the fares of the passengers actually carried. On appeal, however, the contention of the city that the words "gross receipts from passenger fares" included receipts from all tickets sold from the date of sale, whether used or not, prevailed. As to the question whether money derived by the company from advertisers for the right of displaying their advertising cards in the cars of the company, it was held by the court above that the city was not entitled to any percentage upon revenue so derived.

THE "irrepressible boy" has recently been making himself more than ordinarily obnoxious to his companions, his parents, and those *in loco parentis*. We can boast in the Dominion of school boys who have succeeded after a second attempt in setting fire to, and nearly destroying, a well-known public institution in this province; but we have to go to the United States for something more malignant. Branding is common among cattle on the prairies, but it takes an eastern boy or girl to leave a life mark on the faces or shoulders of their companions and playfellows. The criminal aspect of these diabolical out-

rages has been alluded to, but of the civil remedies we have heard nothing. Probably the latter were not worth discussing, or possibly the parents of the fiends have made some settlement with the injured parties. This is quite a different thing from accidents arising from the rough-and-tumble games, characteristic of Anglo-Saxons, and which have something to do with the aggressive and dominant spirit that has carried that race to the front of the nations of the earth. Claims in connection with such mishaps do not often come into court. We notice, however, in this connection, the case of *Markley* v. *Whitman*, decided by the Supreme Court of Michigan in April, 1893 (54 N.W.R. 763). It appears that certain students engaged in a game of "rush" by which they form in a line, each one in the rear pushing the one in advance of him, and so on through the line until the one to be "rushed," and who is ignorant of what is coming, is rushed upon by the one in his rear. It was held that the game was a dangerous one, and the student who is "rushed" and unintentionally injures an unsuspecting fellow-student, who is not participating in the play, is guilty of an assault, and liable for damages; and that it is no defence that he was pushed by the others, or that he did not anticipate the consequences, or that the person injured was a fellow-student and not a stranger.

RIGHTS AND REMEDIES IN A FORECLOSURE ACTION.

(WALKER V. DICKSON, 20 A.R. 96.)

In law, no less than in other branches of science, we have our specialists, whose opinions are valuable in the ratio of the ability and knowledge they bring to bear upon a constantly recurring subject-matter.

If there be any one in Ontario whose opinion upon matters incidental to an action of foreclosure or sale might be taken to be conclusive, we should have thought that man was the Chancellor. But the Court of Appeal seems to have decided otherwise.

Walker v. *Dickson* is a noteworthy case in more respects than one. It introduces to us a species of mortgage which, if not absolutely unknown heretofore, is certainly a rare curiosity, and it places a much narrower construction upon the rule for avoiding

multiplicity of legal proceedings than the construction adopted by the Chancellor and by the Common Pleas Divisional Court.

The plaintiff was assignee of a mortgage made by the defendant Dickson. The lands were subsequently sold by Dickson to Rogers, part of the consideration being that Rogers should assume and pay off the mortgage. Rogers agreed with Collins to sell the lands to the latter, subject to the mortgage. Collins, being indebted to Milburn, requested Rogers to convey the lands to Milburn, it being intended that Milburn should hold the lands as security for his debt. Accordingly, a short form conveyance was executed by Rogers, purporting to convey the land to Milburn, subject to the mortgage, and thereupon Collins went into possession. Default having been made in payment of the mortgage, the plaintiff brought an action of foreclosure or sale against Dickson, Rogers, and Milburn, claiming payment, possession, etc.

Collins was thus a stranger to the title, and it was not pretended that the plaintiff knew anything about the transaction between Rogers, Collins, and Milburn.

The chain of title as registered was set out in the statement of claim, and Milburn was alleged to be the owner of the equity of redemption in possession.

Dickson, in his statement of defence, admitted the mortgage, but claimed indemnity against Rogers and payment by him of the mortgage. Rogers similarly admitted his liability to Dickson, and claimed indemnity against Milburn and payment of the mortgage.

The position taken by Milburn was peculiar, and, in the light of subsequent events, ought to be clearly borne in mind. *He made no defence to the plaintiff's claim*, but pleaded, as against Rogers, that the conveyance was, in fact, made to him by way of security for the debt due to him from Collins.

Upon the application of Rogers, an order was made directing that the issue between Rogers and Milburn should be disposed of at the trial of the action, and this order was affirmed by the Queen's Bench Divisional Court.

The case was tried before the Chancellor, whose judgment does not appear in the report, but the following extract shows the view he took of the transaction:

"I do not think this evidence relieves Milburn from the position he is in as subsequent purchaser. The conveyance is in

form absolute, whatever the agreement between him and Collins may be. I do not think Rogers is affected by the dealing which took place."

Judgment was accordingly given, ordering:

(1) Payment in six months, or, in case of default, a sale.

(2) The three defendants to forthwith pay to the plaintiff the mortgage moneys, interest, and costs.

(3) Milburn to deliver up possession.

(4) Milburn and Rogers to pay Dickson his costs of suit.

(5) Milburn to pay Rogers his costs of suit.

(6) If Dickson should be compelled to pay the plaintiff, then Rogers and Milburn to repay Dickson with interest and costs.

(7) If Rogers should be compelled to pay the plaintiff or Dickson, then Milburn to repay Rogers with interest and costs.

A motion was made by the defendant Milburn to set aside this judgment or for a new trial, but it was dismissed with costs by the Common Pleas Divisional Court.

On appeal to the Court of Appeal, the judgment of the Divisional Court was reversed with costs, and Milburn was relieved of all personal liability, upon the ground that he was, in fact, a mortgagee, and not a purchaser of the lands in question.

Mr. Justice Burton says (at p. 103): "If, as I think the evidence clearly establishes, he was mortgagee of Collins, it is very obvious that he could be under no obligation to indemnify his debtor against any prior encumbrances."

Mr. Justice Maclennan says (at p. 106): "It is clearly proved that Milburn is a mere mortgagee and not the owner of the equity of redemption, that person being Collins."

That a short form deed from A. to B. may be read as a mortgage from C. to B. is certainly a discovery.

The Chancellor, after perhaps a rather hasty examination of the specimen, declined to recognize it as belonging to the *genus* Mortgage at all. The Common Pleas Divisional Court placed it under their microscope, but came to the conclusion that it was at best a *lusus naturæ*, and they rejected it from their collection.

In the Court of Appeal, however, a more minute examination of its structure revealed the fact that in certain important features, especially in the head and tail, the specimen was identical with several well-known species of Mortgage. But the structure of *the body*, while indicating a slight correspondence with Welsh

Mortgages and also with the species known as Bristol Bargains, was found to be so peculiar as to necessitate its classification as a distinct species to be known henceforth as *Triangularis*.

Notwithstanding the opinions of the appellate court, we doubt whether the form of mortgage they have sanctioned—the shortest form on record, we imagine—will meet with any general acceptation by conveyancers. We shall listen with a good deal of curiosity to the opinion of their Lordships when such a mortgagee comes to the court to enforce his security against such a mortgagor.

The rule of Practice above referred to is deserving of more serious attention. It is thus expressed in the headnote:

"It is not proper, in an action for foreclosure, to join as original defendants the intermediate purchasers of the equity of redemption, and to order each one to pay the mortgage debt and indemnify his predecessor in title."

The right of a defendant in a foreclosure action to relief against a co-defendant was well established even before the Judicature Act. *Campbell* v. *Robinson*, 27 Chy. 634, is a leading case upon the subject. There the plaintiff held two mortgages made by the defendant Graham, who subsequently conveyed the lands to the defendants Robinson and Davidson, subject to the mortgages. The plaintiff filed his bill against Graham, claiming relief upon the covenant and against Robinson and Davidson, as being the parties entitled to redeem. Graham, by his answer, prayed relief against his co-defendants—that they should be ordered to pay to the plaintiff the amount which he (Graham) was liable to pay to the plaintiff.

After a careful examination of the authorities, the late Chancellor Spragge gave judgment in favour of Graham's contention. His Lordship, having pointed out that Graham occupied the position of surety for payment of the debt, went on to say: "And it is clear also that it is the right of a surety, upon the debt being in default, to call upon the party as to whom he stands in the relation of surety to pay the debt. This being the case, the question that remains is whether the surety Graham can have that relief against those for whom he is surety in this suit, and I see no good reason why he should not. It falls within the principle laid down by Lord Eldon in *Chamley* v. *Lord Dunsany*, 2 S. & L. 718, on appeal: 'Where a case is made out between defendants, by evidence

arising from pleadings and proofs between plaintiffs and defendants, a court of equity is entitled to make a decree between the defendants. Further, my Lords, a court of equity is bound to do so. The defendant chargeable has a right to do so. The defendant chargeable has a right to insist that he shall not be liable to be made a defendant in another suit for the same matter that may be then decided between him and his co-defendant; and his co-defendant may insist that he shall not be obliged to institute another suit for a matter that may be then adjusted between the defendants. In this case there is no reason against it, for, though it is not necessary to the plaintiff's case, he is not thereby delayed; and giving all the relief that can be given between the parties in one suit is carrying out the spirit of the Administration of Justice Act and the principle upon which this court acts of adjudicating, as far as is reasonably practicable, upon the rights of all parties in one suit. My conclusion, then, is that Graham, in this suit, is entitled to a direction in the *decree that his co-defendants pay to the plaintiff* the amount due upon the mortgages held by him, and he is entitled to his costs against them, inasmuch as it has been by their default in not paying Campbell that he has been put to costs."

