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DIARY FOR JANUARY.

15. Sun..*2nd Sunday after Epiphany.*
16. Mon..First meeting Mun. Council (except County Council).
17. Tues...Second Intermediate Examination. Heir and Dev. [sitt. end.
18. Wed..Second Intermediate Examination.
19. Thurs..First Intermediate Examination.
20. Frid..First Intermediate Examination.
22. Sun..*3rd Sunday after Epiphany.* First Engli h Parlia- [ment, 1256.
24. Tues..First meeting of County Council. Primary Examina- [tion.
25. Wed..Sir F. B. Head, Lieut.-Governor U.C., 1836. Prim- [ary Examination.
29. Sun...*4th Sunday after Epiphany.*
31. Tues..Earl of Elgin, Governor-General, 1847.

TORONTO, JAN. 15, 1882.

WANT of space compels us to hold over an instructive article as to the procedure in impeaching the return of a mandamus *nisi*. Also several interesting cases reported for this journal, and several letters from correspondents. They will appear in our next.

WE supplement the valuable collection of Practice Cases under the English and Ontario Judicature Acts in our last volume (which we propose to continue) by a simple Table of reference thereto, published with the Index and list of cases. The first column of this Table indicates the number of the section or rule illustrated by the case, (the rules being designated throughout by their marginal numbers), and the second column gives the page on which the case in question is to be found.

A VALUED correspondent sends us a letter from Nova Scotia referring to an article which appeared in these columns in last year's volume (p. 445), in reference to the removal of County Court Judges, giving a lengthy extract from an able judgment of Judge Savery on a kindred subject. Want of space prevents its insertion in this issue, but it will appear in our next. It has fallen to the lot of Judge Savery to adjudicate upon many important questions of constitutional law, and he seems to have devoted much attention to the difficult points which have arisen before him in this connection.

THE consolidation of the statutes of the Dominion will be a very arduous task, requiring in those to whom it may be entrusted a thorough familiarity with constitutional law, and with the various Provincial enactments which will necessarily enter into the labours of the Commissioners. It will probably be found desirable, should a joint commission be appointed, to have on it men from the principal Provinces; and probably one familiar with the laws of the several Maritime Provinces could be found to give valuable assistance to the Board on the questions that might arise peculiar to those portions of our Dominion.

IT is to be hoped that if the specially invited guests are to be formally received on their arrival at the approaching conversazione, the task of announcing them will be assigned to some one acquainted with their official titles. We remember hearing of a reception given to the legal dignitaries by the Lord Mayor at the Guildhall on one occasion, at which the Accountant in Bankruptcy and his wife were announced in stentorian tones by the flunkey at the en-

trance as the "Count and Countess of Bankruptcy," and had to parade up the hall to the Lady Mayoress under the embarrassing burden of this novel and unsought for title. We hope no one will have his democratic sensibilities shocked by any similar blunder on the forthcoming entertainment at Osgoode Hall.

A CORRESPONDENT of our namesake in England, speaking of the many hard cases resulting from breaches of trust and misappropriations by trustees, urges that some steps should be taken to provide for the safe keeping of trust deeds, and suggests tha they should be in the custody of some official. We do not see that this would prevent frauds by trustees; but it is plain that every precaution should be taken for the protection of beneficiaries. What might answer a better purpose, though the whole subject is surrounded by difficulties, would be for private trusteeship to cease, and have all trust estates of a certain character, or where a certain sum is involved, administered by official trustees, or at least that the latter should have some supervision for the protection of the *corpus* of the estate. It is, however, rather "too large an order" to speak of without full consideration, and after all, the multiplicity of the interests involved might prevent the possibility of moving in the direction indicated.

