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DIARY FOR APRIL.

17. Sun.....*Low Sunday.*
23. Sat.....St. George's Day.
24. Sun.....*2nd Sunday after Easter.* Battle of Fish Creek, 1885.
25. Mon.....Bank of England incorporated 1694.
26. Tue .....Primary examination of students and articled clerks, University graduates and matriculants seeking admittance to L.S. to present p'rs.
30. Sat.....Last day for filing papers with Sec. Law Soc. before call or admission.

TORONTO, APRIL 15, 1887.

LAW BOOKS.

IN this age of revolutions, social, scientific and otherwise, not the least is that affecting books and book-making. The legal fraternity have been "struck" on this occasion, but the storm has been of a gentle nature, calculated to soothe the nerves of men excited by the ravages of the unlicensed hordes which have swept over and desolated their once verdant pastures. The anti-climax is that the Blackstone Publishing Company of Philadelphia are republishing on this continent a selection from the great legal text books of England, with great promptitude, and at prices so absurdly low, as to enable even every student who enters an office to secure a good law library by the time he is ready to begin practising. The publishers propose to give verbatim reprints of standard text books issued in England after January 1, 1885 (with occasional translations from German and French books), immediately on receipt of copy, making 3,000 to 10,000 pages a year (eight to twelve subjects), in twelve volumes, delivered free of mail or express charges, at the rate of one volume a month, for $15 a year, payable in advance. We need not say what a boon this will be to all professional men and students in this country and the United States.

The following have already been published and distributed to subscribers:—

On December 1st, 1886: Smith on Master and Servant. January 1st, 1887: Challis on Real Property. February 1st, 1887: DeColyar on Guarantees, Principal and Surety. March 1st, 1887: Smith (Horace) on Negligence, 2d Ed. April 1st, 1887: Blackburn on Sales, 2d Ed. These will be followed by Pollock on Torts, Taylor on Evidence (two volumes containing 1,935 pages), May on Fraudulent Conveyances, etc., etc.

The year began on December 1st, 1886, but all persons who subscribe after April 1st will receive in their subscription the complete series of twelve volumes for the year commencing on 1st December last.

The selection so far is very good. No lawyer who desires to keep up even a small library can well afford to be without the text books chosen; they are almost as useful on this continent as in England.

RECENT ENGLISH DECISIONS.

The March number of the *Law Reports* comprise 18 Q. B. D. pp. 313-451; 12 P. D. pp. 45-104; 34 Chy. D. pp. 217-422 and 12 App. Cas. pp. 1-183.

LARCENY—RESTITUTION OF PROCEEDS OF STOLEN PROPERTY—(R. S. C. c. 174, s. 250).

In the *Queen* v. *The Justices of the Central Criminal Court*, 18 Q. B. D. 314, the Court of Appeal held that no appeal would lie to that court, from the order of a Queen's Bench Divisional Court discharging an order for a *certiorari* to remove an order for restitution of the proceeds of stolen goods, on the ground that it was a judgment "in a criminal cause or mat-

ter." The decision of the latter court is reported in 17 Q. B. D. 598, and was noted *ante*, vol. 22, p. 377. The Court of Appeal, although holding that they had no jurisdiction, nevertheless expressed the opinion that the order for restitution complained of, which had been made against an agent of the convict who held the proceeds of the stolen goods in his hands for the convict without notice of the fraud, was properly made.

REVESTING OF PROPERTY OBTAINED BY FALSE PRETENCES —R. S. C. c. 174, s. 250—SALE IN MARKET OVERT—INNOCENT PURCHASER.

The next case, *Vilmont* v. *Bentley*, 18 Q. B. D. 322, is another illustration of the same branch of the law. This was a civil action brought by a person who had been induced to part with his property by false pretences, to recover it from an innocent purchaser, who, before the conviction, had purchased it in market overt. The Court of Appeal (overruling *Moyce* v. *Newington*, 4 Q. B. D. 32, and reversing the decision of Denman, J.,) held that the plaintiff was entitled to succeed under 24 & 25 Vict. c. 26, s. 100, from which R. S. C. c. 174, s. 250, is taken, and that it was not necessary that an order for restitution under that section should be first obtained.

PRACTICE—ATTACHMENT OF DEBTS—ASSIGNEE OF JUDGMENT.

The short point determined by the Divisional Court (Huddleston, B., and Manisty, J.), in *Goodman* v. *Robinson*, 18 Q. B. D. 332, is, that an assignee of a judgment is a person who has "obtained" a judgment, and may enforce it by obtaining a garnishee order attaching debts due to the judgment debtor. Under Ont. Rule 370, the question discussed in this case could hardly arise, as that Rule expressly enables the judgment creditor "or the person entitled to enforce the judgment" to obtain a garnishee order.

ELECTION EXPENSES—RETURN OF EXPENSES.

In re Robson, 18 Q. B. D. 336, was a decision under a statute requiring candidates at municipal elections to make a return of their expenses similar to that required under R. S. C. c. 8, s. 120, and R. S. O. c. 10, s. 186, and it was held that the return must be made though no expenses had been incurred.

MARINE INSURANCE—FULL INTEREST ADMITTED—19 GEO. II. c. 37, s. 1.

Berridge v. *Man On Insurance Company*, 18 Q. B. D. 346, was an action on a policy of marine insurance. The plaintiff had made advances on a ship; the policy in question was issued to insure those advances, and contained the words "full interest admitted." It was argued that the policy not being on the ship or goods was not within the statute 19 Geo. II., c. 37, but the Court of Appeal (affirming Pollock, J.,) held that the policy was one within the Act, and the words "full interest admitted" vitiated it, as being a contravention of its provisions forbidding insurances "without further proof of interest than the policy."

MUNICIPAL ELECTION—DISQUALIFICATION OF CANDIDATE —RETURNING OFFICER, DUTY OF.

The *Queen* v. *The Mayor of Bangor*, 18 Q. B. D. 349, furnishes us with some interesting law on the subject of municipal elections and the duties of returning officers. Two candidates for the office of councillor were nominated, and the nomination accepted, and a poll took place. At the close of the poll, P., one of the candidates, claimed that whatever might be the result of the poll he was entitled to be declared elected, because the other candidate held the office of alderman, and was therefore disqualified for election as a councillor. The returning officer counted the ballots, and announced that the alleged disqualified candidate had the majority of votes, but he reserved his decision as to whom he should declare to be elected, until he had considered P.'s objection. On the following day he published a placard stating that P. had been elected.

Both P. and the other candidate accepted the office, and attended the meeting of the council, but the majority of the council refused to recognize P. as a member of the council, and he then applied for and obtained a *mandamus* to the mayor and corporation to receive his votes at corporate meetings. On appeal from the order awarding the *mandamus*, the Court of Appeal held that the returning officer had no power to decide on the question of disqualification, and that his duty was simply to declare the person having the majority of votes elected; that by stating the number of votes for each candidate he had made a sufficient declaration, and that the

effect of this declaration was not altered by reason of the notice issued on the following day, and that P. was not *de facto* councillor, and entitled to hold the office until dispossessed by an election petition or by *quo warranto*. This case, no doubt, would be a guide in interpreting R. S. O. c. 18, s. 159.

MARINE INSURANCE—ADVANCED FREIGHT, INSURANCE OF—SUBROGATION OF INSURER TO RIGHTS OF INSURED.

In *Dufourcet* v. *Bishop*, 18 Q. B. D. 373, goods were shipped on defendants' ship under a charter party; the freight was paid in advance, and the plaintiffs bought the goods from the charterers at a price including the freight and insurance. The cargo was lost through the defendants' negligence. The action was brought to recover for the loss. The question was whether the plaintiffs were entitled to recover as part of the damages they had sustained a sum of £600, being the amount of the advanced freight, it being admitted that as to this part of the claim the action was being carried on for the parties who had insured the freight, and by whom the plaintiffs had been indemnified as to this part of their loss. Denman, J. held that the plaintiffs were entitled to recover this amount as part of the damages sustained by them by the loss of the cargo.

INTERPLEADER—PARTICULARS OF CLAIM OF CLAIMANT.

In *Hockey* v. *Evans*, 18 Q. B. D. 390, the Court of Appeal reversed a judgment of the Master of the Rolls. Goods had been seized in execution, and the plaintiff in the present action had claimed them under a chattel mortgage, under which he claimed there was due to him £750 and interest. The sheriff interpleaded, and in the interpleader proceedings the sheriff was ordered to sell the goods, and out of the proceeds to pay the plaintiff the amount claimed. The sheriff accordingly sold, and paid the plaintiff the £750 and interest, but the plaintiff also claimed a further sum of £23 for costs, which not being paid, this action was brought to recover it. At the trial the Master of the Rolls gave judgment for the plaintiff for the amount of the costs; but the Court of Appeal held that the plaintiff was bound by the particulars of his claim, the order for sale being made in reference to that claim; and, as Sir James Hannen justly observed, to throw on the sheriff the duty of determining the validity of any other claim, would put him in the difficulty from which it was the object of the interpleader procedure to free him.

