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WE again remind our readers that to-day the new Consolidated Rules come into effect. It is to be observed, however, that by the Rule of 9th June, 1888, it is ordered, "That Consolidated Rules 210, 211 and 212, shall not come into force on the first day of September next, nor until the further order of this court be passed, fixing a day for the same to come into force; and it is further ordered, that until such rules do come into force, all matters of practice and procedure affected thereby shall be deemed to be in force as if the same were in substance repeated in this Rule."

THE DEVOLUTION OF REAL ESTATE.

In our July number we published the letter of a correspondent signing himself "Solicitor," respecting the operation of the Devolution of Estates Act, 1886, now embodied in R. S. O. c. 108. At that time it appeared to us that the letter contained in itself a sufficient refutation of the objections taken to the Act, and for that reason we did not think it necessary to make any comments upon it; but we have since heard that some of our readers, at all events, have taken a different view, and think that the animadversions of our correspondent are well taken.

Stated shortly, the point made against the Act is this, that the heirs or devisees are no longer able to make a deed of the land, descended or devised, to a purchaser without a personal representative being first appointed.

There is no doubt that this is the case; but is it, after all, any real objection to the Act? Let us consider for a moment what the Act was designed to effect, but before doing so, it may be well to take a glance at the state of the law before its passage.

So far as the lands of a deceased person were concerned, it must be admitted that it was in a very anomalous position. The personal representative, executor or administrator, was charged by the law to see to the payment of the debts of the deceased, but, in most cases, he had no power to deal with what was oftentimes the principal asset of the estate, namely, the lands left by the deceased. The lands passed directly to the heir, or devisee, without the intervention of the personal representative; but though the latter had no control over, and no estate in the lands, yet, nevertheless, under a judgment recovered against him alone, to which neither heir nor devisee were parties, an execution might be issued under which the lands of the deceased might be sold.

Nothing could well be more anomalous or more illogical than this condition of things. While this was the state of the law as regards a deceased person's real estate, we all know that a very different system prevailed regarding his personalty; neither legatee nor next of kin had any right thereto, or to any part thereof, until the claims of creditors had been first satisfied. The residuum, after the satisfaction of all liabilities of the testator or intestate was all that was distributable among either legatees or next of kin, and in order that this distribution might not be made until the liabilities of the estate had been first liquidated, the assent of the personal representative to the distribution was necessary, and this assent would not be given until a reasonable time had elapsed, and proper precautions taken, by advertisement and otherwise, to ascertain what the debts and liabilities of the deceased were, and to give all claimants a proper opportunity to establish their claims.

So far as the personal property of the deceased was concerned, his next of kin or legatees could not lawfully take possession and divide it or sell it, without these preliminaries having been first taken.

Now, as we understand it, the object of the Act of 1886 was to place a deceased person's real property in precisely the same position as his personal estate—the devisees or heirs no longer take immediately from the testator, henceforth their title must, like that of legatees and next of kin, be derived through the personal representative. There is much to be said in favor of this change, not only for the security it affords to the creditors of a deceased person for the due application of his assets, both real and personal, but also for the difficulties which it will remove in making title. Formerly, one of the chief obstacles in making title where the land had passed under successive descents arose from the fact that the proof of the heirship of persons who claimed as heirs was so often attended with great difficulty and expense. This will now, to a great extent, if not altogether, be obviated by the deed from the personal representative, who, being directly concerned to convey the land only to the person rightfully entitled, will make it his business to see that the person claiming the conveyance is in fact the person lawfully entitled.

We are unable to agree with our correspondent that the objection he takes is any real defect in the Act. To permit the beneficiaries to convey, as he proposes, without the intervention of the personal representative, would be virtually to defeat the whole purpose and object of the Act. To be consistent, we think he should also contend that the next of kin of an intestate ought to be allowed to take the bonds and promissory notes of their deceased ancestor and indorse them over to third parties without the appointment of a personal representative. Such a proposition, we think, would be regarded as absurd, even by "Solicitor," and we confess our inability to see why, if it is necessary that a personal representative should be appointed before a valid title can be made to a promissory note or bond left by a deceased person—a different rule should prevail regarding his lands.

With regard to the question put by our correspondent as to whether a deed is necessary from the personal representative, we are inclined to think that there

is little, if any, doubt that such a deed is necessary. The effect of the Act is to vest the deceased person's real estate in his personal representative, and we do not see how the estate can be got out of him except by deed. Both the will and the personal representative's deed will be, henceforth, necessary links in the chain of title.

We are unable to see that the difficulty, which may in some cases arise in finding security for the due administration of the realty, is any objection to the Act. Why should not security be required for its due administration, just as much as for the due administration of personalty? Our correspondent fails to suggest any reason, and none occurs to us.

LEGAL EDUCATION.

THE people of Ontario take a pardonable pride in their educational system, which is justly deemed one of the best, if not the very best, in the world. The growth of successive generations, it shows the genius of its founder in the broad and liberal principles on which it is based. The fostering care of the State and the vigilant thoughtfulness of the successive heads of the department, are visible in almost every detail; the successive steps of its growth have kept pace with the foot-prints of our people along the pathway of material, social and politica development—nay, it has been one of the most potent factors in that development. At times its progress has been by rapid strides, at other times by steady plodding, but the march has been ever onward.

It might be a profitable exercise for any of those who are misled by the steadiness of the advancement of late years, into believing that we are at a standstill to make a comparison of the requirements of the various professions and callings which exact a certain amount of literary training for entrance therein, at the present time, and their requirements for a similar purpose ten years ago. Within a few years the training, whether literary or professional, exacted from teachers in our public and high schools has undergone such extensive changes as almost to revolutionize them. The curricula of our universities all indicate most unmistakably the same tendency in the direction of higher requirements. Every two or three years brings some change widening the scope of the matriculation examination in response to the increased facilities for primary and secondary education, and all these changes aim at the elevation of the standard of higher education. The various denominations, in the training of those who are to minister in spiritual things, follow the trend of the age. All of them encourage the taking of an arts degree, where at all practicable, and most of them exact, when the degree is not attainable, an increasingly high literary standard. Quite lately admission to the medical profession has been made more difficult, or rather, less easy, and additional guarantees exacted that matriculants in medicine have had a fair preliminary training. In dentistry, pharmacy, and recently in land-

surveying, the spirit of the times has asserted itself. They all strive to keep pace with the advancing intelligence of the people due to the increasing efficiency of our public and high schools, and the more general spread of material prosperity, with its consequent leisure and opportunities. All these move onward abreast of the age.

It affords grave reason for shame-faced regret that the legal profession is the only one which has not directly availed itself of the benefits of the advances made in all things educational in the last ten years. It could not possibly avoid indirect gains therefrom, but it has received nothing but the ripe fruit that has fallen into its mouth, and has not put out a hand to shake the tree of knowledge. Its requirements for entrance for students-at-law are scarcely higher now than ten years ago, and the knowledge necessary to pass the primary examination was then, as now, in all conscience meagre enough. Every high school-master with experience in the preparation of candidates for the various examinations, will tell you that there is scarcely an examination with which he has to do, for which candidates can be "coached" with so little work and so great ease as the primary examination of the Law Society. A third-class teacher, without any knowledge of classics, wishing to study law, attends a collegiate institute or high school for a few months—three or four in most instances suffice. He "crams" his Latin, using translations, and attempts nothing beyond the rudiments of grammar or prose. His previous knowledge of the other subjects, with a very little brushing up amply suffices, and if he be not hopelessly stupid he passes. This is no fancy picture. Such instances are quite common; and the third-class teacher who passes in this way will compare favourably with the average of successful primary candidates. His knowledge of Latin is as good as that of his fellows, and his attainments in most other subjects are decidedly superior Such is the open door into a *learned* profession!

But the evil ceases not here. Raw and immature in mind—for he has had. little mental discipline and no culture—devoid of habits, and without experience of methods of study, with meagre general information and scant intelligence, without skill in the use of his mother language as an instrument of expression, and pitiably ignorant of its literature, he vegetates in a law office for five years, now and then swallowing some stray crumb of legal learning lying in his way. No marvel that five years of such experience scarcely suffices to give him even a moderate degree of proficiency in the practice of his profession. The marvel would be if it were otherwise. The process is wholly unscientific. The practice presupposes the principles. How can one apply that which he does not know? The best possible preparation for acquiring skill in the practice of law, after the widening influences of liberal culture, is familiarity with the law itself; that having been gained, the practice can be, and has been, acquired in a relatively short time. From the educationalist's point of view, the process now in vogue is as unscientific as to attempt to teach rhetoric before grammar, or astronomy before algebra.

True, there are those engaged in the study, as well as in the practice, of law who have availed themselves of every facility which our institutions afford for

liberal culture. What they have attained has been gained, however, not through any facilities put in their way by the Law Society or its curriculum, but has rather been reached as the natural outcome of a graduated system of instruction, and of the inquiring spirit which that instruction fosters, and it has been reached by spending seven years in study, while those who enter by the wide-open door of the primary examination, beginning with inferior attainments, need spend but five. It is strong evidence of the general appreciation of the value of liberal culture that so many of those who enter upon the study of law, previously take an arts course. But their number is still much too small, and once professional study is commenced, they too, are thrown wholly on their own resources.

A strong feeling has been growing of late in the minds of many thoughtful and intelligent members of the Law Society that something must be done to elevate the standard of general culture within its pale, as well as to supply means for special legal training, or our ancient and honourable professson, in the midst of the general diffusion of intelligence by our schools, colleges and universities, will fail to win the respect and to exert the influence which its members look upon as its birthright. As was natural, the suggestions have been numerous, and the efficiency of the remedies for the admitted evils of the present mode of legal education would probably vary as much in degree as the proposed changes do in character.

Lectures at local centres under the management and control of the Society have been proposed, and, in some quarters, warmly advocated. The wisdom of such an experiment is doubtful. The lectures given in Toronto have never been a success; and it is not easy to see how the causes which have made such lectures a failure here, can be eliminated at local centres. When we say that the courses of lectures already established have been a failure, we intend no reflection on the present or on former lecturers. These have been not unfrequently able men, erudite and earnest. But the students do not attend. It is, we are told, no unusual occurrence for less than a dozen students to be present at a lecture. The average attendance is lamentably small; we are told that it is probably not more than five per cent. of the whole number of students-at-law in the province. The causes are not far to seek. The average student is largely incapable, owing to his lack of previous study and training, of profiting by the facts and principles presented to him in these lectures. He being often little more than a school-boy of meagre attainments, instruction by lecture is not suited to his capacity, or to his stage of mental growth. There is no inducement for attendance. He has an examination before him. To pass he must be familiar with certain text-books; these must be read, and a fair degree of familiarity with them is enough. He will be no further on if he attends every lecture. Then his presence is required in the office, his duties there conflict with the claims of lectures, and the latter suffer. It will not be easier to find suitable lecturers at local centres than at Toronto, the supply of available men will be smaller, the claim of professional duties on their time will be at least equally strong, students are as much occupied with routine office work, the incentives to attendance on lectures are no greater. It is not easy to see how the extension of the present system, confessedly a failure, can remedy the evil.