WE discuss elsewhere some important constitutional questions relating generally to the powers of the Local Legislatures in reference to the administration of justice, and with especial reference to a conflict of opinion in British Columbia which has come to a head in the following manner: It appears that the Provincial Legislature enacted that the Appellate Court should sit once a year on a day to be named by the Executive. The judges, on the day which had been named (Dec. 19), assembled, but not as a Court, taking the ground that the Local Legislature had no right of interference with the Supreme Court, that that tribunal had never been constituted, maintained, or organized by the Province, and that the B. N. A. Act had given to the Local Legislature the power to legislate in regard to civil procedure only as to those Courts which the Province constituted, maintained or organized. It was finally arranged that the question should be argued and put in such a shape that the point might go before the Supreme Court. The 5th of January was fixed for the argument. There has been much friction for some time between the Provincial Executive and the judges. We trust, whatever may be the result of this discussion, that the independence of the judges may be kept inviolate.

ADMINISTRATION OF JUSTICE IN BRITISH COLUMBIA.

British Columbia, which has attracted so much attention in Canada Pacific Railway matters of late years, bids fair once more to come to the front; but this time with grave constitutional questions respecting the administration of justice in the Provinces under the British North America Act 1867. These will have some bearing on the Superior or Supreme Courts through the rest of the Dominion; and, being also unconnected with politics, will no doubt possess considerable interest for our general readers.

The subject now raised for judicial decision in our Pacific Province is the nature and extent of the power of the Local Legislature over the Supreme Court and Judges of British Columbia, the residential unity of its Bench—its Procedure, Rules, and Costs, under the British North America Act 1867, the special terms with which British Colum-

bia joined the Union, and the Imperial and Colonial Acts and Orders in Council which consummated it.

The action in which these points have come up for judicial decision is "*The Thrasher Case,*" (*Sewell and others* v. *two B.C Towing Companies,*) in which the plaintiffs, an influential and wealthy American shipping firm, sought to recover $100,000 damages for the total loss of their ship the *Thrasher*, by alleged negligence on the part of the tugs. They had, under section 6 of The Dominion Superior Court Amendment Act, gone direct to the Supreme Court at Ottawa, to appeal against the decision of the Chief Justice at Nisi Prius at Victoria, and because the Lieut.-Governor in Council, (or, as they construe it, the Local Government) after proceedings commenced and plea pleaded under a set of rules which allowed an appeal to a Court of final resort in the Province, had passed rules which practically denied them that remedy, the Supreme Court at Ottawa sent the plaintiffs back to Victoria to use every effort to obtain the judicial decision of at least a plurality of British Columbia Judges, on a motion for a new trial, before they could assist them. Practically, this was to test the validity of the B. C. Rules of Court, referred to in the direct application at Ottawa.

It will be impossible to give our readers, even approximately, a clear idea of the position of affairs which brought about this result, without entering into a short history of the origin, progress, and present position of B. C. Supreme Court, and somewhat also of the B. C. County Courts. We have before us the judgment of the Supreme Court Judges of B. C. in a murder case, *Regina* v. *McLeans & Hare*, in a report carefully prepared from the judges' notes, and published at Victoria by the Honourable Mr. Justice Crease in 1880. This gives much information with respect to the B. C. Courts. So little is known of our western sister, owing to its distance and youth, that we have obtained such further information as we could procure on the subject. This we propose to give to our readers, not, of course, guaranteeing perfect accuracy in all respects; but under the conviction nevertheless that it will on examination be found to be very generally correct.

The Supreme Court of British Columbia, we learn, occupies apparently a somewhat exceptional position among the Superior Courts in the other Provinces of this, our new Dominion. It is represented in this judgment as being the heir of all the powers and all the privileges of the former Supreme Court of Civil Justice of the mainland of British Columbia, and the Supreme Court of Civil Justice of Vancouver Island. The former of these by an early ordinance, long out of print, almost out of personal memory, was especially invested by name with the criminal jurisdiction of the Queen's Bench, and by a subsequent ordinance, 5 June, 1859 (B. C. Con. Stat. No. 51), had "complete cognizance of all pleas and jurisdiction in all cases, civil as well as criminal, arising within the colony," and this without qualification or reserve. By the proclamation (having the force of law) of 19 Nov., 1858, (for the mainland alone) and by the ordinance of 1867, (Consol. Stat. c. 103), the civil and criminal laws of England, as they stood on the 19 Nov., 1858, are now in force in the whole of British Columbia, save where they are from local causes inapplicable, or have been altered, since 1867, by competent legislation. This includes statute as well as common law, and practice as well as doctrine.