PRACTICE—JURISDICTION OF MASTER IN CHAMBERS.

In *Oppert* v. *Beaumont*, 18 Q. B. D. 435, it was held by the Court of Appeal, that under Ord. 58, r. 16, which provides that "an appeal shall not operate as a stay of execution. . . except so far as the court appealed from, or any judge thereof, or the Court of Appeal may order," the Master in Chambers, as having all the jurisdiction of a Judge in Chambers, except certain specified matters of which this was not one; might make an order staying execution pending an appeal.

NEGLIGENCE—EVIDENCE—BURDEN OF PROOF—COLLISION—SHIP AT ANCHOR.

Proceeding now to the cases in the Probate Division, the first which demands attention is *The Indus*, 12 P. D. 46, which was an action to recover damages for a collision. It appeared that the defendants' ship, while in motion, came into collision with the plaintiffs' ship which was at anchor, and it was held that the fact that the plaintiffs' vessel at the time of the collision was at anchor and could be seen, was *prima facie* evidence of negligence on the part of the defendants, and that the burden of proof was on them to rebut the presumption of liability.

COLLISION—DAMAGES FOR LOSS OF LIFE—LORD CAMPBELL'S ACT.

In *The Bernina*, 12 P. D. 58, the Court of Appeal (reversing the decision of Butt, J.,) held that when a collision had occurred through the fault of both vessels, and two persons—an engineer and a passenger—on board of one of them, but who had nothing to do with the navigation, were drowned, they were not to be deemed to be identified with those in charge of the vessel on board of which they were, so as to deter their personal representatives from maintaining an action of negligence against the owners of the other vessel; and (affirming Butt, J.,) that actions under Lord Campbell's Act are not Admiralty actions, and the Admiralty rule as to half damages does not apply to them. This case is remarkable and deserving of careful attention, for the elaborate discussion it contains of the principle of law involved. The cases of *Thorgood*

v. *Bryan*, 8 C. B. 115, and *Armstrong* v. *Lancashire and Yorkshire Railway Co.*, L. R. 10 Ex. 47, were overruled.

The law bearing on the question is thus summarized by Lord Esher, M.R., at p. 61:

(1) If no fault can be attributed to the plaintiff, and there is negligence by the defendant, and also by another independent person, both negligences partly directly causing the accident, the plaintiff can maintain an action for all the damages occasioned to him against either the defendant or the other wrongdoer. (2) If in the same case the negligence is partly that of the defendant personally, and partly that of his servants, the plaintiff can maintain an action either against the defendant or his servants. (3) If in the same case the negligence is that of the defendant's servants, though there be no personal negligence by the defendant, the plaintiff can maintain an action either against the defendant or his servants. (4) If in the same case the negligence, though not that of the defendant personally or of a servant of the defendant, consists in an act or omission by another, done or omitted to be done in the way in which it is done or omitted to be done by the order or direction or authority of the defendant, the plaintiff can maintain an action either against the defendant or the person personally guilty of the negligence. (5) If, although the plaintiff has himself or by his servants been guilty of negligence, such negligence did not directly partly cause the accident; as if, for example, the plaintiff or his servants having been negligent, the alleged wrongdoers might by reasonable care have avoided the accident, the plaintiff can maintain the action against the defendant. (6) If the plaintiff has been personally guilty of negligence which has partly directly caused the accident, he cannot maintain an action against any one. (7) If, although the plaintiff has not been personally guilty of negligence, his servants have been guilty of negligence which has partly directly caused the accident, the plaintiff cannot maintain an action against any one. (8) If, although the defendant or his servants has or have been guilty of negligence, the plaintiff or his servants could by reasonable care have avoided the accident, the plaintiff cannot maintain an action against any one.

At p. 82 he adds:

That the propositions above stated contain the law on this matter, perhaps not exhaustively, and that the proposition contained in *Thorogood* v. *Bryan* is not to be added to them.

EVIDENCE—LETTERS OF ADMINISTRATION—DECLARATION OF DECEASED PARENT.

In the goods of *Thompson*, 12 P. D. 100, upon an application for letters of administration to the estate of a deceased child, the court allowed the birth and death of the child to be proved by evidence of declarations of its deceased mother.

PRACTICE—THIRD PARTY OBTAINING LEAVE TO DEFEND—DISCOVERY.

Turning now to the cases in the Chancery Division, the first to be noted is *Eden* v. *Weardale Iron Co.*, 34 Ch. D. 223, in which the Court of Appeal (affirming Kay, J., and following *McAllister* v. *Bishop of Rochester*, 5 C. P. D. 194) held that when a third party obtains an order directing that the question of indemnity between him and the defendant should be tried after the trial of the action, and giving him liberty to appear at the trial and oppose the plaintiff's claim so far as he was affected thereby, and to put in evidence, and cross-examine witnesses, that he was liable himself to be examined by the plaintiff before trial for the purpose of discovery.

MARRIED WOMEN'S PROPERTY ACT, 1882, SS. 5, 19 (47 VICT. C. 19, SS. 5, 17 [O.]).

In *Re Whitaker*, *Christian* v. *Whitaker*, 34 Chy. D. 227, the Court of Appeal expound the Married Women's Property Act, 1882, ss. 5, 19, from which 47 Vict. c. 19, ss. 5, 17 (O.), is adapted. By *ante* nuptial settlement of 1873 a husband and wife covenanted to settle after acquired property of the wife, other than personal chattels, savings out of her separate income, or any moneys not exceeding in each case £1,000; "or any property belonging, or which may be given or bequeathed to, or settled upon her for her separate use, all which excepted articles and property shall belong to the said wife, and shall or may be used, enjoyed, and disposed of by her accordingly as if she were not under coverture." Under the will of the wife's father, made in 1884, the wife became entitled to a share of personalty exceeding £1,000, and not limited to her separate use. It was contended that the effect of sec. 5 of the Act of 1882 was to make this bequest the wife's separate property, and that therefore it was not subject to the covenant for settlement. But the Court of Appeal held that the effect of sec. 19 (47 Vict. c. 19, s. 17 O.,) was to limit the operation of sec. 5 by preventing property which would, independently of the Act, have been subject to the trusts of a marriage settlement, from becoming separate property, and therefore the property in question was bound by the covenant.

LIFE POLICY—PAYMENT OF PREMIUM BY PERSON NOT ENTITLED—LIEN—SALVAGE.

In *Falcke* v. *Scottish Imperial Insurance Co.*, 34 Chy. D. 234, an attempt was made to establish a claim to a lien on a life policy for

the amount of a premium which had been paid by the owner of the equity of redemption in the policy, under the belief that a contract had been made by the mortgagee to assign the policy to him, there being in fact, as the court found, no binding contract to that effect. The Court of Appeal (reversing Bacon, V.-C.) held that the claimant was not entitled to any lien for the amount so paid, although the mortgagee got the benefit of it, and that the claim could not be maintained on the ground of salvage of the security, or acquiescence on the part of the mortgagee.

Cotton, L.J., thus states what he considers the effect of the payment, at p. 243:

It is true that here the mortgagor, the ultimate owner of the equity of redemption, was no longer personally liable to pay the sums charged on the policy, and was not bound by the covenant to pay the premium (he had obtained a discharge in bankruptcy), but he pays it as the owner of the equity of redemption entitled to the ultimate interest in the property, although not personally bound to pay the debt or provide for the premium. It must be considered, in my opinion, that he paid it, not so as to get any claim in priority to the incumbrances, but in order to retain the benefit of the interest which would come to him if the property proved sufficient to pay off the previous incumbrancers. In my opinion, it would be utterly wrong to say that a mortgagor, the owner of the equity of redemption, can, under those circumstances, defeat the incumbrances on the estate.

With regard to the doctrine of salvage we may refer to what Fry, L. J., says at p. 254:

We have heard a great deal on both sides of what has been called the doctrine of salvage. I, like V.-C. Kindersley, exceedingly doubt whether that word can with propriety be applied to cases of this description. With regard to salvage, in case of ships and maritime perils, we know its meaning. It appears that the expression "salvage moneys," as we are informed by one of the learned counsel for the appellant, first occurs in the report of the case, *In Re Thorp*, 2 Sm. & G. 578, n., which was before Lord St. Leonards in 1852, when he seems to have used the expression as one familiar to the Irish courts in certain cases. I certainly wish the expression had remained on the other side of the channel where it seems to have arisen. I doubt whether any doctrine which is expressed by the word "salvage" applies to cases of this description.

WILL—CONSTRUCTION—MISDESCRIPTION OF LEGATEE—COUSIN—EVIDENCE.