It seems to follow from this decision that although a mortgagee (before the passing of the Judicature Act) could not *claim* personal relief against a purchaser of the equity of redemption, yet he could *obtain* it by permitting the defendants to adjust their rights in the one suit.

The Judicature Act, we take it, was intended to expand, rather than to contract, the powers of the courts in finally disposing of the rights of parties, as far as possible, in one action.

The wholesome doctrine of *Campbell* v. *Robinson* has been approved time and again in our courts, both before and since the Judicature Act. See *Chamberlain* v. *Sovais*, 28 Chy. 404; *McMichael* v. *Wilkie*, 18 A.R. 464.

In the last-mentioned case, Mr. Justice Maclennan says (at p. 473): "It was always the rule in Chancery to give, as between co-defendants, all the relief which their respective equities arising out of the plaintiff's case entitled them to, as stated by Lord Eldon in the House of Lords in *Chamley* v. *Lord Dunsany*, 2 S. & L., at p. 718; referred to by the late Chief Justice Spragge in *Campbell* v. *Robinson*, 27 Gr. 634. But that was confined to the case of defendants *who were proper parties to the suit, as between*

them and the plaintiff, because they were concerned in the relief sought by the latter."

The general rule of law applicable to cases such as the one under consideration is the following:

"The High Court of Justice and the Court of Appeal, respectively, in the exercise of the jurisdiction vested in them by this Act in every cause or matter pending before them respectively, shall have power to grant, and shall grant, either absolutely, or on such reasonable terms and conditions as to them shall seem just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter; so that, as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided." (Jud. Act, s. 52, s-s. 12.)

In the present case the doctrine enunciated in *Campbell* v. *Robinson* seems to have been totally ignored.

The following extracts indicate the views of the court with respect to the point under consideration:

Mr. Justice Burton says (p. 101): "This case discloses what, to my old-fashioned notions, appears to be a very strange and, I think, a very objectionable practice. The action is one for foreclosure or sale, the only necessary parties to which were the plaintiff, the mortgagee, Dickson the mortgagor, and the person who was, at the time of action brought, the owner of the equity of redemption. In such a suit the judgment or decree would be for a personal order against the mortgagor, and in default of payment an order for sale and an order for possession against the owner of the equity of redemption."

His Lordship then expresses the opinion that Rogers (the intermediate owner of the equity of redemption) was "most unnecessarily and improperly" made a defendant, and proceeds to declare the judgment of the court below erroneous in several particulars arising out of the misjoinder.

Mr. Justice Maclennan was not prepared to go so far as his learned brother, and he says (at p. 104): "Milburn's counsel appears to have made no objection at the trial to being compelled to litigate Rogers' claim against him in this action, and no objec-

tion was made by the plaintiff or any of the other parties. Besides voluntarily filing a statement of defence against Rogers' claim, specially so designated, Milburn appears to have acquiesced in the order of the Queen's Bench Division, and to have made no further opposition to the mode of trial which was thus forced upon him. But for this acquiescence, and what may be called consent on his part, I should have thought it clear that the trial of the question of indemnity in this action was irregular and unauthorized."

His Lordship fortifies this view of the matter by a reference to the opinion of the late Master of the Rolls in *Marner* v. *Bright*, and the court evidently adopted the same view, as they abstained from interfering with the judgment, except as respected Milburn.

So far, then, as this case was concerned, the rule of Practice laid down in the headnote was robbed of its sting.

But were their Lordships right in denouncing as "improper and unauthorized" the course which the plaintiff took in making Rogers, the intermediate owner of the equity of redemption, an original defendant?

The answer to this question depends chiefly, if not entirely, upon the law of principal and surety.

It is now settled law that creditors are bound to recognize, and give effect to, the rights of persons who have become sureties to the principal debtor, when and so often as notice of the relationship is received by such creditors; and this duty devolves upon creditors whether they are parties to the creation of the relationship or not.

In *Duncan* v. *N. & S. Wales Bank*, L.R. 6 App. Cas. 1, the point is stated in the headnote as follows:

"The acceptor of a bill of exchange knows that by his acceptance he does an act which will make him liable to indemnify any endorser of it who may afterwards pay it. The endorser is a surety for the payment to the holder, and, having paid it, is entitled to the benefit of any securities to cover it deposited with the holder by the acceptor."

The same relationship, with its corresponding rights and liabilities, arises when a mortgagor sells the lands subject to the mortgage, and the mortgagee receives notice of the transaction —the purchaser becomes the principal debtor (in respect of the lands), and the mortgagor becomes surety for payment of the

debt. (See *Blackley* v. *Kenney*, No. 2, and authorities collected in it, reported *ante* p. 108.)

Let us now apply these principles, and let us assume that Rogers had conveyed the equity of redemption to the real purchaser, Collins, by deed duly registered.

The plaintiff, by searching the registry office for the owner of the equity of redemption, receives notice of the conveyance (subject to the mortgage) from Dickson, the mortgagor, to Rogers, and therefore of Dickson's position being altered to that of a surety.

The plaintiff makes a similar discovery with regard to Rogers, who, upon execution of the conveyance to Collins, becomes surety, while Collins becomes, in respect of the land, the principal debtor.

De Colyar (Bl. Ser., 218) tells us that "The most important right which a surety possesses before any payment has been demanded of him is that, after the debt has become due, he may compel the debtor to exonerate him from his liability by at once paying the debt. To obtain this relief a surety must formerly have had recourse to a Court of Equity; and he should now resort to the Chancery Division, as being, since the Judicature Acts, the appropriate tribunal in such cases. 'Although,' says Lord Keeper North, 'the surety is not troubled or molested for the debt, yet at any time after the money becomes payable on the original bond this court will decree the *principal* to discharge the debt, it being unreasonable that a man should always have such a cloud hanging over him.'"

Consequently the respective rights of Dickson and Rogers to indemnity arose immediately upon default of payment occurring.

In *McMichael* v. *Wilkie (supra)*, Mr. Justice Maclennan pointed out a test for determining who were proper parties to such an action as *Walker* v. *Dickson*, and the test was, were they or were they not "concerned in the relief sought by the plaintiff"?

According to the view of Mr. Justice Burton (and, we suppose, of the other members of the court also), the only proper defendants were Dickson, the mortgagor, and Collins, the owner of the equity of redemption.

But can it be denied that Rogers was a person "concerned in the relief sought by the plaintiff"?

Here the relief sought by the plaintiff was payment of the

moneys due under Dickson's mortgage, or, in default, a sale of the lands. Rogers' liability to Dickson consisted of an obligation to pay that mortgage. Collins' liability to Rogers consisted of a similar obligation to pay the selfsame mortgage.

Now, while it is true that only the last purchaser is *the* owner of the equity of redemption, technically so called, it is equally true that an intermediate owner possesses *an* equity of redemption, and, being an assign of the mortgagor, he is entitled to pay off the mortgage, and take an assignment of all securities held by the mortgagee.

We should have thought that, under the authorities above referred to, the plaintiff was not only entitled to respect the mutual rights of these parties in the one action, but that he was bound to do so.

There is another and perhaps a more persuasive way of looking at the matter.

Under the principle of *Campbell* v. *Robinson (supra)*, we have seen that a plaintiff may *obtain* an order for payment of the mortgage debt as against a purchaser from the mortgagor, although he cannot *claim* it, the reason being that, the purchaser having undertaken to pay off the plaintiff's mortgage, there could be no injustice in ordering him to fulfil his obligation. If, instead of continuing to hold the lands, he conveys them to some one else, subject to the mortgage, he does not thereby absolve himself from his obligation to the mortgagor.

He is still entitled as against the mortgagee, and liable as against the mortgagor, to pay the mortgage debt. Subsequent purchasers of the equity of redemption would all occupy similar positions with regard to their grantors and grantees.

In this view of the matter all the intermediate owners of the equity of redemption might properly be made parties as original defendants, and be all ordered to pay the plaintiff's claim. By thus joining them, the plaintiff consents in advance to have their rights tried along with his.

The judgment against them all enforces the very obligation which each of them in turn had assumed, and, moreover, adjusts their rights *inter se*.

If the plaintiff is willing to risk a more protracted trial in order to obtain a more extensive remedy, where is the injury to anybody ?

Now, it was precisely in accordance with these principles that the Chancellor appears to have proceeded in the case under consideration, and it cannot fairly be said that, treating Milburn as a purchaser, the rights of all parties were not fully and finally adjusted in the one action.