If lectures are to be beneficial the work must be divided into departments, according to a detailed curiculum; the management of each department must be in charge of a specialist who can afford to make it the object of his undivided attention; the course must be wide enough to give some idea of the broad principles which underlie law, and some acquaintance with the history of the institutions, events and influences which have moulded our jurisprudence, as well as with the minutiæ of law as it stands; examinations must be based on subjects rather than text-books, and must be at least as much a test of legal culture as of legal knowledge.

An attempt to draft such a scheme has been made. Recognizing what must be duly considered at the outset in devising any effective course of legal study, the necessity of placing the purely theoretical, historical and scientific knowledge of law and cognate subjects before practical training in law as it is, and in the details of its administration by the courts, it seeks to unite the functions of the University and the Law Society, and to make each of them auxiliary to the other in rearing a race of jurists whose knowledge of law, scientific and practical—knowledge as to its rise, its development, and its administration—will reflect credit on themselves, their profession, and their country. Our readers are already tolerably familiar with the outlines of the proposal. And with this, as with every similar measure, more than an outline cannot at first be attempted. The principle must first be submitted and approved, and when the outline has taken final form the details may be filled in.

The proposed Law Faculty is not without its defects; but then nothing human ever was or will be. Many of the objections urged against it are the outcome of the aversion to change which always obstructs progress; while some are purely fanciful, others are entitled to thoughtful consideration.

We are strongly of the opinion that the scheme must be so modified as to place all the Universities, as far as practicable, on the same footing in their relation to the Law Society. Otherwise the full benefit of the measure cannot be obtained, and the discrimination in favor of the Provincial University and against the others would operate unjustly.

The allegation that students taking the ordinary course of five years will be worse off than at present, owing to the abolition of the present lectures, requires little more than a passing notice. Students resident in Toronto are the only ones benefited by these lectures; only a very small percentage of Toronto students attend them; they fail of the object for which they are maintained; and, if it be thought advisable, as indeed it probably would be, arrangements could easily be made for the attendance of five year men at as many of the lectures at Osgoode Hall under the proposed scheme as it would be desirable or beneficial for them to take. The objection, in so far as it is one, falls to the ground.

One writer urges that it is impossible for a boy of sixteen to acquire a tolerable degree of skill in conducting a solicitor's business in two years, even with "a two years' dabbling in the depths of international law and Roman jusisprudence." Closely allied to this is the assertion that the student who finds

it hard enough to read the work required for call in five years, will not be able to read that and the work required for LL.B. in four years. Graduates in arts, in rapidly increasing numbers, read both for call and LL.B. in three years now, and that, too, without help or guidance in their reading, and they all allege that they do not study nearly so hard as they did in their arts course. Any student of fair ability can easily pass his first intermediate examination with six weeks' reading. That has been done time and again, and the other examinations, though more difficult, are often disposed of creditably in less than double that time. The average law student reads little, except when an examination is near at hand, most of his five years is consumed in putting in his time under articles. Moreover, if it be the intention that the standard for matriculation into the proposed law faculty shall be so low that the average sixteen year old boy fresh from school can enter, then failure is indelibly stamped on the whole scheme from the outset. To make any such course beneficial, the matriculation examination must be at least as high as the senior matriculation or first year examination in arts. It is indispensable that the preliminary training received by the student before entering upon the course for LL.B. should be as thorough as possible. To overlook this would be to put a premium on ignorance.

The most formidable objection is one which, if real and insuperable, must be fatal. It is urged that few will care to take an arts course extending over four years, and then an LL.B. course requiring as much longer, when two of the main objects, admission to practice and the possession of a degree, can be obtained in four years. Any change sure to diminish the number of those who graduate in arts before commencing the study of law, is a change in the wrong direction, and will find no advocates. The desirability of obtaining the knowledge, the habits of study, the skill in making new acquisitions, and the strength and maturity of mind to be derived from such a course of study is universally conceded. The point at issue then is, does the new scheme tend to deter men from taking an arts course? and, if so, is that tendency so inherent in the warp and woof of the measure that it cannot be removed without the destruction of the whole fabric? It is well to observe that at present the arts man must spend seven years in study, as against the five spent in the more ordinary way. Yet the number of those taking the arts course as a preliminary is increasing. If two years longer do not deter him from so doing, must it of necessity follow that three will? But then it is urged he will take merely the LL.B. course, and so save four years. If the matriculation standard for the LL.B. course is put, as it ought to be, at least as high as the first year examination in arts, then the difference is still but three years. The benefits of the arts training are as great as ever, the number of those attending lectures in arts will undergo no dimunution; really the great majority of such students do not decide until graduation is at hand what their future profession is to be. The question comes to be, then, whether the young graduate of a university, influenced by the certainty of obtaining assistance in his legal studies similar to that of which he was able to avail himself in his arts course, and with the further incentive of another degree at the end of the curriculum, will not be willing to spend an additional year in study for the sake of the

benefits so obtained? But why not hold out some further inducement to the graduate in arts? The ordinary curriculum in medicine demands four years, but a graduate in arts completes it in three. There are surely no unconquerable obstacles in the way of making a programme of lectures and studies in law to occupy the attention of the rank and file four years, but which graduates can, if so inclined, dispose of in three. No more time will then be needed by the graduate to prepare for his profession than at present, he will do no more work then than he does now, when, as is not unfrequently the case, he combines with his strictly professional studies the work prescribed by the University for the degree of LL.B. He will have the by no means inconsiderable gain of complete and exhaustive courses of lectures on both, instead of, as now, reading by himself. The number of those who, by the help afforded by the lectures of skilled instructors devoted to the work of legal education, and by the degree to be obtained, as well as by the knowledge and discipline gained by the projected course, would be led to enter on the broader field of investigation so opened up, instead of groping blindly along the labyrinths of legal lore for five years, would be but a partial test of its success. To benefit them would, however, be a part of its aim, and there seems no good reason for despairing of the realization of the hopes of even its most ardent promoters.

The details of the proposal, as formulated by the Joint Committee of the Provincial University and the Law Society, may require extensive modification; almost any scheme devised by human ingenuity will need improvements in the light of experience in working it. But we think that in the co-operation of the University and the Law Society is to be found the true solution of the problem of legal education.

In the meantime, until some such institution can be founded, the greatest service that the Law Society could render to legal education would be to abolish its primary examination, always a slipshod and superficial one, and exact in lieu of it, evidence that the candidate for admission had passed the first year examination of one of our Universities. This would be the most substantial advance made in general culture in the profession for many years. Incompetent and half-trained students would become fewer, and the way would be paved for some satisfactory system of purely legal instruction. The change suggested is not more radical than many of those made in recent years in departmental and university examinations, and its tendency would be to greatly increase the proportion of students-at-law taking a full arts course. Having completed the first year of the university curriculum, and having some experience of university life, many of them would go on to graduation. The time is fast coming when no young professional man need hope to occupy a respectable rank among his brethren, if his literary training has not reached at least this level.

COMMENTS ON CURRENT ENGLISH DECISIONS.

THE *Law Reports* for July comprise 21 Q. B. D. pp. 1-177, 13 P. D. pp. 89-119; and 38 Chy. D. pp. 237-287.

PRACTICE—EVIDENCE—FOREIGN COMMISSION—ORD. 37, R. 5.

Cock v. *Allcock*, 21 Q. B. D. 1, was an appeal from chambers, in which it was held by a Divisional Court (Field and Wills, JJ.) overruling Denman, J., that where material witnesses are resident abroad, the fact that such witnesses are in the employment or under the control of the party who desires to obtain their evidence, is no sufficient ground for refusing an order for a commission, *Lawson* v. *Vacuum Brake Co.*, 27 Chy. D. 137, was stated by Wills, J., to be inaccurately reported so far as the head note is concerned.

PRACTICE—PROHIBITION—PROCEEDINGS ON CROWN SIDE—PROCEEDINGS AS PAUPER—ORD. 16, R. 22—ORD. 68, RR. 1, 2.

In *Mullensisen* v. *Coulson*, 21 Q. B. D. 3, it was held by Cave and A. L. Smith, JJ., that there was no power to admit an appellant to appeal *in forma pauperis* from the order of a Divisional Court granting a prohibition. Ord. 16, r. 22, was held not to apply to a proceeding on the crown side, as Ord. 68, r. 1, 2, expressly provides that Ord. 16, r. 22, shall not affect the procedure or practice in proceedings on the crown side. (See Ont. C. R. 1). We may observe *en passant* that the new Consolidated Rules of Ontario fail to prescribe any practice in civil proceedings for suing or defending *in forma pauperis*.

PRACTICE—SERVICE OUT OF JURISDICTION—DEFENDANT FOREIGNER RESIDING ABROAD—SERVICE OF WRIT—NULLITY—ORD. 11, R. 6; ORD. 70, RR. 1, 2—(ONT. C. R. 232).

Hewitson v. *Fabre*, 21 Q. B. D. 6, is another decision of Field and Wills, JJ., on a point of practice. By Ord. 11, r. 6, (Ont. C. R. 232), it is provided that where the defendant is neither a British subject nor in British dominions, notice of the writ of summons, and not the writ itself, is to be served upon him. In this case the defendant was a foreigner residing in France, who was sued for goods sold and delivered to him in England. The plaintiff obtained a judge's order for the service upon him of the writ out of the jurisdiction, upon an affidavit which, in good faith, but erroneously, stated that the defendant was a British subject; and under this order the defendant was served with the writ in France, and judgment was signed against him for default of appearance. Upon motion to set aside the judgment, it was held that the service of the writ instead of a notice was a nullity, and not a mere irregularity, and the order for the service of the writ and all subsequent proceedings were set aside. The reason of the decision may be gathered from the following remarks of Field, J., after observing that the service of English writs on defendants in Ireland and Scotland had been the subject of complaint, he goes on to say:

"But the evil is greater in the case of foreign countries, the governments of

which resent the service on their subjects, without their leave, of process of the courts of other nations, and for this reason the alteration has been made in this rule, and a specific distinction between serving the process itself and giving a courteous notice of it has been drawn by Ord. 11, r. 6." (Ont. C. R. 232.)

PRACTICE—COUNTER-CLAIM—DEFAULT IN PLEADING—JUDGMENT ON COUNTER-CLAIM—ORD. 27, R. 11—(ONT. C.R. 727).

In *Higgins* v. *Scott*, 21 Q. B. D. 10, it was held by Pollock, B. and Charles, J., in accordance with *Buckhards* v. *Thurm*, cited in Snow and Winstanley's Annual Report for 1888, p. 379, that when a plaintiff makes default in pleading to a counter-claim for trespass, the only way the defendant can obtain judgment on the counter-claim, is by motion under Ord. 27, r. 11. (Ont. C. R. 727.)