In re Taylor, Cloak v. *Hammond*, 34 Chy. D., can hardly be said to be a satisfactory decision. The Court of Appeal reversed the decision of Pearson, J., but inasmuch as Bowen, L.J., dissented, the net result of the case is that two judges were of one opinion, and two of another. The case turns on the construction of a will whereby a testatrix gave a share of her residue to her cousin Harriet Cloak. The difficulty arose from the fact that she had no cousin of that name, but she had a married cousin, Harriet Crane, whose maiden name was Cloak; and she had a cousin, T. Cloak whose wife's name was Harriet. Pearson, J., and Bowen, L.J., thought Harriet Crane was entitled, but Cotton and Fry, LL.J., thought the wife of T. Cloak was the one entitled.

SELECTIONS.

PRECAUTIONS ON INVESTMENT BY TRUSTEES.

The power of trustees to invest is gradually becoming more and more limited by the decisions of the Equity judges, and we propose briefly to call attention to some of the precautions which recent cases show that advisers of trustees ought to take so as to secure their clients from future trouble and loss. In the first place, they must see that the mode of investment is authorized by the power. In *Leigh* v. *Leigh* (55 L. T. Rep. N. S. 634), Mr. Justice Stirling held that trustees could not, under a power to invest on "real securities," invest on mortgage of long terms of years, created in real estate for the purpore of raising portions; and, of course, leaseholds are not real securities (*Jones* v. *Chennell*, 38 L. T. Rep. N. S. 494; 14 Ch. Div. 626).

But trustees, besides taking care that an investment is made on a security authorized by the power, must be careful to see that it is good of its kind, and that a sufficient margin of value is left. They cannot safely invest more than two-thirds value on freehold land, nor more than half value on freehold house property. In the case of buildings used in trade, they should not invest as much as half value, and where the trade or business is of a

speculative or fluctuating nature, they will do well altogether to decline the investment (see *Re Whiteley, Whiteley* v. *Learoyd*, 55 L. T. Rep. N. S. 564; 33 Ch. Div. 347). The trustee should employ a competent valuer who is acquainted with the neighbourhood where the property on which it is proposed to effect the loan is situate (*Fry* v. *Tapson*, 51 L. T. Rep, N. S. 326; 28 Ch. Div. 268). The valuer should not be one chosen or employed by the borrower, nor should his remuneration wholly or in part depend on the result; he should be paid the same whether the loan is effected or not. The mortgagee should choose and pay his own valuer, the fee being ultimately paid by the mortgagor. The plan of the mortgagee's solicitor saying to the borrower, "Go and get a valuation from Mr. ——" can hardly be considered safe, for the valuer is employed by the borrower, though named by the lender. Probably the best plan would be for the proposed lender to decline to enter upon the transaction unless the borrower would deposit the fee with him for payment of the surveyor, whatever the report should be, and then if the report was unsatisfactory, and the loan was not effected, the trustees would be protected from loss.

The form of the valuation should next receive attention. It should state the selling value of the property, not merely give the opinion of the surveyor that it is a sufficient security for so much (*Whiteley* v. *Learoyd*, *ubi sup.*). It should not be a "puffing" valuation (*Fry* v. *Tapson*). It should call attention to any facts likely to affect the value, and show that a proper deduction has been made in the valuation. Where rates and taxes are paid by the landlord, the valuation should show that due allowance has been made (*Olive* v. *Westerman*, 51 L. T. Rep. N. S. 83; 34 Ch. Div. 70). Property consisting of unoccupied houses (*Hoey* v. *Green*, W. N 1884, p. 236; 78 L. T. 96; *Smethurst* v. *Hastings*. 52 L. T. Rep. N. S. 567; 30 Ch. Div. 490) and unlet property are unsafe, and so are houses greatly out of repair, even though allowance is made in the valuation. It may be thought that these precautions are embarrassing and troublesome; but nevertheless, as the law now stands, they are essential to the safety of trustees.—*Law Times*.

SOLICITOR TRUSTEES.

The recent cases of *Re Corsellis, Lawton* v. *Elwes* (45 L. T. Rep. N. S. 167; 33 Ch. Div. 160; and on appeal, the *Law Times* of the 12th Feb., 1887), and *Re Barber, Burgess* v. *Vinnicome* (the *Law Times*. 14th Aug., 1886; 34 Ch. Div. 77), have called into prominence a somewhat old question, namely, the right of a trustee who is also a solicitor to profit costs for business done by him in his professional capacity in connection with the trust. Ever since the leading case of *Robinson* v. *Pett* (3 P. Wms. 132, 1,734), and previously thereto, it has been well established that a trustee, executor, or administrator shall have no allowance for his care and trouble. But the application of the rule to the case of a solicitor-trustee transacting the business of the trust appears not to have taken place till the year 1833, when Lord Lyndhurst in the case of *Newe* v. *Jones* (mentioned in 9 Bythewood's Conveyancing by Jarman, p. 338), decided that if a trustee who was a solicitor acted as such in the trust he was not entitled to charge for his labour, but merely for his costs out of pocket. "The principle," said his Lordship, "was this; it was the duty of an executor or trustee to be the guardian of the estate committed to his charge. If he were allowed to perform the duties of the estate, and to claim compensation for his services, his interest would be opposed to his duty, and as a matter of prudence this court could not allow an executor or a trustee to place himself in such a situation. If he chose to perform those duties, he was not entitled to compensation. His Lordship was of opinion that the principle applied as strongly to the case of an attorney as to that of any other person. If an attorney who is an executor performs business that was necessary to be transacted; if this executor, being an attorney, performs these duties himself, his Lordship was of opinion that he (the attorney) was not entitled to be repaid for those duties; it would be placing his interest at variance with the duties he had to discharge. It was said that the bill might be taxed; and that this would be a sufficient check. He was of opinion it would not be a sufficient check. The estate had a right not only to the protection of the taxing officer, but

also to the vigilance and guardianship of the executor or trustee in addition to the check of the taxing officer." That seems to us to contain the whole principle, and has been followed in subsequent cases. See *Moore* v. *Froude* (3 My. & Cr. 45 (1837), Lord Cottenham); *Bainbrigge* v. *Blair* (5 L. T. Rep. O. S. 454; 8 Beav. 588); *Todd* v. *Wilson* (9 Beav. 486); *Lyon* v. *Barker* (5 De G. & Sm. 622). The rule applies not only to express trusts, but also to executors and trustees, though there have been no express trusts; thus in *Pollard* v. *Doyle* and *Kearnes* v. *Daw* (3 L. T. Rep. N. S. 432; 1 Dr. & Sm. 319), the facts were shortly these: The action of *Pollard* v. *Doyle* was commenced in 1849 by a judgment creditor of M. in the name of Pollard, as executor and devisee of M., to set aside two deeds as void against the judgment. Pollard died soon after the commencement of the suit, having appointed Kearnes, who was a solicitor, executor and devisee, and he revived the suit. Held, that he was not entitled to any profit costs. The rule also holds good, although the business is done entirely by the partner of the trustee (see *Christophers* v. *White*, 10 Beav. 523); also where a trustee who is not a solicitor employs his co-trustee, who is a solicitor, to do the business (see *Broughton* v. *Broughton*, 26 L. T. Rep. O. S. 54; 5 De G. M. & G. 160). But a trustee, being a solicitor, may employ his partner to act professionally in the business of the trust, provided it be expressly agreed between them that such partner shall alone be entitled to the profits (see *Clark* v. *Carlon*, 4 L. T. Rep. N. S. 361; 30 L. J. N. S. 639, Ch). Vice-Chancellor Wood in that case said that the rule on which the denial of costs to a solicitor-trustee was founded rested mainly on the ground that a trustee should not make a profit out of his trust, and that he could see no reason why a trustee should not be able to say to his partner, "Quoad this transaction we are not in partnership," and that he might then employ his partner in the same way as he might employ his London agent, and the partner would stand in the same position as anybody else. In *Burge* v. *Brutton* (2 Hare, 373) it was formerly decided that an executor who acts as a solicitor in a case in which he is a party in his representative capacity is entitled to be allowed, as against the estate, that proportion of the costs which his town agent is entitled to receive. In the rule under consideration an important exception was made by the well-known case of *Cradock* v. *Piper* (15 L. T. Rep. O. S. 61; 1 Mac. & G. 664), in which it was decided that a solicitor-trustee who acts in a suit as solicitor for himself and his co-trustee and a *cestui que trust*, or for any of his *cestuis que trust* alone, or for himself and co-trustee, or himself and his *cestui que trust* jointly, is entitled to the usual profit costs, provided they are not increased by his being one of the parties. That decision has been the subject of a good deal of adverse criticism both from the Bench and from text writers (see the remarks of Lord Cranworth, L. C., in *Manson* v. *Bailie*, 26 L. T. Rep. O. S. 24; 2 Macq. 80; and in *Broughton* v. *Broughton*, *supra*). But not only has it never been overruled, but it has been uniformly acted upon in the taxing master's office, and in the very recent case of *Re Corsellis*, *Lawton* v. *Elwes* (*supra*), it has received express recognition by the Court of Appeal. There appears, however, to be but little disposition to extend the exception introduced by *Cradock* v. *Piper*. For instance, it does not apply to the case of a solicitor-trustee acting for himself and his co-trustees in the administration of the trust estate out of court (*Lincoln* v. *Windsor*, 18 L. T. Rep. O. S. 39; 9 Hare, 158; *Broughton* v. *Broughton*, *supra*). But, as was remarked by a Lord Chancellor in the latter case, one cannot see any distinction between costs incurred in a suit and costs incurred in administering an estate without a suit—the danger may possibly be less in the former case than in the latter, but the principle is the same.