But the way in which the Court of Appeal would have the rights of the parties adjusted seems to be the following:

Action No. 1. Walker should have sued Dickson, the mortgagor, and Collins, the owner of the equity of redemption. Dickson could then serve Rogers with a third-party notice, so as to bind him by the result of the action, *but could not obtain any relief against him*

Action No. 2. Dickson should have sued Rogers for indemnity, and the latter could draw Collins into the controversy on a third-party notice.

Action No. 3. Rogers should have similarly brought an action for indemnity against Collins.

We have already seen that Dickson and Rogers, respectively, acquired their rights of indemnification at the moment of default being made in the payment of the mortgage. We may, therefore, imagine the above three actions commencing simultaneously, and judgment being given in each of them on the same (subsequent) day.

And what is the nature of the judgment to which the parties would have been entitled?

In Action No. 2, the defendant Rogers would be ordered to pay, *not the plaintiff, but the mortgage debt*, or, in other words, to pay Walker, the mortgagee, and thus relieve Dickson, the plaintiff, from his liability as surety.

Similarly, in Action No. 3, Collins would be ordered to pay, not Rogers, but Walker, the mortgagee.

So that by these three actions, with triple sets of costs, the identical result would be reached as, under the Chancellor's judgment, was reached in a single action.

Surely this is a sad commentary on the rule for avoiding multiplicity of legal proceedings, above quoted.

It would be interesting to know how far, if at all, the Chief Justice and Osler, J.A., agreed with the *dicta* of Burton and Maclennan, J.J.A., on the point of practice above considered.

The real matter in dispute was the question whether Milburn was a purchaser or a mortgagee.

The decision that, after holding himself out as the owner in the registry office, and after allowing the plaintiff's claim against him (in which it was alleged that he was the owner of the equity of redemption) to go by default, he was nevertheless in fact a mortgagee may not commend itself to everybody; but that decision having once been reached, the claim for indemnity against him would necessarily collapse.

A. C. GALT.

CURRENT ENGLISH CASES.

TRUSTEE ACT, 1850—ORDER VESTING STOCK—FORM OF VESTING ORDER—"STOCK," MEANING OF.

In re New Zealand Trust and Loan Co., (1893) 1 Ch. 403, a question was raised as to the form of an order made under the Trustee Act, 1850, vesting the right to call for a transfer of stock in trustees. The order in question vested "the right to call for a transfer and to transfer" certain shares in a joint stock company "to any purchaser or purchasers." The company appealed from the order on various grounds. (1) That the act did not apply to the shares in question because they were not fully paid up. (2) That the company had a discretion to refuse to register transfers and therefore the order ought not to have contained the words "to any purchaser or purchasers," but that the name of the transferee should have been inserted. The Court of Appeal (Lindley, Bowen, and Smith, L.JJ.) overruled both of these objections and affirmed the order of Chitty, J.; but the court intimated that though the court had power to put in the words "to any purchaser or purchasers," yet that it would be better, as a general rule, to omit them in the absence of any special reason for putting them in.

STATUTE—CONSTRUCTION—EJUSDEM GENERIS.

Skinner v. *Shew*, (1893) 1 Ch. 413, may be referred to as illustrating an exception to the rule that general words following particular words in a statute are to be construed as *ejusdem generis* with the particular words. In this case the statute in question provided that "where any person claiming to be the patentee of an invention, by circulars, advertisements, *or otherwise*, threatens any other person with any legal proceedings," any party affected may

take proceedings to restrain such threats. The question was whether the words *or otherwise* were to be construed so as to limit the operation of the Act to threats made by a similar manner to circulars and advertisements. The Court of Appeal (Lindley, Bowen, and Smith, L.JJ.) agreed with North, J., that the statute was intended to prevent the making of threats in any manner whatever, and therefore that threats made by the defendant by letter to the plaintiffs were within the statute.

LUNATIC—ALLEGED LUNATIC—COSTS OF INQUIRY AS TO SANITY OF ALLEGED LUNATIC—LUNACY ACT, 1890 (54 & 55 VICT., C. 5), S. 9—(R.S.O., C. 54, S. 18).

In re Cathcart, (1893) 1 Ch. 466, it was held by the Court of Appeal that the costs of an inquiry into the mental condition of an alleged lunatic may, notwithstanding such person is found to be sane, be ordered to be paid out of his estate together with the subsequent costs of enforcing such order, under the power given to the court over the costs of such proceedings by the Lunacy Act, 1890 (53 & 54 Vict., c. 5), s. 109. (See R.S.O., c. 54, s 18.) In this case the inquiry was instituted by a husband against his wife, who was found to be sane, and two-thirds of the costs of the inquiry were ordered to be paid out of her estate.

DEBENTURE-HOLDERS—COMPROMISE—MEETING—MAJORITY BINDING MINORITY—NOTICE OF MEETING—ARRANGEMENT TO RECEIVE SHARES INSTEAD OF DEBENTURES.

In *Sneath* v. *Valley Gold*, (1893) 1 Ch. 477, the plaintiff was a debenture-holder, and brought the action to restrain the carrying out of an arrangement whereby the majority of the debenture-holders had agreed that the debentures should be exchanged for ordinary shares in a new company. The debentures in question charged all the company's property, and were subject to a provision that a meeting of debenture-holders should have power by special resolution "to sanction" any modification or compromise of the rights of the debenture-holders against the company or against the property. The company afterwards transferred its assets to a new company, and this company subsequently passed a resolution for a voluntary winding up with a view to reconstruction. Its funds were exhausted, and its property consisted of mining rights in California which were liable to be forfeited unless fees to a considerable amount were paid. A scheme was then formed to organize a new company with a larger capital, and as

part of the scheme the debenture-holders were to accept ordinary shares in the new company. This scheme was duly sanctioned by a majority of the debenture-holders, and the Court of Appeal (Lindley, Lopes, and Kay, L.JJ.), though not agreeing with the reasons of North, J., affirmed his decision dismissing the action. North, J., was of opinion that if the resolution did not bind the plaintiff h' was not damnified; but the Court of Appeal disposed of the case on its merits, and held that the plaintiff could not succeed because he was barred by the decision of the majority of the debenture-holders. In the foot note on p. 484, a similar case, *Mercantile Investment Co.* v. *International Co. of Mexico*, is also reported, in which the Court of Appeal (Lindley, Bowen, and Fry, L.JJ.) decided that the majority of debenture-holders could not bind a dissentient minority under a similar provision where the debenture-holders' rights were undisputed and capable of being enforced without difficulty. In other words, unless the occasion for a "compromise" of the rights of the debenture-holders exists, the power to bind the minority by any resolution for the modification of their rights does not arise. The Court of Appeal also held in that case that an advertisement in a newspaper concerning a meeting of shareholders under a trust deed is sufficient notice, unless the deed expressly requires the notice to be given by circular or otherwise; and that a notice required to be "at least fourteen days" means that there must be fourteen clear days between the issue of the advertisement or circular calling the meeting and the day of the meeting, but that it is not necessary that there should be fourteen days between the day such notice actually comes to the knowledge of the persons required to be notified and the day of the meeting.

VENDOR AND PURCHASER—COVENANT FOR TITLE—INCUMBRANCE BY PERSON FROM WHOM VENDOR PURCHASED.

David v. *Sabin*, (1893) 1 Ch. 523, is a case which under the Ontario system of registration of deeds could hardly arise; at the same time it is deserving of notice as showing the extent to which a covenant for title is binding on the covenantor. The defendant granted a lease for ninety-nine years to one Baylis. Baylis made certain sub-leases by way of mortgage. Subsequently he surrendered the original lease to the defendant without disclosing the existence of his sub-leases. By a subsequent

deed the vendor conveyed the land to Baylis in fee, the deed containing an implied statutory covenant for title; the plaintiff subsequently acquired title under this deed. The sub-leases were subsequently discovered, and the plaintiff then brought this action for damages for breach of the implied covenant; and the Court of Appeal (Lindley, Bowen, and Smith, L.JJ.), overruling Romer, J., held that the term of ninety-nine years was still subsisting for the benefit of the sub-leases, and was "an act done by the defendant" within the meaning of the implied covenant for right to convey, and that the creation of the sub-leases, by Baylis was an incumbrance made by "a person rightfully claiming through the defendant" within the meaning of the implied covenants for quiet enjoyment and freedom from incumbrances, and that therefore the plaintiff was entitled to recover. It was also held that though the defendant would have had a good defence against Baylis if he had brought an action for breach of covenant on the ground of Baylis' fraud, yet that he had no defence on the ground as against the plaintiff who had purchased without notice of the fraud, and was not affected by Baylis' disability.

PRACTICE—APPEAL FOR COSTS—TRUSTEE—ORD., LXV. R. 1—(ONT. RULE 1170).