In the various political changes which led to the union of the two formerly separate colonies of British Columbia (Mainland) and Vancouver Island into one colony by the name of British Columbia, all those powers appear to have been enlarged rather than abridged. No single one was taken away, but one by one they were gradually all accumulated, and at last, by statutes framed directly under the eye and order

of the Imperial Government previous to Confederation, and merged, or rather concentrated in the present Supreme Court of British Columbia, the Judge of it was made Chief Justice, and by a similar Imperial order and by warrant under the Queen's sign manual and signet, a Puisne Judge, the Hon. Mr. Justice Crease, who for nine years previously had been under Queen's warrant and Letters Patent H. M. Attorney-General for the Colony, was raised to the Bench of the said Supreme Court with as full and ample powers, privileges, jurisdiction, and authority as were possessed by the Chief Justice of that Court.

Consequently the Court at the Union combined in itself complete jurisdiction in Equity, Common Law, Probate, Divorce, Bankruptcy, Insolvency, Admiralty, and in short, "in all pleas, civil and criminal, arising within the Colony."

Such was the position of the Court and its judges when Confederation came in 1871; and by Art. 10 of the Terms, and by sec. 129 of the B. N. A. Act of 1867, "all Courts of civil and criminal jurisdiction, and all legal commissions, powers and authority, and all offices, judicial, administrative and ministerial, existing therein at the union, (it was enacted) should continue, etc., as if the Union had not been made, subject, nevertheless, (except with respect to such as were enacted by or executed under Acts of the Imperial Parliament), to be repealed, abolished or altered by the Legislature of the Dominion, or the respective Province, according to the authority of the Parliament or of that Legislature under that (the B. N. A.) Act."

Consequently, all the powers, privileges and jurisdiction of this Supreme Court and its judges were perpetuated and handed down as they existed before the Union in every possible respect.

In 1872, a Royal Commission by Letters Patent under the great seal appears to have been issued, in the same ample terms, and with all and singular the same jurisdiction, power and privileges in every respect as those of the other two judges, to the Honorable Mr. Justice Gray, as a Puisne Judge of the same Court, and a B. C. Act passed for the occasion added, as far as it could, local sanction to the appointment and its terms.

It is, therefore, according to these authorities, no mushroom tribunal, but an old and honoured Court of Imperial statutory creation and descent, and as we stated before, heir of all the powers, authorities and jurisdiction of the Supreme Courts of the Colony in all pleas civil and criminal whatsoever arising within it.

To those living on this side of "the Rockies" it may be a matter of surprise to hear that the B C. Court was far ahead of the Courts of the older Provinces in its *procedure*. For, having been established in 1858, it had the advantage over all the older Colonies, in being able to introduce and actually introducing all the reforms established by the Common Law Procedure Acts of 1852 and 1854, and indeed all the amendments of the Statute law up to 19 Nov. 1858, (the birth-day of B.C.,) and afterwards the C. L. P. Act of 1862, which were subsequently extended to some of the other Provinces.

Such, then, our readers will remember in following our subsequent observations on the various local acts which affected the subject, was the Supreme Court, and such its Judges with whom subsequent local provincial legislation after 1871 and 1872 assumed to deal.

At this point we must retrace our steps awhile in our information to say that as far back as 1860 partially, and 1867, over all British Columbia, and ever since, the English County Court system and law, without any very material alteration, was established and has existed in full force down to the present day, administered by six stipendiary magistrates distributed through the country in as

many quasi districts—most efficient government administrators and magistrates, but unfortunately entirely untrained in the law.

It is necessary to refer to the County Court and its Judges in order to follow intelligently the present position of the B. C. Supreme Court.