The question was discussed with some minuteness by Mr. Justice Chitty in the recent case of *Re Barber*, *Burgess* v. *Vinnicome* (34 Ch. Div. 77), where the facts were shortly as follow: A testatrix appointed H., who was a solicitor, and one of the attesting witnesses to her will, and V., executors and trustees of her will, which contained a clause enabling H. to make the usual professional charges, but which clause was rendered inoperative by reason of his having attested the will. Probate was obtained by V. alone, power

being reserved to H. A creditor's action was commenced against V., and she employed the firm of solicitors in which H. was a partner to conduct the action on her behalf. H. afterwards proved the will and was made a defendant. Held, by Mr. Justice Chitty, that H. was entitled to his profit costs of the action, but not for business not done in the action even though transacted before he obtained probate; the judge expressly stating that on the reported decisions *Cradock* v. *Piper* stood unimpeached. The most recent decision on the point is that of the Court of Appeal in *Re Corsellis*, *Lawton* v. *Elwes*, above referred to. The facts were shortly these; T. (a solicitor and partner with the defendant E.) and F. were appointed executors and trustees of a will dated in 1876, which contained a clause enabling T. to make the usual professional charges. T. died in 1880, and the defendant E. was appointed trustee in his place. In 1881 an application for maintenance out of the estate was made to the court, and E.'s firm acted through their London agents as solicitor for E. and his co-trustee in the matter. E. and his co-trustee appointed E.'s partner steward of a manor which formed part of the trust estate, and he carried the steward's fees to the credit of E.'s firm. In 1881 E. became sole surviving trustee, and an action was then commenced against him to carry into execution the trusts of the will and for the appointment of a receiver. E.'s London agents acted as solicitors for him in such action and credited his firm with part of their proper costs. E.'s firm, by their London agents, acted as solicitors of the receiver appointed in the action, and E. claimed a share of their costs in that capacity; E. also claimed a share of profit costs of certain leases and agreements for leases of parts of the trust estates granted by him and prepared by him or his firm. Held, by Mr. Justice Kay, upon the principle that a trustee ought not to place himself in a situation where his interest conflicts with the duties, that none of the profit costs in the aforesaid matters ought to be allowed out of the trust estate to the defendant E.'s firm or to E. On appeal that judgment was sustained as to three of the items out of five, but as to the remaining two, namely, profit costs in the maintenance proceeding and the steward's fees, the appeal was allowed. The Court of Appeal, consisting of Cotton, Lindley and Lopes, L.JJ., after stating that the exception introduced by the case of *Cradock* v. *Piper* had always been acted upon at the taxing-master's office, and was an established rule of the court, laid down that it ought not to be frittered away, and held that the proceedings for maintenance ware within that rule. They also allowed the steward's fees on the ground that they were not professional charges at all, but were fixed by statute or by custom.

Whether a solicitor-mortgagee will be entitled to profit costs appears to be doubtful. According to the older decisions, it seems that he will not. In *Sclator* v. *Cottom* (29 L. T. Rep. O. S. 309; 3 Jur. N. S. 630) the facts were these: In 1882 E. M. and F. C. mortgaged their life estates in certain renewable leaseholds for lives and money in court to L. M. H. and F. S. (who was a solicitor). Two of the lives having dropped, the persons interested in the remainder in the mortgaged premises commenced a suit for the purpose of having the renewal fine paid out of the money in court and out of the rents. To this the mortgagees objected, and the suit stood over generally. L. M. H. died, and then a second suit, adverse to the mortgagees, was commenced and was dismissed.

In the first suit F. S. had acted as solicitor for himself and his co-mortgagee, and in the second for himself alone. Held, by Vice-Chancellor Kindersley, that F. S. was only entitled to his costs out of pocket in the aforesaid suit; and the leading text-books on mortgages confirm that view of the law. But in the recent case of *Re Donaldson* (51 L. T. Rep. N. S. 622; 27 Ch. Div. 544), where one of several mortgagees was a solicitor and acted as such in realizing the mortgage security, it was held by Vice-Chancellor Bacon that he was entitled to charge profit costs as against the mortgagor, whether the mortgagees were trustees or not. No doubt there is much force in the point stated in the taxing master's certificate in that case —namely, that if the beneficiaries of the money lent to the mortgagor were taxing the bill, the rule would apply, but that in the case under notice the trust fund would not in any way be diminished by the soli-

citor being allowed profit costs. Upon this, however, the obvious question arises, is not the mortgaged property in a sense a trust fund? In other words, is the relationship between mortgagor and mortgagee that of trustee and *cestui que trust*, or simply debtor and creditor? In this state of the law it will be advisable, whenever a mortgagee is a solicitor, to insert an express provision in the mortgage deed enabling him to make the usual professional charges. But he must be careful to call his client's pointed attention to such provision, and to explain to him the law on the subject, and the effect of the clause; and it has been suggested that such a provision should not be inserted unless the client has independent advice. A form of such a clause will be found at 3 Bythewood & Jarman by Robbins, 4th edit., p. 1,001. It is scarcely necessary to say that a solicitor-trustee may be and usually is expressly authorised by the instrument creating the trust to make the usual professional charges, including charges which are not strictly professional, but which could have been done by the trustee personally, and a neat short form for that purpose will be found in Messrs. Wolstenholme & Turner's Conveyancing Acts, 4th edit., p. 249. But a doubt has been expressed from the Bench whether a clause extending to non-professional charges ought to be inserted without express instructions (see *Re Chapple; Newton* v. *Chapman*, 51 L. T. Rep. N. S. 748; 27 Ch. Div. 587).—*Law Times.*

NOTES OF CANADIAN CASES.

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COMMON PLEAS DIVISION.

DIVISIONAL COURT.

COATES v. COATES.

The judgment in this case, affirmed with costs.

Aylesworth, for the plaintiff.

R. S. Cassels, for the defendants.

PALMER v. MILLER.

Principal and agent—Estoppel—Evidence.

Action to recover commission on sales made by plaintiff while in defendants' employment, the cash, therefor, however, being received after plaintiff left defendants' service.

The defendants, type founders in Edinburgh, employed plaintiff's father as their agent in Canada, to be paid by a commission "on the receipts, i.e., on the cash, bills and value of old metal received." He also had a small guaranteed salary. It was understood that as soon as the father got too old to manage the business the plaintiff was to succeed him; and in 1880 this was effected. In 1882 the plaintiff was dismissed from the defendants' employment. He wrote complaining of his dismissal, but said that the sting was taken out of it by the defendants having allowed his father $1,250 a year, for which the plaintiff said he was grateful. The plaintiff made no claim then against the defendants, because, as he stated in his evidence, that had he made any, the allowance to the father would have been stopped, and in order to induce the defendants to pay it, and in consequence of such silence and want of action on plaintiff's part, the allowance was paid up to the father's death in 1884. After the father's death the plaintiff for the first time pressed his claim.

Held, that he was not entitled to recover.

Per ROSE, J.—The plaintiff was equitably estopped from maintaining the action.

Per CAMERON, C.J.—The plaintiff, by the express terms of the contract, was only entitled to commission on moneys received during his employment and not afterwards.

Osler, Q.C., and *T. P. Galt*, for the plaintiff.

Robinson, Q.C., and *Hall* for the defendants.

HARTNEY v. ÆTNA INSURANCE CO.

Insurance—Evidence of loss—Proof of loss.