In re Beddoe, Downes v. *Cottam*, (1893) 1 Ch. 547, the Court of Appeal (Lindley, Bowen, and Smith, L.JJ.) decided that when an order is made in an action respecting a trust estate allowing to a trustee costs of other proceedings in which he has been concerned as trustee, such costs are not, like the costs of the action, within the discretion of the judge under Ord. xlv., r. 1 (Ont. Rule 1170), but are charges and expenses in the administration of the trust, and are the subject of appeal. In the present case the trustee had, as the Court of Appeal thought, improperly refused to deliver up to a tenant for life the title deeds, and in consequence an action of detinue was brought against the trustee, and judgment recovered against him with costs. Kekewich, J., had allowed the trustee the costs so incurred out of the trust estate; but the Court of Appeal held that the trustee, not having shown any reasonable cause for defending the action, was not entitled to retain out of the trust estate any costs of the action beyond the amount he would have incurred had he applied for leave to defend it.

WILL—GIFT TO CHILDREN AS A CLASS—LAPSE—ISSUE TAKING BY SUBSTITUTION—WILLS ACT (1 VICT., C. 26), S. 33—(R.S.O., C. 109, S. 36).

In re Harvey, *Harvey* v. *Gillow*, (1893) 1 Ch. 567, the effect of the Wills Act, s. 33 (R.S.O., c. 109, s. 36), was in question. The cases of *Olney* v. *Bates*, 3 Drew. 319, and *Browne* v. *Hammond* 3 Joh. 210, had determined that the section did not apply to gifts to children or grandchildren as a class; but it was sought to create a distinction where, as in the present case, the class consisted of but one individual; but Chitty, J., was of opinion that that fact made no difference. In the present case a testator had made a gift of residuary personal estate to his daughter, E.A.E., for life, and after her death in trust for her child or children, and in default there was a gift over. E.A.E. had only one child, who had predeceased the testator, leaving a child. Chitty, J., held that the personal representative of the deceased child of E.A.E. was not entitled to the share she would have taken had she survived the testator, because the gift to the child or children of E.A.E. was to a class, notwithstanding that in the events that happened the class only consisted of one individual, and he held that the gift to the children of E.A.E. lapsed, and that the gift over consequently took effect.

COMPANY—DEBENTURE-HOLDERS—RECEIVER AND MANAGER, APPOINTMENT OF—FLOATING SECURITY—DEBENTURES NOT IN ARREAR.

In *Edwards* v. *Standard Rolling Stock Syndicate*, (1893) 1 Ch. 574, North, J., at the instance of the plaintiffs, who were debenture-holders, whose debentures were a first charge on all the property of the defendant company as a "floating security," with the consent of the defendant company appointed a receiver and manager of the company's business, notwithstanding the fact that no part of the principal or interest payable under the debentures was in arrear—though with some hesitation.

PARTNERSHIP—ARTICLES—PROVISION FOR CESSER—RECEIVER AND MANAGER OF PARTNERSHIP.

Collins v. *Barker*, (1893) Ch. 578, was an interlocutory application for the appointment of a receiver and manager of a partnership business. The plaintiffs were trustees in bankruptcy of two of the partners, and the defendant was the remaining member of the firm. The partnership articles contained a pro-

vision that, in the event of the death or bankruptcy of any member of the firm, he should be deemed to have ceased to be a partner from the date of his death or bankruptcy, and that his share in the capital should remain as a loan to the solvent member of the firm at interest secured by his covenant or bond. The firm was composed of a father and his two sons; the father had contributed all of the capital. He and one of the sons became bankrupt, and their trustees, the plaintiffs, claimed that the provision as to their share of the capital being a loan to the solvent partner was void as against creditors, and the present motion was for the appointment of a receiver and manager of the business *pendente lite*. Stirling, J., held that the defendant was, under the circumstances, entitled to be appointed receiver and manager on his giving security, and subject to the usual provision of passing his accounts, and also to his furnishing the plaintiffs with proper accounts and giving them reasonable access to the books, and paying balances when they reached an amount to be agreed on into court. Though not deciding the point, Stirling, J., intimated an opinion that the provision for cesser in case of bankruptcy was void.

WILL—TRUST FOR CONVERSION—TENANT FOR LIFE AND REMAINDERMAN—PROPERTY RETAINED AT A LOSS AFTER TIME FOR CONVERSION—APPORTIONMENT OF LOSSES.

In re Hengler, Frowde v. *Hengler*, (1893) 1 Ch. 586, the question was how the losses resulting from the retention of property after the date fixed for its conversion by a will were to be apportioned as between a tenant for life and remainderman. The property in question consisted of leaseholds, and, when the day fixed for its conversion arrived, it appeared that it would be for the benefit of all persons interested that it should be retained by the trustees of the will and managed by them though at a probable annual loss. Kekewich, J., was of opinion that the annual loss or profit, if any, ought to be apportioned between capital and income by estimating the sum which, put out at interest at 4 per cent. per annum on the day fixed for conversion, and accumulating at compound interest at the like rate with yearly rents, would, together with such interest and accumulation, be equivalent at the end of each year to the amount of such profit or loss, and the sum so ascertained was to be credited to or charged against the

capital of the testator's estate, and the rest of such profit or loss was to be credited to or charged against the income. For the purpose of making this apportionment, an inquiry was directed as to the amount of actual profit or loss at the end of each year resulting from the retention of the property.

TRUSTEE—BREACH OF TRUST—STATUTE OF LIMITATIONS—TRUSTEE ACT, 1888 (51 & 52 VICT., C. 59), S. 8—(54 VICT., C. 19, S. 13 (O.)).

In re Gurney, Mason v. *Mercer*, (1893) 1 Ch. 590, was an action by a *cestui que trust* against the trustees for an account, and set up alleged breaches of trust. Among other defences the trustees claimed the benefit of the Trustee Act, 1888 (54 Vict., c. 19, s. 13 (O.)). The breach of trust relied on was the making of an improper investment of the trust funds in property of a speculative and insufficient value. The moneys so advanced had, with the consent of the mortgagor, been applied in discharge of a prior mortgage upon the property in favour of a bank in which one of the trustees was a partner. It was contended by the plaintiff that this amounted to a conversion by the trustee of the trust money to his own use, and that therefore the case was within the exception mentioned in the statute, and the limitation of the right of action contained in the Trustee Act, 1888, did not apply. There was no charge of fraud; and Romer, J., held the trustees were entitled to the protection of the statute, and the transaction impeached, having taken place in 1878, and, the action not being commenced until 1890, he held that it was barred, and the action was therefore dismissed.

POWER OF ATTORNEY—SALE AND TRANSFER OF STOCK—PRINCIPAL AND AGENT—FOREIGN PRINCIPAL.

Crossley v. *Magniac*, (1893) 1 Ch. 594, was an action by a principal against his agent. The plaintiff (a resident in Canada) had sent through a stockbroker living in Yorkshire, England, a power of attorney to the defendants, a firm of London stockbrokers, to sell out certain stock of which the plaintiff was the owner. The defendants sold out the stock and received the proceeds, and credited the amount in their accounts with the stockbroker in Yorkshire, but never paid him any money expressly on account of the stock so sold. The Yorkshire stockbroker having become bankrupt, and no payment having been made to the plaintiff, he claimed to recover the proceeds of the stock from the defendants,

and Romer, J., held that he was entitled to do so, and that the defendants could not discharge themselves from the liability to account to the plaintiff by crediting the money in their accounts with the Yorkshire broker. For even assuming that the latter was authorized to receive the money for the plaintiff, he held that that did not justify the defendant in appropriating the money in payment of a debt due to them by the Yorkshire broker on his private account.

COMPANY—MEETING OF SHAREHOLDERS—VOTING—PROXIES.

In re Bidwell, (1893) 1 Ch. 603, Williams, J., held that at a meeting of the shareholders of a joint stock company, the articles of which allow voting by proxy, even though no poll is demanded, yet the chairman, in ascertaining the number of votes given, must count the vote of each person who has appointed a proxy as but one vote, irrespective of the number of shares held by such person.

COMPANY—TRANSFER OF STOCK—BLANK TRANSFER—FILLING UP BLANK TRANSFER—LEGAL TITLE.

Powell v. *London and Provincial Bank*, (1893) 1 Ch. 610, is an illustration of the maxim of equity, "where the equities are equal the law must prevail," and serves to show the importance of acquiring a legal title, as contrasted with a merely equitable one. The facts of the case were that a person entitled to stock as a trustee deposited with the defendants, as security for a loan, a stock certificate showing that the borrower was entitled as executor; also an agreement to execute a transfer of the stock when required, and, further, a transfer executed by him, but with the name of the transferee left blank. Before making the advance the defendants' manager inquired of the borrower whether he was absolutely entitled, and was informed that he was. The defendants had no notice of the trust on which the borrower, in fact, held the stock. Some time after the loan was made the bank filled in their own name as transferees in the blank transfer, and without any re-execution or redelivery of the transfer procured themselves to be registered as owners of the stock. The plaintiffs claimed to be the equitable owners of the stock under the trusts upon which the trustee had, in fact, held it; and Wright, J., although holding that the defendants were purchasers for value without notice of

the trust, nevertheless held the plaintiffs' title must prevail over the defendants', on the ground that the transfer, filled in, as it was, with the name of the defendants as transferees without any re-execution or redelivery by the trustee, was null and void, and failed to pass the legal title.