PRACTICE—JUDGMENT AGAINST MARRIED WOMAN FOR DEBT CONTRACTED BEFORE MARRIAGE.

Downe v. *Fletcher*, 21 Q. B. D. 11, was an action against a husband and wife to recover a debt contracted by the wife before marriage, which took place after the coming into operation of the Married Women's Property Act, 1870, and the amending Act of 1874, but before the Act of 1882, and upon a motion for judgment which was referred to the Divisional Court, Lord Coleridge, C.J., and Mathew, J., held that it was unnecessary to show that the female defendant had separate property at the date of the judgment, but was entitled to judgment against the wife as against her separate property according to the form settled in *Scott* v. *Morley*, 20 Q. B. D. 132.

LANDLORD AND TENANT—ASSIGNMENT—SURRENDER BY ASSIGNEE OF PART OF PREMISES—LIABILITY OF ASSIGNOR ON COVENANT.

Baynton v. *Morgan*, 21 Q. B. D. 101, is a decision of a Divisional Court (A. L. Smith and Cave, JJ.), upon an appeal from a County Court, and the point decided was this: The plaintiff demised a house and premises to the defendant by deed containing a covenant by the lessee to pay the rent; the lessee assigned the term, the assignee by agreement with the lessor surrendered a small part of the demised premises, upon which was a scullery, and the plaintiff in consideration of his so doing paid the assignee £25, and erected a new scullery on another part of the demised premises; the present action was brought by the lessor against the original lessee, who contended that the effect of the surrender of a part of the demised premises was to create a new term as to the remainder of the property, and consequently to release him from liability on his covenant. The court were, however, unanimous that a surrender of part of the demised premises by an assignee does not have this effect. Counsel for the plaintiff conceded that the surrender of a part of the premises would entitle the lessee to a proportionate abatement of the rent; but Cave, J., without deciding the point, expressed the opinion that the lessee was entitled to no such abatement, that the liability of the lessee arising on contract, if he was liable at all, he was liable for the full amount of rent covenanted to be paid.

INSURANCE (MARINE)—CONCEALMENT OF MATERIAL FACTS—PRINCIPAL AND AGENT.

Blackburn v. *Haslam*, 21 Q. B. D. 144, is a case in which the law relating to the effect of concealment of facts upon the validity of a policy of marine insurance, which was pretty well discussed in the well-known case of *Blackburn* v. *Vigors*, 17 Q. B. D. 553; 12 App. Cas. 531, was again considered. In the latter case it was held that the insured was not liable for the concealment of facts from the insurer, which had come to the knowledge of the agent of the insured, but which had not been communicated by him to his principal. In that case the insured had made the contract of insurance through other agents than the one who had acquired the information which was concealed; but in the present case the jury having found that the same agent who had acquired the information, had commenced the negotiations for the insurance, which he subsequently handed over to his principals to take up at the point where the agent had left off; the Divisional Court (Pollock, B. and Charles, J.,) were of opinion that the principals were bound by the act of their agent in not disclosing the information they possessed to the insurer, and that therefore the policy was void.

ESTOPPEL—NEGLIGENCE—COMPANY—CUSTODY OF SEAL—LOSS BY UNAUTHORIZED USE OF SEAL—PROXIMATE CAUSE OF LOSS.

The Mayor of Staple of England v. *Bank of England*, 21 Q. B. D. 160, is a decision of the Court of Appeal (Lord Esher, M.R., Bowen and Fry, L.JJ.) in which, following *The Bank of Ireland* v. *Evans' Charities*, 5 H. L. C. 389, they affirm the decision of the Divisional Court (Day and Wills, JJ.). The plaintiffs, a corporate body, had permitted their seal to remain in the custody of their clerk, who without authority, affixed it to powers of attorney under which certain stock in the public funds to which the plaintiffs were entitled was sold, and the clerk appropriated the proceeds. The plaintiffs claimed that the stock had been transferred without their authority, and the Court of Appeal held they were entitled to succeed, on the ground that the negligence of the plaintiff in trusting their seal to their clerk, was not the proximate cause of the loss, the proximate cause they held was the felony of the clerk in dishonestly affixing the seal; and that it could not be said that the felony was itself either the natural, or likely or necessary, or direct consequence of the carelessness of the plaintiff.

WILL AND CODICIL—EXECUTION OF WILL—ACKNOWLEDGMENT OF TESTATOR'S SIGNATURE—WILLS ACT, 1837 (1 VICT. C. 26), S. 9—(R. S. O. C. 109, S. 12).

In *Daintree* v. *Butcher*, 13 P. D. 102, the Court of Appeal affirmed the decision of Butt, 13 P. D. 67, noted *ante* p. 266.

COLLISION—MARITIME LIEN—ACTION IN REM.—CHARTER PARTY—IMPLIED AGREEMENT.

The only other case in the Probate Division is *The Tasmania*, 13 P. D. 110, an action to recover damages for a collision by defendant's tug with the plaintiff's vessel while towing her, under the following circumstances: The tug was chartered by the defendants, a company, to work with their own tugs, and one of the terms on which the company towed vessels was that they would not be

answerable for loss or damage to any vessel in tow of their tugs (which were specified by name), whether occasioned by the negligence of their servants or otherwise. The tug in question, which was not one of those specified, was known by the plaintiff, who was a director of the defendant company, to have been chartered by the defendant company. This tug being hired by the plaintiff from the defendant company to tow the plaintiff's vessel, the collision took place in respect of which the action was brought, and it was held that the plaintiff must be taken to have impliedly agreed to employ the tug on the same terms as the other tugs of the company, and that his claim was therefore barred by the condition. By the terms of the charter party the defendants were to appoint a captain as pilot, and all damages were to be for charterer's account. The collision was occasioned solely by the negligence of the defendant's captain; and it was held that an action *in rem* would not lie against the tug, because the maritime lien arising from collision is not absolute, and the owners not being personally liable for this collision, and the charterers being exempted by the terms of their contract with the plainiff, the *prima facie* liability of the tug was rebutted.

PARTNERSHIP—SHARE OF PROFITS—ADVANCE TO CARRY ON BUSINESS—GARNISHEE ORDER—EQUITABLE CHARGE—NOTICE—PRIORITY.

Proceeding now to the cases in the Chancery Division, the first to be noted is *Badeley* v. *Consolidated Bank*, 38 Chy. D. 238, which is an appeal from the judgment of Stirling, J., 34 Chy. D. 536, noted *ante* vol. 23, p. 189. The Court of Appeal (Cotton, Lindley and Bowen L.JJ.), affirmed the judge below in holding that a garnishee order only binds the beneficial interests of the debtor in the debt attached, and that when a valid charge has been created on the debt attached prior to the garnishee order, the charge is entitled to priority over the garnishee order, even though notice has not been previously given by the chargee to the garnishee; but their lordships reverse the decision of Stirling, J., in finding that an advance made to a railway contractor upon an assignment of his contract and all his materials by way of security, and upon a covenant by the borrower to repay all advances within six months, and to pay the lender ten per cent. of the profits, constituted the lender a partner with the borrower. The Court of Appeal being of opinion that, although participation in profits is strong evidence, it is not conclusive evidence of a partnership; and that the question of partnership or no partnership must be decided by the intention of the parties, to be ascertained by the contents of the written instruments, if any, and the conduct of the parties, and that the stipulations in the deed. The expressions in the correspondence in the present case, were all consistent with the relations of the parties being lender and borrower, and not partners.

PLEADING—STRIKING OUT PLEADINGS AS EMBARRASSING AND UNNECESSARY—ORD. 19, R. 27—(ONT. C. R. 423)—EXERCISE OF DISCRETION.

Knowles v. *Roberts*, 38 Chy. D. 263, was an action to enforce a compromise, in which the plaintiff set out in his statement of claim the allegations as to his

right, and the corresponding liabilities of the defendant which were contained in his statement of claim in a former action. An application to strike out these allegations from the statement of claim having been made to the Vice-Chancellor of Lancaster, was dismissed by him, but the Court of Appeal (Cotton, Lindley and Bowen L.JJ.), were of opinion that the application should have been granted, and the appeal was allowed, notwithstanding the order was made in the discretion of the judge below; because their lordships, in appeal, were of the opinion that he had not exercised his discretion "on right principles."

POWER OF SALE—MORTGAGE—NON-COMPLIANCE WITH POWER—CLAUSE PROTECTING PURCHASER AGAINST IRREGULARITY IN SALE.

Selwyn v. *Garfit*, 38 Chy. D. 273, was an action by a mortgagor to set aside a sale made by a mortgagee, under a power of sale in the mortgage, on the ground that the sale was made prematurely and before the period authorized by the power. The mortgage contained a clause relieving a purchaser under the power from inquiring as to the regularity of the sale. After the making of the mortgage the mortgagor had incumbered his equity of redemption. It was held by the Court of Appeal (Cotton, Lindley and Bowen L.JJ.), affirming Kay, J., that the sale having been made before the period stipulated in the mortgage could by any possibility have expired, the sale was void; and that as the purchaser must be taken to have known that the proviso had not been complied with, she was not protected by the protection clause, and that the mortgagor having incumbered his equity of redemption, and therefore not being in a position to waive the notice stipulated for by the power, the purchaser had no right to assume that there had been any such waiver.

JOINT TENANCY—SEVERANCE—MARRIAGE—WIFE'S CHOSE IN ACTION.

In re Butler, Hughes v. *Anderson*, 38 Chy. D. 286, the short point decided by the Court of Appeal (Cotton, Lindley and Bowen L.JJ.), overruling North, J., who had followed *Baillie* v. *Treharne*, 17 Chy. D. 388, a decision of Malins, V.C., was that the mere fact of marriage does not operate as a severance of the wife's joint tenancy in a *chose in action* (bank stock), which has not been reduced into possession by the husband. A passage in Co. Lit., 1856, which appears at first sight to be opposed to this view, where Coke, after stating the rule as regards realty, says: "But otherwise it is of personal chattels," was shown by the court, by reference to other passages in Co. Lit. to refer not to all personal property, but merely to chattels in possession.

LIGHT—IMPLIED GRANT OF EASEMENT—DEROGATION FROM GRANT.

In *Birmingham, Dudley and District Bank* v. *Ross*, 38 Chy. D. 295, the Court of Appeal (Cotton, Lindley and Bowen, L.JJ.) affirm a decision of Kekewich, J. In this case the corporation of a town granted a lease of a piece of land and a newly erected building, "with the rights, numbers and appurtenances to the said buildings belonging," to one Daniell, who subsequently assigned it to the plaintiffs. The building abutted on a passage twenty feet wide, which the corporation

agreed to keep open, and on the other side of the passage were old buildings about twenty-five feet high also owned by the corporation. The corporation demised the land on the other side of the passage to the defendant, who tore down the old buildings, and on their site erected a house eighty feet high, which materially interfered with the plaintiff's light. The land on both sides of the passage was part of a large piece laid out by the corporation upon a building scheme for the improvement of the town, and of this scheme it was held that the plaintiff's assignor, Daniell, had notice. Under these circumstances it was held that there was no express or implied grant of any right to the access of light over the buildings on the other side of the passage, as the same existed at the date of the lease to Daniell. The action which was for a mandatory injunction to remove the obstructive building was therefore dismissed with costs. It was argued by counsel for the defendant that the doctrine that the grantor grants so much as is reasonably necessary for the complete enjoyment of the premises did not exist except where the tenement granted adjoined physically the tenement which was left in the hands of the grantor, and that in the present case the intervening passage of twenty feet between the two parcels of land prevented the application of the doctrine; but this argument was held untenable.