Action on a policy of insurance on a stock of goods. M., the local agent, and through whom the insurance was effected, stated that he had examined the premises, and considered from the size of the store, the appearance of the goods, and the stock book, that when insurance was effected there were goods to the amount thereof. All the goods on the premises were destroyed by the fire on 20th Oct. The defendants' inspector came immediately, and saw plaintiff, who produced a statement shewing the amount of the stock in May—the policy having been effected in June—the sales since then, and invoices of goods purchased up to the time of the fire. The inspector then gave plaintiff a form from which the proof papers were to be made up; and on his return home sent the proof papers with request to fill in same according to the said form, which the plaintiff did, and requesting defendants to notify him if not correct, when would have same made out to defendants' satisfaction. The defendants wrote in reply stating they thought the amount of loss should be $11,734.90 instead of $13,005, the amount claimed; that such sum was not only reasonable, but liberal; and which "we are liable for without prejudice to, or waiver of, any condition of our policy." This letter was received without any objection as to its admissibility. The plaintiff replied that his claim was a just and honest one, but he would accept a deduction of $400 if claim settled at once. The defendants replied that their offer was a fair and reasonable one, and pointed out what they considered the objectionable items of the claim. The plaintiff then made a statutory declaration of the amount of the loss, according to the above form, which he sent to defendants. The defendants wrote, acknowledging above, and stating that, without admitting, but denying any liability, they drew attention to alleged informalities in the proofs in their not specifying loss in detail under each item, and in not giving detailed statement of salvage. The plaintiff then furnished defendants with a statutory declaration giving a detailed statement of his claim.

Held, there was sufficient evidence of the amount of the goods at the time insurance effected, and also of the goods insured being those destroyed by the fire; and also that under the circumstances there would be no objection to the proofs of loss.

McCarthy, Q.C., for the plaintiff.

J. K. Kerr, Q.C., and *Walker*, for the defendant.

UNITED STATES EXPRESS COMPANY v. DONOHOE.

Accomplices—Civil action—Corroboration.

In an action to recover from defendant moneys alleged to have been stolen from the plaintiffs,

Held (GALT, J. dissenting), that the effect of the judge's charge in this case was to leave on the minds of the jury the impression that the evidence of accomplices in crime—where such crime gives rise to a civil action, in which such accomplices are examined as witnesses—ought not to be credited or relied on unless corroborated, and was misdirection.

J. K. Kerr, Q.C., and *Cooper*, for the plaintiffs.

Osler, Q.C., for the defendant.

PROCTOR v. MULLIGAN.

Sale of land—Independent agreements.

On 5th June, plaintiff executed an agreement whereby he agreed to purchase from the defendant a lot in Winnipeg, at and for the sum that might be placed thereon by D. of Winnipeg, provided that if the price fixed exceeded $6,000, the excess should be secured by plaintiff, by mortgage on said property, etc., the sum so fixed to be paid by plaintiff deeding to the defendant his interest in certain lots in Toronto. On the same day defendant executed an agreement, whereby defendant agreed to purchase from plaintiff, the plain-

tiff's interest in the said Toronto lots for $6,000, the defendant to pay interest and taxes to date, but to deduct the same out of the $6,000. The Toronto property was conveyed to the defendant, who entered into possession and paid off the mortgages on it. The defendant contended that D. had valued the Winnipeg property at $8,000; but the evidence showed that D. had declined to make any valuation. The defendant refused to convey it except at the price of $8,000, and also refused to appoint another valuator. In an action to recover from the defendant the sum of $6,000, the plaintiff intimated that he would accept a conveyance of the Winnipeg property.

Held, that unless defendant accepted offer to make a conveyance, the judgment should be for the $6,000, less a sum of $838.28, paid for interest and taxes, leaving a value of $5,162.72 with interest.

Osler, Q.C., for the plaintiff.

GRAHAM v. ONTARIO MUTUAL INS. CO.

Insurance—Incumbrance—Unreasonable condition.

The application for a policy of insurance against fire stated that there were no incumbrances. The application was filled out by the company's agent. The insured informed him of the existence of a mortgage on the property, when the agent informed plaintiff that if there was nothing overdue thereon it was not an incumbrance; and as there was nothing overdue, and under this belief, the statement was made in the application. A policy was issued shortly afterwards, with conditions endorsed thereon under the heading statutory conditions and variations, No. 13 of which was that any fraudulent misrepresentation contained in its application, or any false statement therein respecting the title or ownership of the property, or the concealment of any incumbrance, or the failure to notify the company of any mortgage or incumbrance upon, or other change in the title or ownership of the insured property, etc., rendered the policy void.

Held (GALT, J., dissenting), that under the circumstances the policy was not avoided.

Chatillon v. *Canada Mutual Insurance Co.*, 27 C. P. 450, followed.

Per GALT, J.—That though before the issue of the policy the insurance was not avoided, yet it would be so thereafter, as under the conditions the plaintiff should have notified defendants of the mortgage.

The fourteenth variation condition was "if any agent or canvasser for this company shall have filled up any part of the application he shall be the insured's agent therefor, and not the company's; and no statement, written or verbal, made to such agent or canvasser as to any matter to which the enquiries in the application extend, shall bind the company or affect the company with notice thereof, unless stated in the application."

Per ARMOUR, J., at the trial, and *per* ROSE J., in the Divisional Court, that the condition was unjust and unreasonable.

Maclennan, Q.C., for the plaintiff.

McMullen (of London), for the defendant.

WORDEN v. CANADIAN PACIFIC RY. CO.

Railways—Failure to deliver goods—Damages.

The plaintiff, on 2nd March, 1882, delivered to the G. W. Ry. Co. at Lucknow, Ont., 840 bushels of oats to be carried by said railway and connecting railways to Brandon, Man., and there delivered to the plaintiff. The oats were shipped in car No. 6,253, and while in transit, were transferred to car No. 3,966 of the M. & M. Ry. Co. Before the arrival of the oats the plaintiff arranged with defendants' agent at Winnipeg to have car 6,263 stopped at Winnipeg. The oats were not stopped at Winnipeg but were carried on to Brandon. The plaintiff, before leaving Brandon, and making the Winnipeg arrangement, had instructed an agent at Brandon to receive the oats. The oats arrived at Brandon on 5th May, 1882. The plaintiff's agent at Brandon frequently applied for same, and was always informed that they had not arrived. The defendants alleged that after the arrival at Brandon notice thereof was sent by postal card to the plaintiff's proper address at Brandon, and the goods being of a damageable or perishable nature were, on 22nd July, sold. There was no evidence to show that this notice reached the plaintiff. In an action for damages for non-delivery and for conversion,

Held, that the plaintiff was entitled to re-

cover; that defendants were not protected by 42 Vict. c. 9, sec. 17 (D.), and sub-sections, for to come within it the goods must remain in the defendants' possession for at least a year, unless the tolls have been demanded from the persons liable, and payment refused or neglected for six weeks after demand; and though sub-section 3 says nothing of demand, the whole section must be read together, which shewed a demand was required; that the post card was not a sufficient demand; that there was no breach in not stopping at Winnipeg, as the contract to stop only applied to car 6,263; and that the plaintiff was entitled to recover as damages the value of the oats at Brandon at the time of conversion.

F. Arnoldi, for the plaintiff.

W. Nesbitt, and *P. McPhillips*, for the defendants.

MEAD v. O'KEEFE.

Partnership—Dissolution—Good will.

On the 3rd April, 1882, a deed of partnership was executed by the defendants O. and H. and by M., as malsters and brewers in Toronto for three years. By Clause 20, O., for $25,000, sold and disposed of to H. and M., all his interest in the good will of the firm, etc., theretofore existing between himself and G. M. H. as brewers, etc, as also that which he would be entitled to on the expiration or sooner determination in the partnership then formed, and in the meantime to fully initiate and instruct H. and M. in the business; and he assigned to them all his right, title, interest, claim and demand of in, to or out of the good will of the said business and partnership heretofore existing and carried on by O. & Co., and also in the good will, etc., and covenanted to execute a good and sufficient deed to assign and transfer same. Then followed provisions for O. entering into partnership with either both H. and M. on the determination of the existing partnership, but if not, O. should retire and receive the value of his share, but nothing further for the good will, and he covenanted not to carry on a similar business, etc. Clause 19 provided for the accounts being taken on the expiration or sooner determination of the partnership, and the partners paid the value of their shares. By Clause 29, if either H. or M. should retire from the firm under Art. 2, or be compelled to leave under Art. 3, he should not receive anything for good will. Art. 3 provided for dissolution upon breach or non-observance of any stipulation in certain of the Articles upon notice in writing being given therefor, and the partner receiving notice should be considered as quitting the business for the benefit of the other partners. Subsequently M. misconducted himself in the said business, when O., acting for himself and H., informed M. that he must leave, and the following paper was drawn up: "Notice is hereby given that the partnership heretofore existing between the undersigned as brewers, etc., has this day been dissolved by mutual consent. Messrs, O. and H., who will continue the business, are authorized to collect all debts due to the late firm, and will meet all liabilities." This was signed by O., H. and M. Under this was written: "Referring to the above, the undersigned have this day entered into partnership as brewers, i.e., under the style of O. & Co., who will continue the business as formerly." This was signed by O. & H. A suit was brought by E. M., the assignee of M., under an assignment to her, and a decree was made for an account, but not as to the good will, as it was held this was not covered by the assignment. The good will was then assigned to plaintiff, and this action brought to recover the value thereof.