Notes and Selections.

ATTORNEYS—COMPENSATION—DEFENCE OF POOR CRIMINALS.—In *Presby* v. *Klickitat County*, the Supreme Court of Washington hold that an attorney appointed by the court to defend a poor person accused of crime, as provided by Code Proc., section 1271, is not entitled to any compensation for his services, since the statute does not expressly provide therefor, and it is a part of an attorney's professional duty not to withhold his services from one who is stricken by poverty, and accused of crime. To compel an attorney to render services gratuitously in such a case does not cast a burden or levy a tax on him not borne by citizens engaged in any other profession or business, nor is the taking of his time and labour, which is his property, without compensation, and without due process of law, in violation of the constitution.

ELECTRIC STREET CARS.—The observations in the cases hereafter referred to are in point nowadays in those of our cities where electric street cars are in use, and are worthy of note: In *Winter* v. *Federal St. & P. V. Pass. Ry. Co.*, Supreme Court of Pennsylvania, January 30, 1893, it was held that where one, after dark, obstructs an electric street-car track with his team while unloading his wagon, he is guilty of such negligence as will bar an action for the injuries to the team from a car, though it was more convenient to unload the wagon in that position than in any other. The court said: "Now that rapid transit is recognized and demanded as essential to the prosperity of, and the transaction of business in, our large cities, the use of the streets for individual convenience is necessarily qualified so as to make such transit possible, and to minimize its dangers. The substitution of cable and electric cars for the horse car and the omnibus is a change which renders

impracticable and dangerous certain uses of the streets which were once permissible, and comparatively safe. It introduces new conditions, the non-observance of which constitutes negligence. It is the duty of property owners on the streets occupied by cable and electric lines of railway, and of persons crossing or driving upon such streets, to recognize and conform to these conditions. The risk of a crossing or possession of the tracks of a railway operated by horse power is not to be compared with the peril involved in a crossing or occupancy of the tracks of steam, cable, or electric railway."

TRIAL BY JURY.—A learned chief justice in Alabama, in a recent judgment, gets off the following: "Trial by jury is a bulwark of American, as it has long been of English, freedom; it wisely divides the responsibility of determinative adjudication, of punitive administration, between the judge, trained in the wisdom and intricacies of the law, and twelve men chosen from the common walks of non-professional life—chosen for their sound judgment and stern impartiality. The one declares the rules of law applicable to the issue or issues formed in the light of the testimony adduced; the other weighs the testimony, determines what facts it proves, and, moulded by the law as declared by the court, renders its verdict. In the jury box, and under the oath the jurors have solemnly sworn on the holy evangelists of Almighty God, there is no room for friendship, partiality, or prejudice; no permissible discrimination between friends and enemies, between the rich and the poor, between corporations and natural persons. The ancients painted the Goddess of Justice as blindfolded, and jurors must be blind to the personal consequences of the verdicts they render. If the testimony convinces their judgments of the existence of certain facts, they must be blind to the consequences which result from those facts. A wish that it were otherwise furnishes no excuse for deciding against their convictions. Justice thus administered commands the approbation of heaven and earth alike; and a verdict thus rendered meets all the requirements of the juror's oath, in the fullest sense of the word—a true expression of the convictions fixed on the minds of the jury by the testimony."

It is very sad to know that this much-lauded relic of bygone days should have so far forgotten its high position and glorious

heritage as to compel the learned chief justice, doubtless with many tears, to declare that the verdict of the jury in the case in which the panygeric was uttered "was so palpably against the evidence" that a new trial had to be granted. Poor "old bulwark"!

THE same learned chief justice must, we think, have had his eye on a further term when, in the same judgment, he got off the following solemn warning to obey the law as it "stands on the statute book." He says: "If we cut loose from its restraints, we expose ourselves to the tempests of human passion and human prejudice, and, like a ship at sea without a rudder or compass, will surely be dashed on some of the many shoals which are found all along the voyage of life."

We seriously think of asking him to take charge of our staff of poets, which, we regret to say, is not only increasing in number, but becoming very unmanageable.

PRISONERS GIVING EVIDENCE ON THEIR OWN BEHALF.—The Bill to Amend the Law of Evidence in Criminal Cases, which has just been introduced into Parliament by Lord Herschell, purports to remove from our criminal procedure the anomalous rules which still practically debar a prisoner, or the wife or the husband of a prisoner, from giving evidence on his behalf. Unlike its contemporaries in France and Germany, the criminal law of England is essentially contentious in character. A criminal trial is not so much an investigation instituted by the State and conducted by a State official appointed to inquire into and ascertain the guilt or the innocence of a prisoner as a suit, with the prosecutor for plaintiff, the accused for defendant, and the judge as a mere official arbiter charged with the duty of holding the balance between them and seeing that the issue is fairly contested. Hence it comes to pass that the judge has no independent inquisitorial powers, and the seal of silence is placed on the lips of the prisoner, lest his voice should contribute to the proof of his guilt, which his accuser is bound to establish; and that, on the other hand, the prosecutor has the benefit of those rigid rules of evidence which, in civil causes, used to exclude from the witness-box nealy all interested testimony. Whether this is or is not a complete historical explana-

tion of the anomalies to which we refer, the expediency of removing them is no longer open to doubt. The rule which, in most cases, still prevents the wife or the husband of a person charged with an offence from giving evidence at the trial has already been impliedly condemned in the condemnation of the analogus doctrine which formerly prevailed in our law of civil procedure, and the strong natural bias under which such witnesses labour is in fact, and ought to be in law, an objection to their credibility and not to their competency. Again, the compulsory silence which, in the great majority of cases, the law has imposed upon persons charged with the commission of criminal offences is at variance with the settled principle that the best evidence ought to be adduced in proof or disproof of any alleged fact, and although, doubtless, intended for their protection, easily lends itself to injustice and oppression. At present a prisoner is too often a mere bewildered spectator of a game of chance or skill played by a number of legal experts, with a judge as umpire, and his own liberty or life as the stake. Lord Herschell's Evidence in Criminal Cases Bill attempts—and, in our opinion, attempts successfully—to redress the grievances to which we have called attention. It provides that a person charged with an offence, and the wife and husband of any such person, shall be a competent witness at his or her trial, "whether the person so charged is charged solely or jointly with another." But no prisoner will be examinable without his own consent, nor will the wife or husband of an accused person be permitted to give evidence without the consent of such person, save where a husband is prosecuted under the Vagrancy Act, 1824, for deserting his wife or refusing to maintain her. A person giving evidence in pursuance of the Bill will not be excused from answering any question on the ground that it tends to prove the prisoner guilty of the offence with which he is charged, but he shall not be asked, or, if asked, required to answer, any question the object or effect of which is to show that such a prisoner has committed some other offence, or is of bad character, unless such proof is legally admissible as evidence of the particular offence in issue, or the accused has himself called evidence with a view to establish the fact that his character is good. In our judgment, one Lord Chancellor's Bill has fairly preserved the *via media* between the laxity of continental and the exclusiveness of English criminal inquiries. It admits all evidence relevant to

the question of a prisoner's guilt; it leaves prosecuting counsel perfectly free to expose and comment upon the bias of a prisoner and his witnesses. At the same time, it gives a person accused of an offence an opportunity of explaining his conduct infinitely more satisfactory than the unsworn statement which some modern judges permit him to make, and subjects his testimony to the crucial test of cross-examination without commiting the error, which has vitiated continental criminal jurisprudence, and has even appeared in the administration of justice in several of the American States, of allowing a prosecutor to show that a man has perpetrated one crime by accumulating a mass of testimony or prejudice to prove that he has perpetrated another. Subject to any amendments which the legal wisdom of Parliament may suggest, we hope that this measure will pass into law.—*Law Journal.*

Correspondence.

THE COURT OF APPEAL.

To the Editor of THE LAW JOURNAL:

DEAR SIR,—Can you tell me why it is that our Ontario Court of Appeal is made up of even numbers? A case was reported the other day as having fallen through because two judges were on one side and two on the other, and this is not at all a solitary case. I believe, in this instance, with Rory O'More, that "there's luck in odd numbers."

Yours, LEX.

[We believe the theory of the even number is that if the court is equally divided it is right that the decision of the court below should stand, thus, as far as possible, insuring a majority judgment. This, of course is not always obtainable. Many instances have occurred where an unsuccessful litigant has had a considerable majority of judges in his favour, as for example the case of *McKay* v. *Crysler*, 3 S.C.R. 436, where nine judges were overruled by three; Spragge, C., Blake and Proudfoot, V.C.C., Moss, C.J., Burton, Patterson, Morrison, Strong, and Gwynne, JJ., being in favour of the plaintiff, whilst Ritchie, C.J., and Fournier and Henry, JJ., only agreed with the defendant, who, however, succeeded. We are inclined to think it is best that there should be an even number, though it is not a rule that works satisfactorily in all cases.—ED. C.L.J.]

DIARY FOR MAY.