PRACTICE—MARRIED WOMAN SUING BY NEXT FRIEND—SECURITY FOR COSTS.

In re Thompson, Stevens v. *Thompson*, 38 Chy. D. 317, the point of practice decided by the Court of Appeal (Cotton, Fry and Lopes, L.JJ.), affirming North J., was simply this, that where a married woman suing by her next friend obtained judgment without prejudice to an application by the defendant for security for costs on the ground that the next friend was not a person of substance; that an order for security on that ground was rightly granted, since the next friend alone was liable for the costs, and this, notwithstanding, that the married woman, if she had sued alone, would not have been liable to give security; and, it was held that the plaintiff after obtaining judgment by her next friend could not claim the right to sue alone.

PRACTICE—ADMINISTRATION ORDER—DISCRETION OF COURT—DIRECTION BY TESTATOR TO EXECUTORS TO BRING ADMINISTRATION ACTION.

In re Stocken, Jones v. *Hawkins*, 38 Chy. D. 319, it was held by the Court of Appeal affirming North, J., that nothwithstanding a direction by a testator to his executors to have his estate administered by the court, the court has still a discretion as to granting such an order, but that some weight ought to be given to such a direction, in considering whether or not the order should be made. Pursuant to such a direction in the will of their testator, one of the executors in the present case, after the lapse of a year from his death, applied for an administration order, which was granted, declaring the estate ought to be administered under the direction of the court, and directing an inquiry of what the estate then consisted; his co-executor, who was also beneficially interested, applied to discharge the order, as being unnecessary and likely to involve the estate in

unnecessary expense. North, J., having refused to discharge the order, his decision was upheld by the Court of Appeal, who expressed their approval of the limited form in which the order had been made.

PRACTICE—SERVICE OUT OF THE JURISDICTION—INJUNCTION.

The principle laid down in *Marshall* v. *Marshall*, 38 Chy. D. 330, is important. An application was made by the plaintiff, resident in Scotland, for leave to issue a writ against the defendant, also resident in Scotland, for an injunction and damages, on the ground that the defendant was selling goods in England in such a way as to lead the public to believe they were the plaintiff's goods. But it was held that as an injunction in England could only be enforced against the defendant's agents and not against himself, the matter ought to be left to the Scotch Courts, and leave to issue the writ was therefore refused.

VENDOR AND PURCHASER—CONDITIONS OF SALE—TIME, WHEN OF THE ESSENCE OF THE CONTRACT.

It is not very surprising to learn that in *Hatten* v. *Russell*, 38 Chy. D. 334, Kay, J., decided that where a contract for sale fixes a day for completion, and provides that if the purchase is not completed on that day the purchaser shall pay interest from that day until completion, time is not of the essence of the contract, so as to entitle the purchaser immediatly to repudiate the contract; if in consequence of a defect of conveyance merely, and not of title, the vendor is unable on his part to complete by the day named, and that where the defect is simply one of conveyance, and time is not of the essence of the contract, the purchaser is not entitled to repudiate after the day fixed for completion until he has given the vendor notice to remove the defect within a reasonable time, and the vendor has failed to do so.

INTERNATIONAL LAW—DE FACTO GOVERNMENT—CONTRACT—DE JURE GOVERNMENT.

Republic of Peru v. *Dreyfus*, 38 Chy. D. 348, is a decision of Kay, J., on an important question of international law, to the effect that a contract made with a *de facto* revolutionary government by the subject of a foreign State which has recognized the *de facto* government, is one that by the law of nations is binding on the *de jure* government, if subsequently restored to power; and in litigating with such foreign subject in respect of rights arising out of such a contract, the *de jure* government must adopt the contract, and only such defences are open to it as would have been open to the *de facto* government.

CROWN PREROGATIVE—DEBTOR TO CROWN—PRIORITY.

In re West London Commercial Bank, 38 Chy. D. 364, brings up a point which does not often find its way into the reports, the crown prerogative as against its debtors. In this case letter receivers were in the habit, with the sanction of the Postmaster-General, of paying moneys received on account of the Post Office into a bank to their private account together with their own

moneys, and of drawing cheques both for their own purposes and for payments to the Post Office. The bank had notice that their customers were letter receivers, and drew cheques for Post Office purposes. The bank having gone into liquidation, the crown claimed payment in priority to other creditors of the bank of the balance due on the letter receivers' account in respect of Post Office moneys, and it was held by Chitty, J., following *Rex* v. *Ward*, 2 Ex. 301 *n.*, that the claim was well founded.

PRACTICE—DISCOVERY—TRANSCRIPT OF SHORTHAND NOTES—PRIVILEGE.

The short point of practice disposed of by North, J., *In re Worswick*, *Robson* v. *Worswick*, 38 Chy. D. 370, is that the transcript of shorthand notes of proceedings in open court, is not privileged from production, and it makes no difference whether the notes in question were taken by the party called on to produce them, or by a stenographer for him or by his solicitor, counsel, or the solicitor's clerk.

SATISFACTION—ADEMPTION—LEGACY—DEBT.

In re Fletcher, Gillings v. *Fletcher*, 38 Chy. D. 373, North, J., held that where a testator, who at the date of his will owed his wife £625, and by his will bequeathed her a legacy of that amount; and subsequently in his lifetime paid her the debt, that the widow was not entitled to the legacy.

PRACTICE—PLEADING MATTER SINCE WRIT—ORD. 24 R. 3—(ONT. C. R. 440)—CONFESSION OF DEFENCE—JUDGMENT FOR COSTS.

In *Bridgetown* v. *Barbadoes*, 38 Chy. D. 378, the defendants pleaded a matter of defence arising after action brought, and the plaintiffs therefor filed a confession of such defence and signed judgment for their costs, which judgment on the application of the defendants was set aside by North, J., on the terms of the defendant withdrawing the defence arising after action.

PRACTICE—COSTS OF MOTION ADJOURNED TO TRIAL.

In *Gosnell* v. *Bishop*, 38 Chy. D. 385, Kekewich, J., held that where an action was dismissed at the trial with costs, the defendant was entitled to tax as part of his costs of the cause, the costs of a motion for an interim injunction adjourned to the trial, but not then brought on.

Notes on Exchanges and Legal Scrap Book.

CONTRACT AND PROHIBITION.—The Supreme Court of New Hampshire decided in *Jones et al.* v. *Surprise*, that a person who, in that State, solicits or takes orders for spirituous liquors, to be delivered at a place without the State, knowing, or having reasonable cause to believe, that, if so delivered, the same will be transported to a place within and sold in violation of the laws thereof, cannot recover the price of such liquors in the courts of New Hampshire, although the sale may be lawful in the State where it takes place. The rules of comity do not require a people to enforce in their courts of justice any contract which is injurious to their public rights, or offends their morals, or contravenes their policy, or violates their public law. Comity will not extend the remedy afforded by the laws of that State, to enforce a contract valid in the State or country where it is made, when it is tainted by the illegal conduct, within the State, of the party seeking to enforce it.

STATUTE OF LIMITATIONS.—The Supreme Court of Rhode Island, in *Taylor* v. *Slater*, S. C. R. I. (25 Rep. 441), brought into one view the law on the subject of the effect of a payment, and a new promise upon the bar created by the Statute of Limitations. The facts were, that a married woman filed a bill in equity to enforce the payment of two promissory notes, one bought by her with the money belonging to her separate estate, and the other given for interest on that note. The Statute of Limitations was relied on by the defendant. It was conceded that the Statute of Limitations had begun to run on the original note before it came into her possession. The second note given for the interest was made payable directly to her, and was due upon demand. On the subject of the effect of a promise, the court says: "The question whether a new promise to pay a debt already barred by the statute creates a new cause of action, so that suit must be brought upon it instead of the original contract, has given rise to considerable diversity of opinion. On the one hand, it has been held in a number of cases, that such new promise is a new cause of action, and that suit must be brought upon it, and not upon the original promise. In these cases the court proceeds upon the theory that the debt is extinguished by the statute, but inasmuch as it has been extinguished by operation of law instead of by the act of the parties, a moral obligation to pay it remains, and this moral obligation is a sufficient consideration for the new promise. On the other hand, it has been held in numerous cases that the statute does not extinguish the debt, but only bars the remedy, that the new promise simply removes the bar of the statute, thereby enabling the plaintiff to recover upon the original contract, and does not create a new cause of action which can be made the basis of a suit and judgment. And there are cases which hold that suit may be maintained either upon the original debt or upon the new promise. But whatever difference of opinion may

exist with reference to the effect of a new promise in the case of a debt already barred, it is settled that a new promise, made before the debt is barred, does not create a new cause of action, but merely suspends the bar of the statute for another period of limitation dating from such new promise." And upon this last principle the case was decided.—*Central Law Journal.*