Held, that the plaintiff, under the circumstances more fully set out in the case, was entitled to recover.

Maclennan, Q.C., and *Osler*, Q.C., for the plaintiff.

Moss, Q.C., and *G. T. Blackstock*, for the defendants.

WILSON v. RYKERT.

Appropriation of payments—Statute of Limitations.

Appropriation of payments are to be applied (1) as the debtor directs at the time of payment; (2) when no direction by debtor, then as the creditor directs: (3) when neither makes any direction, then the law will apply it to the older debt as may be just.

The defendant was indebted to the plaintiff and gave six promissory notes therefor, which fell due in 1871. The interest was paid up to August, 1878. Thereafter three payments were made; two specially on account of interest, and the third without any appropriation.

Held, that the payments must be applied to the interest due on all the notes, the effect of which was to take them out of the Statute of Limitations.

Masters, for the plaintiff.

Osler, Q.C., for the defendant.

GORST v. BARR.

Slander—Privileged communication—Crime.

The plaintiff had been working for a couple of days for the defendant as a seamstress. She was unknown to the defendant before that. The defendant missed $11.00 and so informed plaintiff. In the evening the defendant drove plaintiff home, telling her she would want her again in a week or so. The next day the defendant laid the case before the chief of police, and he said that plaintiff must have taken the money. The defendant then went to a Mrs. W., for whom she thought the plaintiff was working, and on being informed that plaintiff was not there asked to speak to Mrs. W. alone, and then informed her of having missed the money, and of the plaintiff being the only one there except defendant's children and defendant's sister. The defendant stated what the chief of police had said, and asked what she should do—that she would have plaintiff arrested. Mrs. W. advised her not to, but to go and see plaintiff. The defendant then went to a Mrs. B., for whom plaintiff was working, and called plaintiff outside, and told her what the chief of police had said. The defendant then put her hand on the plaintiff's shoulder and said, "you did; you must have taken it"; and asked her to confess, and give back the money, and defendant would give her all her sewing. The plaintiff denied taking the money, and asked to be taken to her father's, and defendant drove her there. Before doing so, plaintiff went upstairs to get her things, when Mrs. B. asked what was the matter, when plaintiff said that defendant accused her of taking some of her money. Mrs. B. said that while defendant and plaintiff were speaking the door blew open, and she heard defendant say, "You did; you must have," and the door then slammed to. When defendant arrived at the father's she did not want to go in, but the father pressed her and asked her what was the trouble. The defendant told him she had lost $11.00, and what the chief of police had said. The father asked defendant if she knew the plaintiff's character, and why she should be accused more than the defendant's sister. The defendant, he said, appeared shocked at that, and said she would have plaintiff arrested, when the father said she would do it on her own responsibility.

Held, that action failed; that the words spoken to the plaintiff and to her father were privileged, while those heard by Mrs. B. did not impute any criminal offence, nor did the words spoken to Mrs. W.

Delamere, for the plaintiff.

Foster, Q.C., for the defendant.

REGINA v. SPROULE.

Canada Temperance Act, 1878—*Interest of magistrate—Witness.*

In a prosecution under the Canada Temperance Act the defendant claimed that J. F. A., one of the magistrates, was a member of an association for the enforcement of the Act, and had been present at a meeting of the association. On the case coming on for trial the defendant objected to the jurisdiction of the magistrate, which was overruled. The license inspector who laid the information then gave evidence in support of the charge. In cross-examination he was asked by defendant as to whether he laid the information of his own accord, or had consulted with J. F. A. before acting, and whether the association had anything to do with the selection of the magistrate. The magistrate ruled that the witness was not bound to answer the questions at the close of the prosecution, and on going into the defence the defendant called the magistrate, J. F. A., as witness, but he refused to give evidence. The defendant was convicted and fined.

Held, that as a general rule a person who lays an information is not bound to disclose the source thereof; but as the questions asked the witness were put with the view of shewing the magistrate was a member of the association

and thus disqualified by interest from sitting, the defendant had the right to put the questions, and they were therefore improperly disallowed; and that the magistrate also should have given evidence when called on.

The defendant, therefore, having been debarred the right of making a full defence as allowed by sec. 30 of 32 & 33 Vict. c. 3 (D.), the conviction could not be sustained, and must be set aside.

The calling of a magistrate sitting in a case as a witness, and his being sworn, does not of itself disqualify him from further acting in the case.

Aylesworth, for the applicant.

Delamere, and *E. F. B. Johnson*, contra.

RE WEIR.

Extradition—Depositions—Authentication of admissibility—Evidence—Sufficiency of—Weight of.

In extradition proceedings the information, warrant and depositions were certified under the hand and seal of a justice of the peace of Oscodo township, in the county of Josio, in the State of Michigan. There was also a certificate under the hand of the clerk of the county of Josio, and clerk of the Circuit Court for the said county, and the official seal of the said Circuit Court certifying that the said justice of the peace was, at the time of signing his certificate, a duly elected and qualified justice of the peace in the active discharge of the duties of the said office, and that his official seals were entitled to full credit.

Held, that the documents were sufficiently authenticated.

Held, also, that the depositions and statements admissible in evidence are not restricted to those made in respect of the charge upon which the original warrant was issued.

Held, also, that the depositions, etc., before the county judge, before whom the extradition proceedings were had, disclosed sufficient evidence to warrant the defendant being placed on his trial for murder, caused, as was alleged, by the defendant having feloniously ravished the deceased while in such a state of health as to hasten her death.

Per CAMERON, J.—The Divisional Court cannot review the decision of the judicial officer having jurisdiction to hear extradition cases upon the weight of evidence merely; and, *per* ROSE, J., it was not necessary to express any opinion on this point.

THORNE v. WILLIAMS.

Ejectment—Deed, Alteration of—Equitable title—Adding party.

In an action to recover possession of land it appeared that one of the deeds required in proving plaintiff's title was altered by the grantor's agent under the authority of a letter from the grantor.

Held, that the deed was void, but that the plaintiff was entitled to recover on his equitable title. Leave was granted to add the owner of the legal estate as a party plaintiff.

J. E. Robertson, for plaintiff.

McCullock, for defendants.

Rose, J.]

O'RORKE v. CAMPBELL.

Illegitimate child—Custody and care of.

The father of an illegitimate child has the right to the custody and care of the child as against a stranger or person other than the mother. That the mother has the right as against the father, and father has the right as against the grandfather and grandmother.

Action for food, clothing, lodging and other necessaries supplied by child's grandmother at mother's request.

Defence: That defendant demanded from plaintiff (the infant's maternal grandmother), and from the child s mother, the person of the infant, both of whom refused to comply. Averment that he is, and always has been, ready and willing to support the child and furnish it with food, etc.

Held (on demurrer), that the statement of defence furnished a good answer to the action.

J. H. Ferguson, for the demurrer.

Aylesworth, contra.

BEAM v. ABSALOM MURNER.

Patent of invention—Threshing machines—Omission to label—Royalties and damages—Change in co-partnership—Right to dispute patent—Principles of patent.

The jury having found that the machines were manufactured after the principle of plaintiff's patent, and that plaintiff had sustained damage by reason of the breach of defendants' covenant, the learned judge, before whom the action was tried, directed judgment to be entered for plaintiff, for the royalties and damages.

Held, that the plaintiff was entitled to judgment in respect to both royalties and damages.

That a change in defendants firm did not disentitle plaintiff from recovering from the new firm.

That it was not open to the defendant to dispute the validity of plaintiff's patent.

That the jury was warranted in finding that the machines were made after the principle of the plaintiff's patent.

John King, for the plaintiff.

Osler, Q.C., and *E. P. Clement*, for the defendant

BEAM v. SIMPSON MURNER.

Patent of invention—Right to manufacture and sell—Payment of royalty—Infringement of—Estoppel—Want of novelty—Subject of patent.

Action for the recovery of royalties payable under an agreement in the manufacture by defendant of a threshing machine patented by plaintiff.

Held, that the defendant constructed the machine under the agreement, and must pay the royalties.

That the defendant could dispute the validity of the patent because of want of novelty, nor that it was not the subject of a patent.

That the combinations were properly patented.

That plaintiff was estopped from setting up a defence which had been negatived in a former action between the same parties.

Colquhoun, for the plaintiffs.

Osler, Q.C., and *E. P. Clement*, for the defendant.

STEINHOFF v. MCRAE.

Conversion—Saw logs—Finding of jury—License to take timber after time expired before removal—Parol evidence—Admissibility.

In trover for certain timber, the defendant claimed under a contract for sale thereof to him. The jury in reply to a question stated that it was one of the conditions of sale that the timber had to be removed within two years. All the other questions having been answered in plaintiff's favour, the learned judge entered judgment for plaintiff.

On motion of the defendant to enter judgment in his favour on the ground that the jury having found that the license was for a time that had expired, plaintiff must fail.