1. Monday.....Law School ends. St. Thomas Chancery sittings. Hamilton Assizes.
2. Tuesday.....Supreme Cou. sits. J. A. Boyd 4th Chancellor, 1881.
3. Wednesday..London Assizes.
4. Thursday....Mr. Justice Henry died, 1888. 2nd Intermediate Examination (last).
6. Saturday....Lord Brougham died, 1868, aged 90.
7. Sunday.....*Rogation Sunday.*
8. Monday.....St. Catharines Assizes.
9. Tuesday.....Ct. of Appeal sits. Gen. Sess. and Co. Ct. sittings for trial in York. Exam. for Certificate of Fitness.
10. Wednesday..Examination for Call.
14. Sunday.....*Sunday after Ascension.*
15. Monday.....Easter Term begins. Toronto Chy. sittings begin. Chy., Q.B., and C.P. Divisions H.C.J. sit.
16. Tuesday.....Convocation meets.
18. Thursday....Brantford Chancery sittings.
19. Friday .....Convocation meets.
21. Sunday.....*Pentecost. Whit Sunday.* Confederation proclaimed, 1867.
22. Monday.....Earl of Dufferin, Governor-General, 1872.
24. Wednesday..Queen Victoria born, 1819.
25. Thursday....Guelph Chancery sittings.
26. Friday.....Convocation meets.
27. Saturday....Habeas Corpus Act passed, 1679.
28. Sunday.....*Trinity Sunday*
29. Monday.....Peterborough Chancery sittings.

Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

COURT OF APPEAL.

From C.P.D.] [April 20.

MACDONALD *v.* BALFOUR.

Assignments and preferences--Partnership and separate estate--R.S.O., c. 124, s. 5.

Where an assignment for the benefit of creditors is made by an assignor carrying on business by himself, creditors having claims against him for goods sold to a firm in which he was formerly a partner are entitled to rank against his estate ratably with creditors having claims for goods sold to the assignor alone.

Section 5 of R.S.O., c. 124, does not apply to such a case, but only to the case of an assignor who has both separate estate and joint estate.

Judgment of the Common Pleas Division affirmed.

J. J. Scott for the appellant.

J. H. Macdonald, Q.C., for the respondents.

From Q.B.D.] [April 20.

IN RE THOMPSON *v.* HAY.

Prohibition— Division Court — Territorial jurisdiction — Transfer—R.S.O., c. 51, s. 87—52 Vict., c. 12, s. 5 (O.).

Under R.S.O., c. 51, s. 87, as amended by 52 Vict., c. 12, s. 5 (O.), either party in a Division Court action may, after notice disputing the jurisdiction has been duly given, apply to have the action transferred to another court. If no application be made, and if, in fact, there be jurisdiction, prohibition will not lie merely because the judge assumes that because no application for a transfer has been made he has jurisdiction ; but if, in fact, there be no jurisdiction, the objection still holds good, and prohibition will be granted.

Judgment of the Queen's Bench Division, 22 O.R. 583, affirmed.

Shepley, Q.C., for the appellant.

G. W. Marsh for the respondent.

From GALT, C.J.] [April 20.

IN RE CAMPBELL AND THE VILLAGE OF LANARK.

Municipal corporations—Bonus—By-law—Evasion of Act.

A municipal corporation cannot now grant a bonus for promoting any manufacture, and what it cannot do directly it will not be allowed to do indirectly or by subterfuge.

Therefore a by-law, valid on its fact, purporting to purchase a water privilege for electric-lighting purposes, but shown to be really a by-law to aid the owner of the water privilege in rebuilding a mill, was quashed.

Scott v. *Corporation of Tilsonburg*, 13 A.R. 233, applied.

Judgment of GALT, C.J., reversed.

Osler, Q.C., for the appellant.

Marsh, Q.C., for the respondent.

From GALT, C.J.] [April 20.

MASON *v.* JOHNSTON.

Limitation of actions—Judgment—Execution—Accord and satisfaction—Part payment—R.S.O., c. 44, s. 53 (7)—R.S.O., c. 60, s. 1—R.S.O., c. 111, s. 23.

A judgment remains in force for twenty years at least, the only limitation that can be applicable to it being R.S.O., c. 60, s. 1. In view of the amendment made in R.S.O. (1877), c. 108, s. 23, by the revision of 1877, R.S.O., c. 111, s. 23, the English authorities such as *Jay* v. *Johnstone* (1893), 1.Q.B. 189, and cases there cited, do not apply.

Boice v. *O'Loane*, 3 A.R. 167, followed.

Part payment of a judgment must, to be an extinguishment thereof, be expressly accepted by the creditor in satisfaction. Where, therefore, the judgment debtor forwarded to the solicitor of the judgment creditor a bank draft, payable to the solicitor's order as payment "in full," and the solicitor endorsed

the draft, and obtained and paid over the moneys to the judgment creditor, but wrote refusing to accept the payment "in full," the judgment creditor was allowed to proceed for the balance.

Day v. *McLea*, 22 Q.B.D. 610, applied.

John McGregor for the appellant.

Johnston, Q.C., for the respondent.

From GALT, C.J.] [April 20.

THE SCOTTISH-AMERICAN INVESTMENT CO. v. PRITTIE ET AL.

Railways—Mortgage—Foreclosure—R.S.O., c. 170, s. 20 (25).

A railway company took possession of certain lands under warrant of the County Court judge, and proceeded with an arbitration with the owners as to their value. The lands were subject to a mortgage to the plaintiffs, who received no notice of, and took no part in, the arbitration proceedings, and gave no consent to the taking of possession. An award was made, but was not taken up by either the railway company or the owners. The plaintiffs brought this action against the railway company and the owners for foreclosure, offering in their claim to take the compensation awarded, and release the lands in the possession of the railway company.

Held, that the railway company were proper parties to the action, and that the plaintiffs were entitled to a decree against all the defendants, with, in view of the offer, a provision for the release of the lands in the possession of the railway company on payment to the plaintiffs of the amount of the award.

Per OSLER and MACLENNAN, JJ.A.: S.s. 25 of s. 20, R.S.O., c. 170, applies only where the compensation has been actually ascertained and paid into court.

Judgment of GALT, C.J., reversed.

W. Cassels, Q.C., and *Lockhart Gordon* for the appellants.

H. S. Osler for the respondents.

From County Ct. Essex.] [April 20.

WINDSOR WATER COMMISSIONERS *v.* CANADA SOUTHERN R.W. CO.

Municipal corporations—Assessments and taxes—Exemptions—Extension of town—R.S.O., c. 184, ss. 22, 54—Windsor waterworks—37 Vict., c. 79, ss. 11, 12.

The defendants were the owners of vacant land in the city of Windsor, abutting on streets in which mains and hydrants of the plaintiffs had been placed. The defendants had a waterworks system of their own, and did not use that of the plaintiffs, though they could have done so if they wished. The commissioners imposed a water rate "for water supplied or ready to be supplied" upon all lands in the city, based upon their assessed value, irrespective of the user or non-user of water.

Held, that this rate was, under 37 Vict., c. 39, ss. 11, 12, validly imposed.

The lands owned by the defendants were originally part of the township of Sandwich West, and by a by-law of that township, confirmed by special legislation, the lands of the defendants were exempted, subject to certain specified exceptions, from all taxation for ten years from 1st of January, 1883. In 1888 the limits of the (then) town of Windsor were, under the provisions of R.S.O., c. 184, s. 22, extended so as to embrace the lands in question.

Held, that assuming that the water rate was a species of taxation, the effect of R.S.O., c. 184, s. 54, was to put an end to the exemption.

Cornwallis v. *Canadian Pacific Ry. Co.*, 19 S.C.R. 702, distinguished.

Judgment of the County Court of Essex affirmed.

D. W. Saunders for the appellants.

A. M. Grier and *R. McKay* for the respondents.

Stated Case.] [May 9.

IN RE THE ASSIGNMENTS AND PREFERENCES ACT, SECTION 9.

Constitutional law—Bankruptcy and insolvency—Property and civil rights—Assignments and preferences—B.N.A. Act, ss. 91 (21), 92 (13)—R.S.O., c. 124, s. 9.

Held, MACLENNAN, J.A., dissenting, that s. 9 of R.S.O., c. 124, An Act respecting Assignments and Preferences by Insolvent Persons, is *ultra vires* the Ontario Legislature.

Robinson, Q.C., and *W. Nesbitt* for the Minister of Justice.

Irving, Q.C., and *Moss*, Q.C., for the Attorney-General of Ontario.

From GALT, C.J.] [May 9.

LEMESURIER *v.* MACAULAY.

Revivor—Ejectment—Limitation of actions—Lapse of time.

An action of ejectment was brought in 1867, and was entered for trial in that year, but the trial was postponed. The original plaintiff died in 1871, having several years before conveyed the lands to one I., who in 1886 conveyed to the present plaintiff. In 1892 an *ex parte* order of revivor was obtained.