LIABILITY OF INSURANCE COMPANY.—A novel question was decided in *Baker* v. *Ohio Farmers' Ins. Co.*, Michigan Sup. Ct., holding that where the agent of an insurance company fills out and signs an application in which the property is declared to be unincumbered, although the assured in her oral application disclosed a mortgage thereon, the company is liable, notwithstanding the provisions of the policy exempting it from liability in case of misrepresentation by agents. The court said: "In the case under consideration the assured had in no manner authorized or permitted the agent to act for her, and his act, as before shown, was the act of the company, in which she had no part or knowledge. Nor was she bound in any way to know it, or to make inquiry in regard to it. We are not referred to any case wherein the policy of insurance contained the precise clause relied upon in the present case, to wit, that the 'company shall not be bound by any act or statement made to or by the agent or other person, which is not contained in the written application or indorsed on the policy.' The counsel admits that this language is comparatively new in the insurance policies, but claims that his view of the case, and the effect of this clause, is sustained by the following authorities: *Insurance Co.* v. *Lewis*, 30 Mich. 41; *McIntyre* v. *Insurance Co.*, 52 id. 188; *Cleaver* v. *Insurance Co.*, 32 N. W. Rep. 660; *Catoir* v. *Insurance Co.*, 33 N. J. Law, 487; *Moore* v. *Insurance Co.* (Iowa), 34 N. W. Rep. 183; *Chase* v. *Insurance Co.*, 20 N. Y. 55; *Enos* v. *Insurance Co.*, 67 Cal. 621; *Insurance Co.* v. *Fletcher*, 117 U. S. 519. In 20 N. Y., *supra*, the application was signed by the assured, and it contained a clause expressly stating that the company should not be bound by any act done or statement made to or by any agent or other person, which was not contained in such application. As the assured signed this application, he was presumed to know the contents of it. He was therefore not permitted to show the knowledge of the agent, who examined the premises and wrote up the application, that it was not correct in its statements. 20 N. Y. 55, 56. In *Enos* v. *Insurance Co.*, *supra*, the policy contained a provision 'that this company shall not be bound by any act or statement which is not contained in the written application or indorsed upon the policy.' It was held that the local agent could not waive any of the provisions of the policy. It does not appear from the report of the case what particular thing or point in the policy was undertaken to be waived, or in what manner, except that such waiver, whatever it may have been, was not written upon the application or the policy. 67 Cal. 622, 623. *Moore* v. *Insurance Co.*, *supra*, does not touch the point involved here, as will be seen by an examination of the case. The case of *Catoir* v. *Insurance Co.*, 33 N. J. Law, 487, was one where the policy contained the following clause: 'Agents are not authorized to make contracts for the company, nor to write upon

the policy except his signature, when necessary, to the first receipt of premium, nor to waive forfeiture of the same.' A premium was not paid in time, the result of which was to forfeit the policy, unless the plaintiff proved that the company had legally waived the payment as it became due. The plaintiff showed no waiver, except that the local agent had orally consented that the plaintiff could pay it afterward, 'when he had it.' The policy was upon the life of plaintiff's wife. Held, that the agent could not waive the payment in the face of this provision in the policy. In *Insurance Co.* v. *Fletcher*, *supra*, the assured signed the application, but it was claimed he did not know it was to be a part of his policy —that one agent read the questions over, which he answered truthfully, while another agent pretended to write down his answers; that he had no reason to suppose that such answers were taken down differently from those given; that he was asked to sign the paper to identify him as the party for whose benefit the policy was to be issued, and that he signed it without reading it, and did not read his policy when he received it, nor at any time. The answers so written were false, and not as the assured gave them. The application contained an agreement that, if any of the answers were false, the policy to be issued upon them was void. The court held it was 'his duty to read the application he signed. He knew that upon it the policy would be issued, if issued at all. . . . If he had read even the printed lines of his application, he would have seen that it stipulated that the rights of the company could in no respect be affected by his verbal statements, or by those of its agents, unless the same were reduced to writing, and forwarded with his application to the home office. The company, like any other principal, could limit the authority of its agents, and thus bind all parties dealing with them with knowledge of the limitation. It must be presumed that he read the application, and was cognizant of the limitations therein expressed.' *Insurance Co.* v. *Fletcher*, 117 U. S. 529. It will be seen that the principles laid down in these cases do not reach or govern the case at bar. *Insurance Co.* v. *Lewis*, 30 Mich. 41, distinguished. . . . The fraud of the agent was not her fraud, nor was she in any respect negligent. The company was negligent, and must suffer, rather than Mrs. Baker, for taking and acting upon an application wholly, signature and all, in the handwriting of an agent whom it declined in the express provisions of its policies to trust."—*Albany Law Journal.*

RAILWAY BRIDGES CROSSING HIGHWAYS.—A recent decision of the Court of Appeal is of some importance to the highway authorities throughout the country whose roads are crossed by railways, and it may be of general interest to our readers to indicate the nature and extent of the liability imposed upon railway companies to maintain the bridges which cross highways and the roadways upon or under such bridges. The Railways Clauses Act, 8 Vict. c. 20, s. 46, enacts, that if a line of the railway cross any turnpike road or public highway then (except where otherwise provided by the special Act) either such road shall be carried over the railway, or the railway shall be carried over such road, by

means of a bridge of the height and width, and with the ascent or descent by that or the special Act in that behalf provided; and such bridge, with the immediate approaches, and all their necessary works connected therewith, are to be executed and at all times thereafter maintained at the expense of the company. This section deals with two cases, first, the case of a road carried over the railway by means of a bridge; and, secondly, the case of the railway being carried over a road. These two cases require separate consideration.

Taking the first of these cases, where the road is carried over the railway, we find that a question was raised as long ago as 1858 as to the liability to repair the roadway carried over the bridge. In the case of *Reg.* v. *North Staffordshire Railway Company*, 22 J. P. 112, otherwise reported as *North Staffordshire Railway Company* v. *Dale*, 8 E. & B. 836; 27 L. J. M. C. 147, the railway company contended that under the section already set out the road was to be distinguished from the bridge. The section, it was urged, provided that the road should be carried over by means of a bridge; therefore the road was something distinct from the bridge. The thing to be executed under the section was the structural work of the bridge, and it was that line which the company were bound to repair. The court, consisting of Lord Campbell, C.J., Wightman and Crompton, JJ., refused to adopt this view. They held that the section provided as well for the construction of the bridge and the roadway over it as for the future maintenance and repairs of both; and that the company was not only bound to make the bridge considered as the substratum of the roadway, but also the roadway on and over that substratum, and to maintain and repair such substratum and roadway. The same point was raised in the case of *Leach* v. *The North Staffordshire Railway Company*, 24 J. P. 71; 29 L. J. M. C. 150. In that case, by the special Act of the railway company, the company were required to erect a bridge over a certain highway where the railway crossed, and the Act provided that so much of the said road as should be broken up and damaged for the purposes of the Act should be reinstated and made good with such repairs as the road was then composed of, and the fences, wherever necessary, should be reconstructed and put into complete repair by the company, and kept in repair for the space of 12 calendar months after the making, forming, and completing thereof. It was held that an obligation to keep in repair the roadway over bridges and the approaches to bridges was imposed upon companies by section 46 of the Railways Clauses Act, and further, that such obligation was not taken away by the special Act which we have quoted. The court expressly affirmed the decision in *The North Staffordshire Railway Company* v. *Dale*, *supra*. The next case in which the point arose was that of *The North of England Railway Company* v. *Langbaurgh*, 28 J. P. 518. There it was contended that although the railway company were bound to make the bridge over the railway and the road, still they were not bound to maintain the road itself, for that was the proper duty of the inhabitants of the parish; but the court held that they were bound to follow the previous decisions, and that upon the authority of these decisions the company were bound not only to construct the bridge and the roadway and approaches, but to keep all these in repair for the future. From

the fact that the same question was raised in three cases, it may be inferred that the railway companies were not satisfied with the point decided, and accordingly in the recent case to which we have already referred they have made a bold attempt to have them overruled in the Court of Appeal. The case is *The Mayor, &c., of Bury* v. *The Lancashire and Yorkshire Railway Company*, 20 Q. B. D. 485. The result is that the previous decisions have been unanimously affirmed by the Court of Appeal. The Master of the Rolls said: "One thing is quite clear, that whatever works section 46 compels the railway company to execute, it likewise compels them to maintain for ever. In ordinary English a bridge includes the roadway upon it, over which people are to pass. If the railway company are to make that, as I think they are, they are also to maintain it." Fry, L.J., added some important observations upon the duty of the company as to the repair of the approaches to the bridge. It was argued, he said, that the "approaches" did not include the metalling on the arches or embankments, or whatever might be the substructure of the approaches. But surely the approach to a bridge must be something by which the bridge might be approached by the kind of traffic for which the bridge was to be used, and, therefore, must include the metalling of the roadway. If so it would be a monstrous conclusion that the company should be bound to repair the metalling of the roadway to the approaches, but not of the roadway of that of which they were approaches. It will be seen that, according to the decision of the Court of Appeal, a railway company is bound to keep in repair the roadway and the approaches to and upon a bridge which is carried over a railway, but the case where the railway is carried by means of a bridge over a highway is different, and depends upon different considerations. It will be observed that section 46 must necessarily differ in its application to such a case, for it provides that such *bridge* and the immediate approaches and all other necessary works connected therewith shall be executed and maintained by the company. The bridge in this case is the bridge which crosses the roadway, and no doubt the company are bound to keep that bridge in repair, but it was by no means clear whether the section has provided for the repair of the road under the bridge by the railway company. It was accordingly decided in two Irish cases, *Waterford and Limerick Railway Company* v. *Kearney*, 12 Ir. C. L. R. 224, and *Fosberry* v. *Waterford and Limerick Railway Company*, 13 Ir. C. L. R. 494, that the company were not bound to repair the road under the bridge. These cases were followed by the Court of Queen's Bench in England in *The London and North-Western Railway Company* v. *Skerton*, 28 J. P. 518; 5 B. and S. 559. There it was held that where the railway was carried over the highway by a bridge, the roadway being lowered to allow vehicles to pass under the bridge, the company were not bound to keep the slopes of the roadway in repair as being approaches to the bridge within the meaning of section 46. The result is that while in the first case where the road crosses the railway the company are bound to keep the roadway over the railway and the approaches in repair; in the second case where the railway crosses the road, even although the road may have been lowered to admit of the railway being carried across it, the company are under no liability to repair the roadway or the approaches to the bridge.—*Justice of the Peace.*

DIARY FOR SEPTEMBER.

1. Sat.....Long Vacation ends.
2. Sun.....*14th Sunday after Trinity.*
3. Mon....L. S. Trinity term begins. C.C. non-jury, York. Sir Edward Coke died, 1634, æt. 82.
4. Tues ...Court of Appeal sits.
6. Thur....Chy. Div. H.C.J. sits.
9. Sun.....*15th Sunday after Trinity.*
11. Tues....Gen. Sess. and C.C. sittings for trials in York.
13. Thur....Quebec taken and death of Wolfe, 1759.
14. Fri. ....Duke of Wellington died, 1852.
16. Sun.....*16th Sunday after Trinity.*
17. Mon....First Parliament of Up. Can. met at Niagara, 1792.
18. Tues....Quebec surrendered to the British, 1759.
23. Sun.....*17th Sunday after Trinity.*
28. Fri. ....W. H. Blake, 1st Chan. U.C., 1849.
30. Sun.....*18th Sunday after Trinity.*

Reports.

DIVISION COURTS.

[Reported for the CANADA LAW JOURNAL.]

GREENWOOD *v.* LONDON LOAN CO.,

Second mortgagee—Right to retain bonus in lieu of unearned interest on principal due through default in interest—R. S. O. c. 169 *—Rules of the company, how far binding on borrowers—R. S. C. c.* 127.

The plaintiff was a second mortgagee of lands of which the defendants were first mortgagees. The defendants' mortgage was for ten years, but in the third year they sold the land for default in payment of interest, retaining the arrears of interest, the principal, and $100 as a bonus or discount to compensate them for the lower rate at which any new loan would have to be made, money being worth only 6 per cent., while their mortgage was at 7½ per cent. This sum of $100 the plaintiff claims as a subsequent incumbrancer, contending that the defendant, had no right to retain it.

Held, that the signing of an application containing an agreement to be bound by the rules of the defendants' company made the mortgagor liable to pay this bonus or discount under those rules, notwithstanding the Registry Laws and R. S. O. c. 169.