Held, following *Johnson* v. *Shortend*, 12 O. R. 633, that the judgment was wrong.

Parol evidence is admissible to explain or contradict a receipt, which is not a contract.

Rose, J.]

SCOTT v. SCOTT.

Will—Execution—Validity.

A testator brought his will, which had been previously signed by him, to two persons to sign as witnesses. The witnesses signed in the testator's presence at his request, and in the presence of each other; and they either saw or had the opportunity of seeing the testator's signature.

Held, that the will was validly executed.

Graham, for the plaintiff.

Elgin Meyers, contra.

Rose, J.]

ROSS v. WILLIAMSON.

Document—Loss of—Proof of contents—Necessary evidence of.

Where a party endeavours to prove by oral testimony the contents of a written document, the court before giving effect to such testimony should be convinced that all the terms have been proven.

It is not sufficient for the party undertaking such a duty to furnish evidence of certain clauses which support his claim, but must set out the whole agreement so that the court may be able to give effect to all its provisions, and that by testimony of the clearest nature.

In this case the learned judge was of opinion that the defendant, the party setting the agreement, had failed to establish.

G. T. Blackstock, and *Walsh*, for the plaintiff.

Fletcher, for the defendant.

CHANCERY DIVISION.

Div'l Ct.] [January 8.

LAWRENCE v. THE CORPORATION OF THE VILLAGE OF LUCKNOW.

Corporation—By-law—Contract—Novation of—Meeting of councillors—Taking possession of building—Acceptance of work on executed contract—Liability of corporation.

The defendants passed a by-law, approved of by the ratepayers, reciting that there was "an urgent necessity for a building to be used by the municipal corporation as a lockup, firehall, council chamber and public hall," for the purpose of acquiring the land, and erecting such a building at a cost of $4,500, for the raising of which sum provision was therein made. B.'s tender for carpenter work, etc. (including a shingle roof), was accepted, but at a special meeting of the council, at which only three of the councillors, with B. and L., the plaintiff, were present, an arrangement was made by which B. threw off $4 a square, and was relieved of the roof part of his contract, and L. agreed to put on a metallic roof at $6 a square, and it was resolved by the council that "the iron shingles, instead of wooden shingles, be put on the roof of the new Town Hall." All this was done subject to the approval of the Reeve, who was not present, but who afterwards approved of it, and at whose instance L. ordered the material and did the work. L. received a payment on account, but on the discovery of some defects in B.'s work the defendants refused, although they had taken possession of the building, to pay the balance on the ground that the roof was not properly done, and that L. was a sub-contractor under B., and that there was no contract under seal with them.

Held (affirming O'CONNOR, J.), that the legal effect of this was to consummate a tripartite agreement by which B. was to give up part of his contract, and L. was to do the work for a specified price. That, between the plaintiff L., the defendants and B., there was a novation of contract so far as the roof was concerned, and as to that L. became the principal and only contractor.

Held, also, that the taking possession, payment on account, etc., was sufficient evidence to justify a finding of an acceptance of the work as an executed contract, or a case "of an actual and *de facto* performance of the contract by one party, of which the other party has taken, received and enjoyed the benefit." *The Mayor, etc., of Kidderminster* v. *Hardwick*, L. R. 9 Ex. 18, cited. *Munro* v. *Butt*, 8 E. & B. 738, distinguished.

A municipal corporation is liable on an executed contract for work done by its order, on its behalf, and for its benefit, though there be no agreement under seal, if the thing done were urgently required for the purposes of the corporation, and especially so where the price to be paid is not of large amount. *Robins* v. *Brockton*, 7 O. R. 481, referred to.

Cassels, Q.C., for the plaintiff.

Garrow, Q.C., for the defendants.

Div'l Ct.] [January 8.

WELLS v. LINDOP.

Slander—Denial of, by pleading—Evidence of privileged occasion—Amendment.

W. was in the employ of a mining co., of which L. was president, and had been working in the mining district under an arrangement by which his wife was to draw half his wages at the headquarters of the co. (her home). After he ceased to be employed by the co., but while still in the mining district, and before he was settled with and paid up, his wife with a companion, went to L. to apply for some of her husband's wages, and he replied, "We do not owe him anything now, he

stole the boat, the cooking stove, and a lot of other things and sold them." The secretary of the co. had previously received a letter stating that the plaintiff had done what the defendant said. The defendant, by his statement of defence, denied using the words, and gave evidence to the effect at the trial, but proposed also to give evidence that whatever the words used were, he honestly believed them to be true, and leave was asked to amend by setting this up. The judge who tried the case held that the occasion was not privileged, and refused to allow the amendment, and on a motion for a new trial it was

Held (reversing O'CONNOR, J.), that the occasion was privileged, and a new trial was granted to give the plaintiff an opportunity to prove malice.

Aylesworth, for the motion.

D. J. Donohue, contra.

Proudfoot, J.] [February 2.

STEWART v. GAGE.

Assignment for benefit of creditors — Judgment against assignor after assignment—Proof of claim—Statute of Limitations—Balancing of accounts—Payments on account—Appropriation of payments—Interest.

S. was assignee of J. E., and G. was assignee of E. H. E. Before the assignments J. E. was a creditor of E. H. E., both on an account for money lent, and as holder of certain promissory notes. After the assignments, S. obtained a judgment against E. H. E., but G. refused to recognize S. as a creditor on E. H. E.'s estate by virtue of the judgment. S. then brought an action against G. on said judgment, and asked an account of G.'s dealings with the estate of E. H. E.; G. set up the Statute of Limitations. On a reference to a Master he found (1) That the judgment was an answer to the defence of the Statute of Limitations. (2) That there had been a balancing of accounts between J. E. and E. H. E. as to the accounts before E. H. E.'s assignment, and as to the notes after E. H. E.'s assignment, and that each balancing of accounts was such a balancing as prevented the operation of the Statute of Limitations. (3) That before the assignments, and within six years of action brought, E. H. E. paid several sums to J. E. on general account, and that such payments as far as the general account outside of the notes was concerned, prevented the operation of the Statute of Limitations. (4) That E. H. E. agreed to pay interest to J. E., and he allowed it to him. (5) That he disallowed some of the items of the judgment as having been proved outside of the judgment. (6) That he disallowed certain sums of money omitted from plaintiff's claim—although proved to his satisfaction—as outside the scope of the reference.

On an appeal from the Master, it was

Held, that the judgment recovered against E. H. E. after his assignment in an action in which G. was not a party was not even *prima facie* evidence against G. *Eccles* v. *Lowry*, 23 Gr. 167, considered.

That the balancing of accounts before the assignments upon the general account, and the payments on account were sufficient to prevent the operation of the Statute.

That the balancing of accounts after the assignment as to the notes did not prevent the operation of the Statute.

That the payments made on general account being appropriated to the account of the whole indebtness including the notes, the notes were not barred by the Statute.

That the interest was properly allowed—as it was included in the balancing of accounts, and the notes were payable with interest.

Marsh, for the plaintiff.

W. M. Clark, for the defendant.

Ferguson, J.] [February 12.

THE HAMILTON AND MILTON ROAD CO. v. RASPBERRY.

Statutory remedy for penalty—Injunction.

On a motion by a road co. for an injunction to restrain R. from passing through toll gates without paying the tolls when demanded, it was contended that because there was a statutory remedy for the recovery of a penalty for each offence under sec. 129 of R. S. O. c. 152 the court would not interfere by way of injunction.

Held, that if the plaintiffs establish a *prima facie* case in regard to the rights they claim there is jurisdiction to interfere by way of

injunction pending the determination of the question at the trial, and an injunction was granted upon a consideration of the balance of convenience in favour of the plaintiffs.

Letten v. *Goodden*, L.R. 2 Eq. 130, and *Cory* v. *Yarmouth etc., R. W. Co.*, 3 Ha. 593, considered and followed.

Waddell, for the plaintiffs.

Osler, Q.C., for the defendant,

Ferguson, J.] [March 30.

THE INCORPORATED SYNOD OF THE DIOCESE OF TORONTO v. LEWIS ET AL.

St. James' Rectory—Imp. Stat. 31 *Geo. III. c.* 31, *sec.* 38—*Endowment of rectory with lands—City rectory—Township rectory—Sale of lands under* 29 & 30 *Vict. c.* 16—*Distribution under* 41 *Vict. c.* 69 *(O.)—City incumbents—Township incumbents—Who entitled to participate.*

The Church of St. James was erected into a rectory at the city of Toronto within the said township (York), by patent, under Imp. Stat. 31 Geo. III. s. 38, in 1836, and was endowed at different times with lands, situate some in the city of Toronto and some in the township of York.