Held, affirming the judgment of GALT, C.J., 22 O.R. 316, that the action was governed by C.S.U.C., c. 27, and that it came to an end as soon as the conveyance to I. was made, except perhaps as to costs, for which the original plaintiff might probably have proceeded.

W. R. Meredith, Q.C., and *F. A. Hilton* for the appellants.

Marsh, Q.C., for the respondent.

From Q.B.D.] [May 9.

BEAVER *v.* GRAND TRUNK R.W. CO.

Railways—Ticket—Refusal to pay fare—51 Vict., c. 29, s. 248 (D.).

A passenger, who has paid his fare and lost his ticket, cannot be ejected from the train upon his failure to produce his ticket for inspection by the con-

ductor, there being upon the ticket no condition requiring its production, and no contract for its production having been entered into. That is not a refusal to pay his fare under 51 Vict., c. 29, s. 248 (D.).

Judgment of Queen's Bench Division, 22 O.R. 667, affirmed; OSLER, J.A., dissenting.

Osler, Q.C., for the appellants.

Du Vernet for the respondent.

From Q.B.D.] [May 9.

ERDMAN *v.* TOWN OF WALKERTON.

Evidence—Identity of issues—Examination de bene esse.

Although the widow's right of action under Lord Campbell's Act is, in several respects, distinct from the husband's right of action in his lifetime, arising out of the same circumstances, still the issues are so far connected and identical that the examination *de bene esse* of the husband in his action is admissible evidence in the widow's action against the same defendants, the husband having been cross-examined by them.

Judgment of the Queen's Bench Division, 22 O.R. 693, affirmed.

Aylesworth, Q.C., and *Hoyles*, Q.C., for the appellants.

Shaw, Q.C., for the respondent.

From GALT, C.J.] [May 9.

IN RE VIRGO AND TORONTO.

Municipal corporations—By-law—Hawkers and pedlars—"Licensing, regulating, and governing"—R.S.O., c. 184, s. 495 (3).

Under R.S.O., c. 184, s. 495 (3), which provides that the council of any city may pass by-laws "for licensing, regulating, and governing" hawkers and pedlars, a city council may, acting in good faith, validly pass a by-law to prevent hawkers and pedlars from prosecuting their trade on certain streets.

Judgment of GALT, C.J., affirmed.

Du Vernet for the appellant.

H. M. Mowat for the respondents.

From C.P.D.] [May 9.

LAWSON *v.* MCGEOUCH.

Assignments and preferences—Bankruptcy and insolvency—Evidence—Presumption—Onus of proof—R.S.O., c. 124, s. 2, s-ss. 2 (a) and 2 (b).

Held, per HAGARTY, C.J.O., and BURTON, J.A. The presumptions spoken of in s-ss. 2 (*a*) and 2 (*b*) of s. 2 of R.S.O., c. 124, the Act respecting Assignments and Preferences by Insolvent Persons, is a rebuttable one, the onus of proof being shifted in cases within the subsections.

Per MACLENNAN, J.A: The presumption is limited to the doctrine of pressure, and as to that is irrebuttable.

Per OSLER, J.A.: The presumption is general and is irrebuttable, but the security in question is supportable under the previous promise.

Cole v. *Porteous*, 19 A.R. 111, distinguished.

Judgment of the Common Pleas Division, 22 O.R. 414, affirmed.

Kappele for the appellant.

Shilton for the respondent.

HIGH COURT OF JUSTICE.

Chancery Division.

FERGUSON, J.] [March 8.

EVANS *v.* KING.

Will—Construction—Estate tail—Shelley's case—Expression of intention contrary to operation of rule.

The testator, by the third clause of his will, devised certain lands as follows: "To my son James for the full term of his natural life, and from and after his decease to the lawful issue of my said son James, to hold in fee simple; but in default of such issue him surviving, then to my daughter Sarah Jane for the term of her natural life, and, upon the death of my said daughter, then to the lawful issue of my said daughter, to hold in fee simple; but in default of such issue of my said daughter, then to my brothers and sisters and their heirs in equal shares."

By a later clause the testator added: "It is my intention that upon the decease of either of my said children, without issue, if my other child be then dead, the issue of such latter child, if any, shall at once take the fee simple of the devise mentioned in the third clause of my will."

Held, that James took an estate tail according to the rule in Shelley's case, though probably against the real intention of the testator, and the later clause of the will could not be allowed to affect the interpretation of the third clause.

E. D. Armour, Q.C., for the defendants.

J. Bigelow and *A. Bigelow* for the plaintiff.

Common Pleas Division.

Div'l Court.] [March 4.

CLARK *v.* MCCLELLAN.

Bailment—Storage of wheat—Loss by fire.

A quantity of wheat was delivered by the plaintiff to the defendant, a miller, under a receipt, stating that the same was received in store at owner's risk, and that the plaintiff was entitled to receive the current market price when he called for his money. The wheat, to the plaintiff's knowledge, was mixed with wheat of the same grade and ground into flour. The mill, with all its con-

tents, was subsequently destroyed by fire ; but there had always been in store a sufficient quantity of wheat to answer plaintiff's receipt.

Held, that the receipt and evidence in connection therewith showed there was a bailment of the wheat, and not a sale.

Negligence on the part of the defendant was attempted to be set up, but the evidence failed to establish it.

South Australian Ins. Co. v. *Randall*, L.R. 3 P.C. 101, distinguished.

Elgin Myers for the plaintiff.

Aylesworth, Q.C., for the defendant.

Div'l Court.] [March 4.

MILLOY *v.* GRAND TRUNK RAILWAY CO.

Railways—Carriers—Liability as.

The plaintiff delivered a quantity of apples to defendants at their warehouse for the purpose of shipment by defendants' railway, and on a sufficient quantity being delivered to fill a car applied for a car, and was promised one at a named date. The defendants failed to furnish a car at the date specified, and, a fire occurring, the apples were destroyed.

Held, ROSE, J., dissenting, that the responsibility of the defendants was that of carriers and not of warehousemen ; and therefore they were liable for the loss sustained by the plaintiff.

Fullerton, Q.C., for the plaintiff.

Osler, Q.C., for the defendants.

Div'l Court.] [March 4.

MCCLELLAN *v.* MCCAUGHAN.

Power of attorney—Sale of land—Authority of attorney.

Acting under a power of attorney from the defendant, empowering him to attend to and transact all defendant's business in connection with her properties, both real and personal, and generally to do anything he might think necessary, etc., in the premises, as fully and effectually as if she were personally present, the attorney entered into a contract for the sale of defendant's farm to the plaintiff, and a deed was executed by defendant, and delivered over to the attorney for the purpose of carrying out the sale. The terms of purchase were that plaintiff was to pay off certain encumbrances, make a cash payment, and execute a mortgage to secure the balance of the purchase money, which he did, making the cash payment and mortgage to the attorney as trustee for the defendant, and which the attorney was willing to hand over to the defendant on her delivering up possession, which she refused to do.

Held, that the plaintiff's deed could not be questioned, and that he was entitled to possession of the land.

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

E. D. Armour, Q.C., for the defendant.

Div'l Court.] [March 4.

MCCORMACK *v.* LAMBE.

Sale of land—Delivery of possession—Time essence of contract.

Land was advertised for sale, with the notification that immediate possession would be given, it being also represented to the plaintiff, who, on the faith thereof, became the purchaser, and signed the contract of sale, whereby the sale was to be completed by the 1st May. It contained a provision that in case from any cause whatever the purchase should not be completed by the 1st May, the purchaser should pay interest upon the whole unpaid purchase money, at seven per cent., from that date until completion of the purchase. A tenant being required to give up possession, proceedings under the Overholding Tenants Act were taken on the 12th April to recover possession, but which failed; whereupon it was agreed that the defendant should eject the tenant, which plaintiff was advised would take a long time. About the 27th April the plaintiff notified the defendant that he was prepared to pay the balance of the purchase money, and would require possession by the 1st May, and that he would attend on the following day for such purpose. On the 28th he did attend, when he was informed that possession could not be given him, and on the 30th April he wrote demanding the return of his deposit by the 2nd May, or proceedings would be taken to recover same.

Held, by MACMAHON, J., at the trial, that by the contract the time for the delivery of possession was made the essence of the contract, and that the plaintiff had in no way waived his right.

On appeal to the Divisional Court, the Court was equally divided, and the appeal was dismissed.

Webb v. *Hughes*, L.R. 10 Eq. 281, and *Patrick* v. *Milner*, 2 C.P.D. 342, considered.

John Macgregor for the plaintiff.

E. D. Armour, Q.C., for the defendant.

Practice.

BOYD, C.] [March 15.

WILSON *v.* CAMPBELL.

Mortgage—Action on covenant—Acceleration clause—Judgment—Execution—Payment of interest and costs—Rules 359, 360, 361—R.S.O., c. 107, schedule B., s. 16.

Where, by virtue of an acceleration clause in a mortgage deed, the whole of the mortgage money has become due by default of payment of interest, and judgment has been recovered by the mortgagee against the morgagor, in an action solely upon the covenant for payment contained in the mortgage deed, for the whole of the money, the defendant is not entitled, upon payment of interest and costs, to have the judgment and execution issued thereon set aside.