Held, also that this is not a contravention of R. S. C. c. 127. *Green* v. *Hamilton Provident and Loan Co.*, 31 C. P. 574, cited and followed.

[ELLIOTT, Co. J.—London, July 27.

The plaintiff was the second mortgagee upon the land on which the defendants held the first mortgage, purporting to be made in pursuance of the Act respecting Short Forms of Mortgages, and containing power of sale in conformity with the form given in the Act.

The mortgagor being in default in the payment of interest, the defendants, in pursuance of the terms of their mortgage, claimed that the whole purchase-money became due, and in exercise of their power of sale they sold the mortgaged land, appropriated the proceeds towards the repayment of the principal, with interest and costs, and also, as it is termed, discounted the future payments during the unexpired term of the loan, which consists of several years.

W. H. Bertram, for plaintiff.

Geo. McNab, for defendants.

ELLIOTT, Co. J.—It is as to the right of defendants to retain the amount arising from this discount that the differences which are the subsubject of this suit have arisen. It is not disputed that the plaintiff, as second mortgagee, is entitled to recover $100 if he is entitled to recover anything, and the facts are admitted, so that the question to be solved is one entirely of law. The defendants rely upon *Green* v. *The Hamilton Provident and Loan Co.* (31 C. P. 574), where the same question was the subject of dispute. OSLER, J., in that case said: "If the question turned upon the terms of the mortgage alone, there would be nothing to support the defendants' contention. It is clear they would have no right to charge more interest than the principal money had earned. They could not by calling the latter in, either by a sale or otherwise, exact interest which had not accrued."

In that case and in this the authority to sell the mortgaged premises was contained in the power to sell given in the first schedule of the Act respecting Short Forms of Mortgages, which as amplified in the extended form, gives no authority to claim discount, so that in this respect the two cases are alike. Then, where is their authority for claiming this discount? There is nothing in the terms of the mortgage authorizing it, neither was there such authority in the mortgage held by the Hamilton company. In both cases the companies claimed by virtue of the rules regulating their proceedings, and in force when the loan was made to the mortgagors. Accordingly, unless there is something in this case to distinguish it from the Hamilton case, I must follow the latter. In the first place, let us see what is the statutory authority giving power for these rules. By 39 Vict. c. 32, s. 6, now to be found in R. S. O. c. 169, s. 66, it is enacted, after pointing out that borrowers need not be members, that "all borrowers from the society *shall be subject to*

all the rules of the society in force at the time of their becoming borrowers."

Now the rules relating to the claim for discount on further payments are the same in the Hamilton case as in this, and in the Hamilton case it was held that the rules must govern and give the right of their claim for discount, although in the absence of rules there would be no claim whatever to it; unless there is something else to distinguish the Hamilton case from this, I must disallow the plaintiff's claim. The only difference between the two cases I can see is, that in the Hamilton case it is recited in the mortgage that the mortgagor was a member of the society and applied for a loan, while in the mortgage in this case there is nothing of that kind. The mortgage in the Hamilton case was made in 1874, when borrowers were required to be members of the society, or at least, it was usual to make them such. But in 1876, by 39 Vict., above referred to, it became no longer requisite that borrowers should be members; so in the case of the mortgage in question, the mortgagor was simply a borrower, and that is not mentioned in the mortgage. But his written application to borrow from the defendant's society is admitted. By that S. undertook to be subject to the rules of the society, so that the only difference in the Hamilton case and this appears to be, that in the former the mortgagor was mentioned as being a borrower from the society, whereas there is no mention of that circumstance in the mortgage of S. It appears to me that the difference is unsubstantive; that S. was a borrower was made plain by the fact of the mortgage.

I must say that, were it not for the case of the Hamilton company, I should have found it difficult to get over the fact that in the mortgage there is no reference whatever to any rules, nothing to show that they are obligatory, and nothing appears to show that they were brought to the knowledge of the mortgagor further than in the application to borrow he acknowledged his submission to them. To supersede the subject of the statutory power of sale which, in drawing the mortgage, was invoked, and which disallows any claim to discount, and to make the rules paramount, and to ignore the effect of the Registry Laws, would have caused me some perplexity, were it not for the authority of this Hamilton case. The plaintiff's counsel also refers to c. 127 Rev. Stat. of Canada, prohibiting any fine or penalty which increases the rate of interest payable, but does not prohibit a contract for the payment of interest on arrears of interest as principal, at any rate not greater than the rate payable on principal not in arrears. In this case it is not shown that there has been any contravention of this Act. On the contrary, the discretion of the directors under the company's rules has been, I understand, exercised by imposing the difference between the rate of interest in the mortgage, which is 7½ per cent., and the current rate of 6 per cent., and thus constituting the so-called discount on the future payments. It was further objected on behalf of the plaintiff that the rate of interest upon which the discount was to be calculated, should have been shown in the mortgage by virtue of the last mentioned statute, but the provision does not apparently apply to this question of discounting further payments. I arrive at the conclusion that, following the law of *Green* v. *Hamilton Loan Society*, my judgment must be for the defendant's company, but without costs.

Early Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

COURT OF APPEAL.

COATTS *v.* KELLY.

Fraudulent preference—Assignment for benefit of creditors—48 Vict. c. 26 (O.).

One Chamberlain, who was in insolvent circumstances, and indebted to K. in $120, was pressed by him for payment, when he agreed to sell K. a horse for $110 in part payment, and about the 15th August, 1885, delivered the horse in pursuance of such agreement. K. kept possession of and worked the horse for one day, when he lent him to Chamberlain, who continued to use him in his business until the early part of October following, when he returned the horse to K., who thenceforward retained possession of him. On the 31st October Chamberlain executed an assignment to

the plaintiff, in pursuance of the Act 48 Vict. c. 26 (O.) (1885), respecting assignments for the benefit of creditors. There was evidence tending to show that Chamberlain was insolvent when he sold the horse, but none that K. knew or had reason to know that fact.

In an action against K. to recover the horse, on the ground of fraudulent preference, the court below nonsuited the plaintiff, and on appeal to this court that judgment was affirmed with costs.

TODD *v.* DUN, WIMAN & CO.

Libel—Privileged Communication—Mercantile agencies—Pleading—Variance.

In an action against a mercantile agency company the alleged libel consisted of the publication, among the general body of the defendants' subscribers, of a notice or circular containing the words, after the plaintiff's name, "If interested, inquire at office." The defendants pleaded that the notice also contained words explanatory of the alleged libel which should be read in connection therewith, and which had not been set out in the statement of claim. Upon this the plaintiff took issue.

At the trial it appeared that the circular contained not only the expression alleged in the statement of claim, but also a further statement referring to, and explanatory of, it.

The evidence was confined to the effect and meaning of the words set out in the statement of claim, notwithstanding the defendants' objection that they could not be severed from the rest of the circular. The plaintiff insisted that an amendment was unnecessary, and made no application to amend until the jury had retired.

Held, that there was a variance between the libel alleged and that proved, and that the plaintiff should have been nonsuited.

A subscriber to a mercantile agency company applied to them for information as to the standing of a customer, and in order to furnish it they requested a local agent of theirs (the defendant C.) to advise them confidentially on the subject.

In an action by the customer against the local agent for an alleged libel, consisting of the information given by him to the company, in answer to their request,

Held, that the information having been procured for the purpose of being communicated to a person interested in making the inquiry, and there being nothing in the language in excess of what the defendant might fairly state, the communication was privileged; and there being no proof of express malice, the plaintiff was not entitled to recover.

It is the occasion of publishing the alleged libel which constitutes the privilege.

Where privilege exists implied malice is negatived, and the burden of showing express malice is on the plaintiff. The mere untruth of the statement, unless coupled with proof that defendant knew that what he was stating was untrue, is not evidence of express malice.

Judgment of the court below reversed.

Clark v. *Molyneaux*, 3 Q. B. D. 235; *McIntee* v. *McCulloch*, 2 E. & A. 390, referred to and followed.

Semble.—*Per* OSLER, J. A.—A mercantile agency company have no higher privilege for their business publication than other members of the community, and a general publication of libellous matter to all their subscribers indiscriminately is not privileged.

CITY OF TORONTO *v.* TORONTO STREET RAILWAY CO.

By-law—Terms of agreement—Safety of public.

In 1861 an agreement was entered into between the plaintiffs and certain parties for the construction and operation of street railways in the city of Toronto, in which they agreed to construct the lines of road specifed, from time to time, and would at all times employ careful, sober and civil agents, conductors and drivers to take charge of the cars upon the said railway, and that they and their agents conductors, drivers and servants would at all times . . . . operate the said railways, and cause the same to be worked under such regulations as the Common Council of the city of Toronto might deem necessary and requisite for the protection of the persons and property of the public, and provided such regulations should not infringe upon the privilege granted by the agreement. Subsequently the privileges so conferred upon these persons were assigned

to the defendants, who continued to work the several railways, and after some years introduced for use thereon smaller cars drawn by one instead of two horses, as had been done previously, and with only one man in charge instead of two as on the large cars.

In 1882, the Council of the city passed a by-law (No. 1264) prohibiting the operation of any car within the city limits without two men in charge, one as driver, the other as conductor. The defendants refused to conform to this by-law, and this action was brought to compel defendants to do so, the agreement of 1861 being relied on as warranting that relief.

Held [reversing the judgment of the court below] (1) that the by-law in question was not within the terms of the agreement, its provisions not being aimed at the protection of the public, that term as used in the agreement not including passengers in the defendant's cars, and that it was therefore *ultra vires*; (2) that the by-law was also invalid, as it was an invasion of the domestic concerns of the company.

HIGH COURT OF JUSTICE FOR ONTARIO.

Queen's Bench Division.

Divisional Court.] [June 23.

CLARKE *v.* JOSELIN.

Rectification of contract—When ordered—Evidence—Exchange of mortgages—Liability of assignors.

In order to secure the rectification of an instrument the clearest evidence is required to be adduced: but the court need not stay its hand because one of the parties to the instrument chooses to deny that there is any mistake in it. The writing must stand as embodying the true agreement between the parties until it is shown beyond reasonable doubt that it does not.

If the court, after considering all the circumstances surrounding the making of the instrument, whether it accords with what would reasonably and probably have been the agreement between the parties, gauging the credibility of the witnesses, paying due regard to their interest in the subject matter, and weighing their testimony, is satisfied beyond reasonable doubt that the instrument does not embody the true agreement between the parties, it should order rectification.

The transaction between the plaintiff and defendant was an exchange of mortgages. The plaintiff in assigning his mortgage to the defendant guarded himself against personal liability, but the defendant in assigning her mortgage did not do so, and the plaintiff sued her upon the covenant in her assignment that the mortgage assigned was a good and valid security, alleging that it was not so.

Held, upon the evidence, that the true agreement was that neither the plaintiff nor the defendant should be personally liable in respect of the mortgage which each assigned to the other; and rectification according to such agreement was adjudged.