When the lands were sold under 29 & 30 Vict. c. 16, and had to be distributed by the Synod under 41 Vict. c. 69 (O.), there were clergymen of parishes in the city of Toronto and in the township of York, and it was contended that only those clergymen of the city parishes were entitled to participate in the distribution of the fund.

On a special case being stated for the opinion of the court, it was

Held, that the city of Toronto was for the purposes of the grant erecting the rectory considered as being within and a part of the territory of the township of York, and the grant was for the benefit of both the township and the city as one territory.

That the duties of the first rector of St. James extended over the whole township. The township was his parish.

That the incumbents of the Churches in the township must, under 41 Vict. c. 69, s. 2 (O.), be included among the participants of the fund, unless there is some reasonably clear enactment taking their rights away which does not appear either in that statute or 29 & 30 Vict. c. 16.

Moss, Q.C., for the plaintiffs.

Robinson, Q.C., and *McMichael*, Q.C., for the township incumbents.

Maclennan, Q.C., for the city incumbents.

Boyd, C.] [April 7.

GILMORE ET AL. v. GILMORE ET AL.

Will—Devise—Lands charged with legacies conveyed during lifetime of testator—Effect of maintenance—Dower—Election—Personal estate—Legacies payable out of.

J. G., by his will, (1) devised lands to his son, J. G., Jr., (3, 4 and 5) devised lands to three grandsons, (7, 8, 9 and 10) devised legacies to four different daughters and charged them upon the lands devised to J. G., Jr., (16) charged the lands devised by 3, 4 and 5 with the maintenance and support of his widow for life, and two infant children until they became of age, and inserted two clauses in these words: "And I hereby charge the executors of this my last will and testament, hereinafter named, with the performance and execution of all trusts and charges by me heretofore made, the same to be borne out of my personal estate. I further charge that my personal estate be sold by my executors hereinafter named, said personal estate consisting of all goods and chattels, farm stock and utensils, same to be equally divided after all debts and funeral and testamentary expenses be paid, the same to be equally divided between all my children."

The testator in his lifetime conveyed the land covered by clause 1 to J. G., Jr., without any reference to the charges created by 7, 8, 9 and 10.

Held, that the widow was entitled to both dower and maintenance out of the lands charged with the maintenance.

That the infant was entitled to maintenance, and the benefit under the will, to be invested and accumulate for him.

That there was no intestacy as to any part of the personal estate, as it all passed under the wording of the clause set out.

That the legacies to the daughters were payable out of the general personal estate.

Moss, Q.C., for the executors.
Maclennan, Q.C., for Joseph Gilmore.
J. Hoskin, Q.C., for other infants.
Cassels, Q.C., for the widow.
R. Cassels, for some children.
Swayze, for executrix of deceased legatee.

PRACTICE.

C. P. Div. Ct.] [March 12.

McMAHON v. LAVERY.

Jury notice—Legal and equitable issues—C. L. P. Act, ss. 257 and 258.

The plaintiffs sued, as executors of McB., to recover from the defendant, a solicitor, moneys placed in his hands for investment, and notes and money received by him as solicitor and agent for McB., and prayed that the defendant might be ordered to assign certain securities in his hands. The defendant set up by way of defence a certain agreement, under which he alleged that the plaintiffs were estopped from making their claim. The plaintiffs then amended their statement of claim, setting up fraud in procuring this agreement, and asked that it might be declared void, and be delivered up to be cancelled.

Held, that the case came within ss. 257 and 258 of the C. L. P. Act, and that the legal issues should be tried by a jury, and the equitable issues by a judge without a jury, unless the judge at the trial, in the exercise of his discretion, chose to try the whole case without a jury; but that the defendant was not entitled as a matter of right to have the jury notice struck out.

Temperance Colonization Society v. *Evans*, *ante* p. 37, followed.

W. H. P. Clement, for the defendant.
Watson, for the plaintiffs.

Wilson, C.J.] [April 1.

WILLIAMSON v. AYLMER.

Taxing officer, powers of—Evidence—Solicitor—Retainer.

The taxing officers have the power to call for evidence on taxations pending before them.

Where the plaintiff was out of the jurisdiction, and a taxing officer had refused to proceed with the taxation of her costs of the action against the defendants until she was produced before him for examination, touching her retainer of the solicitor in whose name the proceedings in the action had been conducted, it was directed that the officer should first examine other witnesses, and then, if unable to decide the question of retainer, should report to a judge in chambers.

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

Rose, J.] [April 2.

IN RE MACFIE v. HUTCHINSON.

Prohibition — Division Court—Attachment of debts—R. S. O. c. 47, s. 125.

The defendant was the medical health officer of the city of London, and his monthly salary as such was attached in a Division Court action in the hands of the city corporation to answer a debt due to the plaintiff. It was claimed by the defendant that $25 of the salary was exempt from attachment under the Division Court Act, R. S. O. c. 47, s. 125, which provides that "no debt due or accruing due to a mechanic, workman, labourer, servant, clerk, or employee for, or in respect of, his wages or salary, shall be liable to seizure or attachment under this Act, unless such debt exceeds the sum of $25, and then only to the extent of such excess." No facts were in dispute, and the Division Court judge determined as a matter of law upon the construction of the above section, and of the Public Health Act, 1884, and amending acts, the Municipal Act, 1883, s. 281, and by-law No. 319 of the city of London, that the defendant's salary was not exempt from attachment.

Held, that the decision of the judge could be reviewed upon a motion for prohibition; and

Held, that the defendant was an employee within the meaning of R. S. O. c. 47, s. 125, and that his salary to the extent of $25 was exempt from attachment under that Act.

G. W. Marsh, for the defendant.
Shepley, for the plaintiff.

Rose, J.] [April 2.

HOVEY v. GILBERT.

Discovery — Examination of defendants before statement of claim—Ex parte order.

In an action by creditors of defendant R. to set aside conveyances by him to defendant G. as fraudulent, the plaintiffs swore that it was necessary to have an examination of the defendants before delivering the statement of claim, in order that it might be framed with proper particularity as to the fraud, of which they had no personal knowledge, and a local master upon the application of the plaintiffs *ex parte* made an order for such examination.

Held, that the order should not, at any rate, have been made *ex parte*, and that the position of a defendant resisting a claim as to which he has no personal knowledge, and of a plaintiff advancing such a claim being vastly different, the order should not in this case have been made at all.

C. J. Holman, for the defendants.

Aylesworth, for the plaintiffs.

Boyd, C.] [April 6.

IN RE HAGUE, TRADERS' BANK v. MURRAY.

Costs—Executor—Taxation—Moderation.

Bills of costs for services rendered to an estate after a testator's death down to the date of an order for the administration of the estate were paid by the executor after the order, and pending administration proceedings.

Held, that there could be no taxation of the bills as against the executor at the instance of creditors, but that the bills should be moderated. So far as the solicitors were concerned, the payment by the executor was to be regarded as payment of the bills, and to obtain a taxation after payment a case would have to be made against the solicitors.

Practically, the moderation might be so conducted, if warranted, by special circumstances, as to differ but little from taxation.

Lefroy, for the plaintiffs, and the Central Bank of Canada.

Reesor, for the executor.

FLOTSAM AND JETSAM.

WE are not surprised to see some comments in the Press on the sentences inflicted by Mr. Justice Day. Eighteen months' imprisonment of a clergyman for marrying a person who was under age without due publication of banns, penal servitude for life on a boy for attempting to extort money by threats of false accusation, and eighteen months' imprisonment of the young man called Rowden, or Rawden, for falsely publishing in a newspaper that he was engaged to marry a young lady of high rank, are really a group of sentences which must excite amazement in the ordinary mind. Indeed, when we compare them with the punishments often awarded by judges for offences complicated with violence, they would appear to be eccentric, and passed with a view to invite the interference of the Home Secretary.—*Law Times.*

ASSISTANT LAW CLERK.—On being informed to-day that Mr. F. A. McCord had been appointed assistant law clerk of the House of Commons, Dr. Richard Wicksteed was much surprised and chagrined. Dr. Wicksteed expected the appointment by right of promotion, and had been given to understand by some of the ministers that his claims would be duly considered. For many years Dr. Wicksteed has filled the position of second assistant law clerk, and confidently expected to succeed Mr. Wilson. Some time ago the Minister of Justice stated that a Nova Scotia lawyer, a protégé of his own, was an applicant for the position, but on learning that a thorough knowledge of the French language was necessary, he withdrew from the contest, receiving a solatium in the shape of a job of preparing an index to the revised statutes, for which he is to receive probably $1,000. Dr. Wicksteed regards the appointment of Mr. McCord over his head as an act of gross injustice which will not do the Government any good, and for which they will be taken to task when Parliament meets. The doctor, like many others, is being made to feel the influence of the Chapleau faction, as the Secretary of State, who is now all powerful in the Government, could not refuse to secure a good position for the son-in-law of his old colleague and treasurer, Judge Wurtele.—*Ottawa Free Press.*