The acceleration is not in the nature of a penalty, but is to be regarded as the contract of the parties.

Rules 359, 360, and 361, and the long form of the acceleration clause, R.S.O., c. 107, schedule B., s. 16, considered.

A. Elliott for the plaintiff.

F. E. Hodgins for the defendant.

Court of Appeal.] [April 20.

HENDERSON *v.* ROGERS.

Appeal—County Court—Garnishing matter—Judgment on issue—Parties—R.S.O., c. 47, s. 42—Judgment not drawn up.

Under s. 42 of the County Courts Act, R.S.O., c. 47, an appeal lies to the Court of Appeal from the order or judgment of a County Court disposing of an issue directed by an order made in an action in such County Court upon a garnishing application; and the claimant, the plaintiff in the issue, though not a party to the original action, is a "party" within the meaning of s. 42, and may be an appellant.

Sato v. *Hubbard*, 6 A.R. 546, distinguished.

It is not a ground for quashing or dismissing an appeal that the order or judgment appealed from has not been drawn up.

Whiting for the appellant.

E. D. Armour, Q.C., for the respondent.

Court of Appeal.] [April 20.

CENTRAL BANK OF CANADA *v.* ELLIS.

Attachment of debts—Salary not yet due—Rule 935—Salary of police magistrate—Public policy.

The salary of a judgment debtor, not actually due or accruing due at the time of service of the attaching order, but which may hereafter become due, cannot be attached to answer the judgment debt; and the enlarged provisions of Rule 935 have made no difference in this respect.

The salary of a police magistrate appointed by the Crown, but paid by a municipality, cannot, on grounds of public policy, be attached; HAGARTY, C.J.O., expressing no opinion on this point.

W. R. Riddell for the plaintiffs, appellants.

Raney for the defendant Ellis, respondent.

Going for the garnishees, respondents.

Court of Appeal.] [April 20.

TESKEY *v.* NEIL.

Appeal—Interpleader—Attachment of debts—Issue sent from High Court to County Court—Appeal from judgment on issue—Jurisdiction—Rules 940, 1163—Quashing appeal—Costs.

The Master in Chambers made an order in an action in the High Court, by consent of parties, directing the trial in a County Court, between an execu-

tion creditor and a claimant, of an interpleader issue with respect to the ownership of certain goods, which the sheriff had not seized or intended to seize, but which, by consent of the parties recited in the order, were to be regarded as if the sheriff had seized them and applied for an interpleader order.

Held, that there was no jurisdiction, under Rule 1163 or otherwise, to make the order for trial of the issue in the County Court; and, as the absence of jurisdiction was apparent on the face of the order, all the proceedings under it were *coram non judice*, and there was no right of appeal to the Court of Appeal from the judgment of the County Court upon the issue.

No express authority is conferred upon the High Court by Rule 940, or any of the Consolidated Rules, to direct the trial of an issue in a County Court in attachment proceedings; and if there is authority to do so under some power derived from the old jurisdiction which the Court of Chancery possessed, the appeal from the decision of such an issue is not to the Court of Appeal, but to the court out of which the issue has been sent.

Appeal quashed with costs where, upon the merits, there appeared to be no reason to differ from the court below.

G. G. Mills for the appellant.

A. E. K. Greer and *Swartout* for the respondent.

Court of Appeal.] [April 20.

CLANCY *v.* YOUNG.

Appeal—Interpleader—Application of stakeholder—Issue sent from High Court to County Court—Appeal from judgment on issue—Jurisdiction—Rules 1141, 1163—S. 110, O.J.A.

The Court of Appeal has no jurisdiction to entertain an appeal from the decision of a County Court upon an interpleader issue sent for trial by an order made in an action in the High Court, upon the application of a stakeholder.

Rule 1163 applies only to the case of an application by a sheriff, and not to a case coming within the first clause of Rule 1141; and in the latter case the High Court has no power, by virtue of any of the Consolidated Rules, to direct an interpleader issue, in or arising out of an action in the High Court, to be tried in a County Court; and therefore, unless otherwise supportable, the proceedings under an order so directing are *coram non judice*.

But if the High Court has power to make such an order—and, *semble*, it has—by force of s. 110 of the Judicature Act, irrespective of the Consolidated Rules, preserving the old jurisdiction of the Court of Chancery, the appeal from the decision upon the issue is, in the first instance at all events, to the High Court, and not to the Court of Appeal.

Fullerton, Q.C., and *J. A. Macdonald* for appellants.

Biggs, Q.C., for the respondents.

ARTICLES OF INTEREST IN CONTEMPORARY JOURNALS.

Covenants on sale of land against beerhouses and places for sale of liquor *Justice of the Peace*, Feb. 25th.
Conspiracy to defraud. *Ib.*
The "Parol Evidence" Rule. *Harvard Law Review*, Feb.-March.
Land transfer—The Torrens systems discussed. *Ib.*, March.
Implied warranty in a manufacturer's executory contract of sale. *Central Law Journal*, March 10.
Injuries from polluted water—Landlord and tenant. *Ib.*, March 17.
The amendment of the records of certain classes of public bodies, such as municipal councils, school boards. *Ib.*, March 24.
The ability of the state to copyright judicial opinions. *Ib.*, March 31.
Solicitor and client *versus* party and party costs. *Irish Law Times*, March 4.
Who is a *bonâ fide* traveller? *Justice of the Peace*, March 4.
Barbed wire fences. *Ib.*
Right of access to highway. *Ib.*
Using a highway as a highway. *Ib.*, March 11.
Altering level of highway. *Ib.*
Level crossings. *Ib.*, March 18.
Enforcing contracts of service. *Ib.*
Infant's religious education. *Ib.*, March 25.

Flotsam and Jetsam.

THE DEVOLUTION OF ESTATES ACT.

(To the Editor of *Leith's Blackstone.*)

There was a man of great renown, a learned man was he,
Who many pages did indite about the simple fee.
And when he'd written all he knew, and put it in a book,
He went away across the sea, on other lands to look.
And while he wandered far away this Act the light first saw,
And quite upset the simple fee and killed the heir-at-law.
And when that learned man came back he thought he'd try again
About the law of simple fee to argue and explain;
But when he came to ponder o'er the clauses of this Act,
He straightway to his lodgings went and his portmanteau packed,
And never more has he been seen from that day until this,
And searching for the heir-at-law 'tis my belief he is.

[The poet takes no notice of 54 Vict., c. 18. We are aware, of course, that land no longer descends direct to the heir-at-law—the distinguishing mark of a fee simple. It may be, however, that the learned "man of great renown" was successful in his search, and found in some deserted land the mortal remains of the lost heir-at-law, and we now find him galvanized into life by the statute referred to.—ED. C.L.J.]

A JUDGE once said that no man should go to the bar without the clear prospect and certainty of five years' independent income. *Apropos* of this, M.A. and LL.B. say that "Sir Charles Russell could surely not have had the income of a for-five-years independent gentleman when he donned his forensic robe, otherwise he would hardly have accepted the post of a recording angel in the press gallery of the House of Commons. The satirical *Saturday* was for long years indebted to the pen of a ready writer wielded by Mr. Asquith, Q.C., M.P., etc. Mr. Lockwood, Q.C., M.P., did not disdain the *rôle* of a London correspondent. Mr. Finlay, Q.C., M.P., was not above doing 'something for his living,' bred, as he was, a doctor in Scotland. Mr. Candy, Q.C., weary of the drudgery of a tutor's life—(the starting-point, by the way, of the late Baron Huddleston)—worked at something else, and 'unbeknownst' laid a foundation by his journalistic advocacy of the cause of the Licensed Victuallers in the pages of the *Morning Advertiser*." These things are as interesting as they are authentic.—*London Law Times.*

IT was just after the first sickening crash of the collision, and the air was filled with shrieks and groans, mingled with the hiss of escaping steam.

The dark, sinister man with the smooth face lay motionless where the shock had thrown him. Around him were scattered broken timbers and twisted iron rods, but by a seeming miracle the débris had not fallen upon him, and his limbs were free.

"He's dead," sadly whispered the rescuer who saw him first.

The lips of the dark, sinister man moved. "Not by a jugful," he observed audibly.

The rescuer hastened forward. "Are you hurt?" he anxiously inquired.

"No." The dark man was positive. "Not a scratch," he declared.

The rescuer was unable to repress an exclamation of surprise.

"Well, why don't you get out of the wreck?"

The sinister man gazed at the twinkling stars above him.

"I just about know my business," he calmly replied.

"I've been in collisions before. I'll stay right here where they threw me until I'm moved. Then perhaps"—a faint smile played about his lips—"the company can't work the contributory negligence racket on me when I sue for damages. Oh, no, I don't object to your carrying me away if you like; but I call on you to witness that I take no active part in the process myself. I know my business."

And the man with the sinister face laughed a hard, metallic laugh.—*Ex.*