S. R. Clarke, the plaintiff in person.

J. Reeve, for the defendant.

Divisional Court.] [June 23.

HOUSINGER *v.* LOVE.

Partnership—Judgment against partners—Payment by one—Enforcing against the other—R. S. O. (1887) *c.* 122, *ss.* 2, 3, 4—*Partnership accounts—Statute of Limitations.*

The plaintiff and defendant were partners, and judgment was recovered against them in 1876, by a bank upon certain promissory notes of which they were respectively maker and indorser. The plaintiff paid the judgment immediately after its recovery, took an assignment of it, and in 1886 proceeded to enforce it against the defendant.

The partnership accounts were taken by a referee whose finding, approved by the court, was that the defendant should have paid one-half of the judgment.

Held, that the plaintiff was entitled to that extent to stand in the place of the original judgment creditor, and enforce the judgment against the defendant.

Per ARMOUR, C.J.—The Mercantile Amendment Act, R. S. O. (1887), c. 122, ss. 2, 3, 4, applies to the case of partners. *Small* v. *Riddel*, 31 C. P. 373; *Potts* v. *Leask*, 36 U. C. R. 476; and *Scripture* v. *Gordon*, 7 P. R. 164,

are to be disregarded, in view of the opinions of the judges of the Court of Appeal in *London and Canadian L. & A. Co.* v. *Morphy*, 14 A. R. 577.

Per STREET, J.—It is not necessary to inquire whether the statute relates to partnership dealings; apart from it the plaintiff is entitled, as surety for the defendant to the extent of one-half of the debt, to the benefit of the security, having made the payment with the intention of keeping the debt alive and not of extinguishing it, as shown by his taking an assignment; and the fact that a trustee was not introduced is not material. *Prima facie* the defendant was liable to pay one-half the judgment; it was, therefore, for his benefit that the partnership accounts were gone into; and he could not claim the benefit of the Statute of Limitations, more especially as he submitted to have the accounts taken, and did not raise the statute till after they had been taken.

G. C. Campbell, for the plaintiff.

Aylesworth, for the defendant.

Common Pleas Division.

The Divisional Court.] [March 10.

BOND *v.* CARMEL.

Illegal arrest and imprisonment—Conviction for having liquors near public works—Destruction of liquors—Necessity of quashing conviction before action commenced—Putting in new conviction after return to certiorari—Notice of action—Statement of cause of action and service—Sufficiency of defence of "not guilty by statute"—Necessity to refer to section of statute—Venue—Order for destruction of liquors—Non-production of at trial—Admissibility in Divisional Court.

Action against two justices of the peace for the illegal and malicious arrest of the plaintiff, and the destruction of his stock of liquors. The defendant was arrested and convicted for having liquors for sale near public works, and imprisoned. Writs of *habeas corpus* and *certiorari* were issued, and on the return thereof the plaintiff was discharged. Under a writ of *certiorari*, directed to the defendants, the conviction was returned not under seal. The return was made by the defendants' solicitor, to whom all the papers, including the conviction, had been delivered by the defendants to look over, and in his affidavit accompanying the return he swore that the conviction returned was the one made by the defendants. It was objected that the conviction should have been quashed before action brought.

Held, by ARMOUR, J., at the trial, that not being under seal, this was not necessary.

Haacke v. *Adamson*, 14 C. P. 201; and *McDonald* v. *Stickney*, 31 U. C. R. 581, followed.

It was urged at the trial, and in the Divisional Court, that the alleged return to the *certiorari*, being a *certiorari* in aid of a *habeas corpus*, did not preclude the defendants from putting in a properly sealed conviction. No such conviction, however, was produced, but one of the defendants stated that in his belief such conviction existed.

Held, that as the return was made to the *certiorari* directed to the defendants, and did not refer to the *certiorari* in aid directed to the gaoler, and in the face of the solicitor's affidavit, the conviction could not be received.

Per ROSE, J.—And for the additional reason that the evidence disclosed a want of *bona fides*.

The notice of action stated that the cause of action arose "in the month of May last, 1887, at said village of M., and in the town of P.," and was not served personally on the defendant C., but was served on his agent at his head office, also at his place of residence, and on his solicitor. The statement of claim alleged the service of each notice. The only defence was not guilty by statute, R. S. O. c. 73, s. 11, the section referring to notice being s. 10.

Held, by ARMOUR, J., and affirmed by the Divisional Court, that the statement of time and place, as well as the service, was sufficient.

Oliphant v. *Leslie*, 24 U. C. R. 398, followed.

Held, also, by the Divisional Court, that no objection could now be taken to the notice, as under the O. J. Act and rules, when the defence of "not guilty by statute" is set up, the particular section of the statute relied on must be pleaded.

The venue was laid at Toronto, but was changed by order, and the action was tried at Port Arthur, in the district where the cause of action arose.

Held, that in such an action as this the venue need not be laid where the offence is committed.

Legacy v. *Pitcher*, 10 O. R. 620, followed.

Per ROSE, J.—The point was not taken in the motion paper, and this was not a case in which to review *Legacy* v. *Pitcher*, even if opened for review by *Ascott* v. *Lilley*, 14 A. R. 283.

From the village of M., where the arrest and conviction took place, and the liquors were destroyed, to the Canadian Pacific Railway, then in course of construction, and over fifty miles distant, the railway company had constructed a colonization supply road for the conveyance of supplies for the railway. No proclamation was issued under R. S. O. (1877) c. 32, proclaiming this a public road; but, subsequently, the Dominion Government, by proclamation issued under R. S. C. c. 151, proclaimed the ten miles on either side of the supply road to be in the vicinity of the public work.

Held, by ARMOUR, J., and affirmed by the Divisional Court, MACMAHON, J., doubting, that the village of M. was not within three miles of a public work under R.S.O. (1877) c. 32.

Per GALT, C.J.—The place did not come within either Act, no proclamation having been issued at the time.

It was urged in the Divisional Court that the order for the destruction of the liquors, with a certificate indorsed, stating that the liquors were destroyed thereunder, though not produced at the trial, should now be received, and was a bar to the plaintiff's claim in respect of the destruction of liquors.

Per GALT, C.J.—There was no power to make the order, the authority to do so being based on R. S. O. (1877) c. 32, which was not made applicable; and, therefore, the order should not be received in evidence.

Per ROSE and MACMAHON, JJ.—The order was not dependent on the conviction of the plaintiff, and came within R. S. O. (1877), c. 73. The destruction was an act under an order, and the order must he quashed to avoid the protection afforded by s. 4; but

Per ROSE, J.—The order should not now be received; in any event there must be a new trial; but this would be of doubtful value, as it would only be on payment of costs of the trial and the motion.

Per MACMAHON, J.—The order should be received, but a new trial should be granted on this part of the case.

G. T. Blackstock, for the plaintiff.

McCarthy, Q.C., for the defendants.

Street, J.] (May 23.

MCARTHUR *v.* NORTHERN AND PACIFIC JUNCTION R. W. CO.

Railway—Company incorporated by Dominion Parliament—Line built through lands under timber license—Timber cut within and outside six-rod belt—Damage by reason of railway—Limitation of action.

The defendants, a railway company incorporated under an Act of the Parliament of Canada, built the railway through lands in this Province, the fee of which was in the Crown, but was under a timber license issued by the Ontario Government to the plaintiffs, and cut down and removed the timber both within and outside of the six-rod limit mentioned in R. S. C. c. 109, s. 6, ss. 12. The timber was all cut more than six months before action brought.

Held, that as to the timber cut within the six-rod limit, this was damage or injury sustained "by reason of the railway" under R. S. C. c. 109, s. 272, and the action was, therefore, barred by reason of its not having been brought within the six months; but that as to the timber cut outside the six-rod belt, the plaintiffs were entitled to damages.

A. R. Creelman, for the plaintiffs.

E. Martin, Q.C., and *W. Cassels*, Q.C., for the defendants.

Chancery Division.

Robertson, J.] [May 22.

BALDWIN *v.* KINGSTONE *et al.*

Will—Devise—Heir at law—14 & 15 Vict. c. 6 (C. S. U. C. c. 82)—Moneys paid over six years—Moneys paid within six years under common mistake of law—Recovery of moneys which were the proceeds of lands vested by acts of the parties.

A. W. B., by his will, dated August 14, 1850, after giving a life estate to his wife, provided as follows: "After the death of my said wife I devise the lands . . . known as Russel

Hill to my nephews the Hon. R. B. and W. A. B., sons of my brother the late Hon. W. W. B., deceased, their heirs and assigns forever, or in case of the death of them or either of them, in my own lifetime, then I devise the share of such deceased to the heir-at-law or heirs-at-law of such deceased, his heir or their heirs and assigns," and died January 15th, 1866, leaving W. A. B. and two sons and two daughters of the Hon. R B. (who predeceased him) him surviving. One of the daughters died July 10, 1866, unmarried and intestate, during the lifetime of the wife of A. W. B., the life-tenant who was in possession until her death, which happened on April 19, 1870. On her death the two sons and surviving daughter entered into possession, collected rents, sold part thereof, dividing the proceeds thereof in equal shares amongst themselves, and partitioned part of the unsold balance thereof by deed dated Jan. 31, 1885, and in all respects dealt with the said lands, and the proceeds thereof, as if they were all equally interested therein, their father, the Hon. R. B., having by his will divided his estate equally between them, until May, 1886, when the plaintiff, the eldest son of the said Hon. R. B. was advised he was entitled to the whole as "heir-at-law" of his father. In an action for the construction of the said will, and recovery back of the moneys paid over, and the partitioned lands remaining unsold, and the proceeds of those sold, and for a declaration that the plaintiff was solely entitled to the unpartitioned lands. It was

Held, following *Sylee* v. *Deal*, 19 Gr. 601, that the Act 14, 15 Vict. c. 6, C. S. U. C. c. 82, abolishing primogeniture, which came into force January 1, 1852, does not apply except in cases of intestacy, and that the plaintiff was heir-at-law, and that the several divisions of property and money did not come under the head of family arrangements. But

Held, also that the moneys paid over more than six years before action could not be recovered; and following *Rogers* v. *Ingham*, 3 Ch. D. 35, that as to the moneys paid over within six years, an action for money had and received would not lie, for moneys paid by one party to another under a mistake of law common to both where both had a full knowledge of all the facts.

Held, also, that moneys not paid over, being the proceeds of lately sold lands, could not be recovered by the plaintiff, as the lands of which they were the proceeds had become vested in the different parties claiming them by possession as tenants in common, and by the partition deed.

C. Robinson, Q.C., *Maclennan*, Q.C., and *Morris*, Q.C., for the plaintiffs.

Irving, Q.C., *McCarthy*, Q.C., and *George M. Evans* for the defendants, the trustees of Robert Baldwin, deceased.

Moss, Q.C., *W. Barwick*, for the defendant Ross.

Divisional Court.] [June 28.

JOHNSON *v.* CLINE, *et al.*

Fraudulent conveyance—To defeat, delay and hinder creditors—Unable to pay debts in full —48 Vict. c. 26, s. 2 (O.).

E. C. having entered into a partnership at the instigation of his wife, M. E. C. and family, conveyed certain land to her to prevent its becoming liable to any creditors of the new firm. He then, as agent of his wife, placed the same land in the hands of the plaintiff as a land agent to sell or exchange. Through the exertions of the plaintiff an agreement for exchange was arranged between the wife and one E. The plaintiff sued M. E. C. for his commission, and recovered a verdict against her. M. E. C. reconveyed the land to the husband E. C.

In an action to set aside the reconveyance as fraudulent and void against the creditors of M. E. C., it was

Held (reversing GALT, C.J.C.P.), that the conveyance by the husband E. C. to the wife M. E. C. was made to defraud creditors, and following *Mundell* v. *Tinhis*, 6 O.R. 625, that the court will not assist a person who has placed his property in the name of another in order to defraud his creditors, that M. E. C. had an interest in the property which could be made available to her creditors for the payment of her debts, and that the conveyance from M. E. C. was made with intent to defeat, delay and prejudice creditors, and that, as the evidence showed she was unable to pay her, debts in full, it fell within the provisions of 48 Vict. c. 26, s. 2 (O.), and was void.

Moss, Q.C., and *Ritchie*, Q.C., for the plaintiffs.

Foster, Q.C., and *E. Meek* for the defendants.

Practice.

Ferguson, J.] [June 19.

SMITH *v.* FLEMING.

Costs—Covenant for renewal lease, construction of—Costs of lease—Costs of reference and award.

It was provided in a lease that if the lessee should desire a renewal for a further term, and should give a defined notice, containing the name of an arbitrator, the lessors should and would, *at the expense of the lessee*, execute a new lease at such increased yearly rent as might be determined by the award of three indifferent arbitrators, or a majority of them.

Held, that the costs of the lease were provided for both by law and by the above clause, and must be borne by the lessee, but that the costs of the arbitration were not provided for by the clause, and each party must bear his own costs of the reference and half the costs of the arbitrators' fees, for which the action was brought.

A. C. Galt, for the plaintiffs.

S. H. Blake, Q.C., and *Tilt*, Q.C., for the defendant Fleming.

Arnoldi, for the defendants, the Rector and Churchwardens of St. James's Church, Toronto.

Falconbridge, J.] [July 11.

In re SOULES *v.* LITTLE.

Prohibition—Division Court—Defendant out of jurisdiction—Taking chances at trial—Delay in moving.

T., one of the defendants in a Division Court action, resided out of Ontario, and process was served substitutionally upon him. L., the other defendant, objected that the court had no jurisdiction by reason of T.'s absence from the Province. No written notice of this objection was given before the trial, and there was a conflict of evidence as to whether it was taken at the trial; but at any rate, if taken at all, it was practically abandoned, and the defence rested on a different ground. The trial was on the 13th January, 1888, when judgment went for the plaintiff for more than $100; a new trial was moved for by L., and was refused on the 23rd February, 1888; execution then issued, under which goods of L. were seized, and became the subject of an interpleader. L. did not appeal, but on the 16th May, 1888, moved for prohibition.

Held, that L. having taken his chances at the trial, and not having sufficiently accounted for his delay in moving, the discretion of the court should not now be exercised in his favor.

W. T. Allan, for the motion.

C. J. Holman, contra.

ELECTION COURTS.

Street, J.] [January 31.

EAST ELGIN ELECTION (DOMINION).

MERRITT *v.* WILSON.

Dominion Controverted Elections' Act—Inducing a voter to vote—Loan to voter—R. S. C. c. 8, s. 84 (a) 88, 91.

Where it was charged that an agent of the defendant paid, or offered to pay, money to a voter for travelling expenses and loss of time, and the evidence showed that prior to the election the said voter, on being asked by the agent if he intended to vote at the election, had answered that he did not think of doing so, as he could not spare the money to go; but that if he did go he would vote for the respondent, and the agent then gave him the cost of a return ticket, which he afterwards, without any demand being made for it, repaid; that the agent had previously lent the said voter sums of money, which had been repaid; that this transaction was, from the beginning, understood between the parties as a loan, and not as a gift; and that the loan was not made with the intention of influencing the voter's vote, or inducing him to vote for the respondent.

Held, that the transaction was not "bribery," or an unlawful act, or corrupt practice within R. S. C. c. 8, s. 84 (*a*), s. 88, or s. 91.

If the position taken by a voter is equivalent to that which would be expressed by his saying to the candidate or his agent, "I will not vote unless you lend me a sum of money," and the money is thereupon lent to him, then the lending of the money would be to wilfully induce the voter to vote within the meaning of R. S. C. c. 8, s. 84 (*a*). But if the position of the voter is equivalent to that which would be expressed by his saying "I am willing to vote, but cannot do so, because I have not the

means of going to the polling place," and the means are thereupon loaned to him to enable him to go to the polling place, then he is not induced, but merely enabled, to vote.

W. R. Meredith, Q.C., and *T. D. Crothers*, for the petition.

B. Cassels, Q.C., *J. H. Coyne*, and *Farley*, for the respondent.

Falconbridge, J.] [February 13.

WEST MIDDLESEX ELECTION.

MCNEIL *v.* ROOME.

Hiring Vehicles—Conveying voters to poll—R. S. C. c. 8, s. 88, 91.

Where it was charged that agents for the respondent had hired from certain livery-stable keepers vehicles for the purpose of conveying voters to the poll, and paid for the use of the same at the election, and the evidence showed that W., one of the livery-stable keepers (who were in partnership together), had acted as agent for the respondent, and under his partnership agreement with his partner had paid him half prices for each vehicle taken out by himself, and that the vehicles in question purported to have been taken out by himself, and he afterwards paid half prices on account of the same to his partner.

Held, that this amounted to a corrupt practice under R. S. C. c. 8, s. 88, 91, and the fact of W. being a member of the firm did not make it less a "hiring" of the vehicles.

S. H. Blake, Q.C., and *C. J. Holman*, for the petitioner.

W. R. Meredith, Q.C., *Harry Becher*, Q.C. and *McNeil*, for the respondent.

Appointments to Office.

ONTARIO.

COUNTY JUDGE.

Wentworth.

John Muir, of Hamilton, Junior Judge, and Local Judge of the High Court of Justice.

SHERIFF.

Rainy River District.

William H. Carpenter, of Fort William, Sheriff of the District of Rainy River, *vice* J. McQuarrie, Esq., resigned.

DIVISION COURT CLERK.

Prescott and Russell.

M. J. Costello, of the Township of West Hawkesbury, Clerk of the Seventh Division Court, *vice* Richard Lawlor.

NOVA SCOTIA.

COUNTY JUDGE.

District No. Seven.

Murray Dodd, Q.C., Sydney, Cape Breton, Judge of the County Court of the counties comprised in the above district.

Law Society of Upper Canada.

CURRICULUM.

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 Society 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, four 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. Graduates of Universities who have given due notice for Easter Term, but have not obtained their Diplomas in time for presentation on the proper day before Term, may, upon the production of their Diplomas and the payment of their fees, be admitted on the last Tuesday in June of the same year.

9. 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.

10. 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.

11. 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.

12. 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.

13. Articles and assignments must not be sent to the Secretary of the Law Society, but must be filed with 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.

14. 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.

15. Service under Articles is effectual only after the Primary Examination has been passed.

16. 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 seven months of his third year.

17. An Articled Clerk is required to pass his First Intermediate Examination in the year next but two before his Final Examination, and his Second Intermediate Examination in the year next but one before his Final Examination, unless he has already passed these examinations during his Clerkship as a Student-at-law. One year must elapse between the First and Second Intermediate Examination, and one year between the Second Intermediate and Final Examination, except under special circumstances, such as continued illness or failure to pass the Examinations, when application to Convocation may be made by petition. Fee with petition, $2.

18. When the time of an Articled Clerk expires between the third Saturday before Term, and the last day of the Term, he should prove his service by affidavit and certificate up to the day on which he makes his affidavit, and file supplemental affidavits and certificates with the Secretary on the expiration of his term of service.

19. 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.

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

21. 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.

22. No information can be given as to marks obtained at Examinations.

23. An Intermediate Certificate is not taken in lieu of Primary Examination.

FEES.

Notice Fee	$1 00
Student's Admission Fee	50 00
Articled Clerk's Fee	40 00
Solicitor's Examination Fee	60 00
Barrister's Examination Fee	100 00
Intermediate Fee	1 00
Fee in Special Cases additional to the above	00 00
Fee for Petitions	2 00
Fee for Diplomas	2 00
Fee for Certificate of Admission	1 00
Fee for other Certificates	1 00

BOOKS AND SUBJECTS FOR EXAMINATIONS.

PRIMARY EXAMINATION CURRICULUM, For 1888, 1889, and 1890.

Students-at-Law.

1888.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. IV.
- Cæsar, B. G. I. (1-33.)
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. I.

1889.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. IV.
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. V.
- Cæsar, B. G. I. (1-33.)

1890. Xenophon, Anabasis, B. II.
Homer, Iliad, B. VI.
Cicero, Catilinam, II.
Virgil, Æneid, B. V.
Cæsar, Bellum Britannicum.

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

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's Arnold's composition, and re-translation of single passages.

MATHEMATICS.

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

ENGLISH.

A paper on English Grammar.
Composition.
Critical reading of a selected Poem:—
1888—Cowper, The Task, Bb. III. and IV.
1889—Scott, Lay of the Last Minstrel.
1890—Byron, The Prisoner of Chillon; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

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.
1888 } Souvestre, Un Philosophe sous le toits.
1890 }
1889 Lamartine, Christophe Colomb.

or NATURAL PHILOSOPHY.

Books—Arnott's Elements of Physics, and Somerville's Physical Geography; *or*, Peck's Ganot's Popular Physics, and Somerville's Physical Geography.

Articled Clerks.

In the years 1888, 1889, 1890, the same portions of Cicero, *or* Virgil, at the option of the candidate, as noted above for Students-at-law.

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.

RULE *re* SERVICE OF ARTICLED CLERKS.

From and after the 7th day of September, 1885, no person then or thereafter bound by articles of clerkship to any solicitor, shall, during the term of service mentioned in such articles, hold any office, or engage in any employment whatsoever, other than the employment of clerk to such solicitor, and his partner or partners (if any) and his Toronto agent, with the consent of such solicitors in the business, practice, or employment of a solicitor.

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 by Candidates who obtain 75 per cent. of the maximum number of marks.

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 Government in Canada, 2nd edition; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three Scholarships can be competed for in connection with this Intermediate by Candidates who obtain 75 per cent. of the maximum number of marks.

For Certificate of Fitness.

Armour 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. I., containing the Introduction and Rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris's 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 Examination are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

Trinity Term, 1887.