Confederation had at once a very marked effect upon these County Court Judges or Stipendiary Magistrates, as they were termed. With a jurisdiction each over all the Province, they united in their own persons all governmental (quasi) district offices, like the "Residents" at the native courts in India. It should here also be observed that there is a clause in an old B. C. County Court Act (sec. 9, of cap. 47, Consol. Stat. of B. C.), which allowed any Supreme Court Judge in his discretion to sit in any County Court case, with or without the County Court Judge of the particular (quasi) district. It is under this voluntary clause, if we be rightly informed, that the Supreme Court Judges have been and are now temporarily carrying on the County Court work of the Province.

To return.—With the Union, the Stipendiary Magistrates became "Dominion" officers, and (what we now understand as) their "Provincial" duties were at once swept away, and they remained merely Stipendiary County Court Judges. Thus arose, from Confederation itself, a great waste of judicial force. Soon, however, the Dominion cast numerous intricate and purely legal duties on them by its legislation in Insolvency, in appeals from Magistrates' Courts and so forth, and though their decisions were, it would seem, rarely reversed on appeal to the Supreme Court of B. C, still exception was taken to their non-legal training. A race of young lawyers was rapidly springing up into practice. A Bar Society was formed with Benchers' admissions and all in regular order; and the existence of non-legal judges was held forth as an anachronism.

It does not strike us as unnatural to hear further that the Dominion Government hesitated to pension off a number of gentlemen of unexceptionable character, in the prime of life, and of great experience in the preservation of order in such a country as British Columbia, which was the only complete alternative, previous to the appointment of legal men to the County Judgeships. And we are not surprised to hear that year after year local acts on the subject were passed, sent back, amended, disallowed, re-enacted in endless protean shapes, delayed or refused, left to their operation or declared unconstitutional by the courts. The Local Government, we are told, complained to the Federal; the latter recriminated with invitations to suggest adequate remedies themselves, and this they did with a vengeance, if our chronicle be correct, for in 1879 the B. C. Legislature passed an Act authorizing the Governor-General to appoint two additional judges of the Supreme Court; declared that not less than three of the Supreme Court judges should reside on the mainland of British Columbia; enacted that on and after the new appointments the County Court system and Courts should still continue in force through the Province, and that every County Court must be presided over by a judge of the Supreme Court, who (it went on to say) "*shall* have and exercise all the jurisdiction. . . . . now lawfully exercised by any judge of the County Court or judge of the Supreme Court" under the voluntary clause we have before cited. This retained the County Court system intact, but imposed *compulsorily* on the Supreme Court judges, and in the teeth of their solemn written protest, all the County Court work of British Columbia.

(To be continued.)

RECENT DECISIONS.

Before proceeding to deal with the December numbers of the Law Reports, it is well to observe that the decision of Kay, J., in *Shardlow* v. *Cotterell*, noticed in the article on Recent Decisions in our last issue, has since been over-ruled by the Court of Appeal, as appears from the Weekly Notes for December 17th. The Court (Jessel, M.R., and Baggallay and Lush, L. J J.) held that the receipt and memorandum taken together without the poster contained a description sufficient to satisfy the Statute of Frauds. A full report of the judgments will no doubt appear shortly.

The December numbers of the Law Reports consist of 6 App. cas., p. 657 to p. 904, —7 Q.B.D., p. 501 to p. 619,—6 P.D., p. 125 to p. 156, and 18 Ch. D., p. 297 to p. 710.

EVIDENCE OF OWNERSHIP.

In 6 App. cas. it may be worth while to notice a dictum of Lord Selborne, L.C., at p. 694, that "payment to occupiers, however it might be explained, would certainly not be evidence of the purchase of the fee-simple for a perpetual rent-charge from the owner."

MORTGAGE—CONSOLIDATION.

And we can then proceed to *Jennings* v. *Jordan*, p. 698. In this case the mortgagor of one property had assigned the equity of redemption, and afterwards mortgaged another property to the mortgagee of the first, and the question before the House, as stated by Lord Blackburn, p. 714, was, "whether where the mortgage on one property is not created till after the equity of redemption in the other property has been parted with, there is, as against the purchaser, an equity to consolidate the two."

Lord Selborne, L.C., in his judgment discusses the doctrine of consolidation in its various branches, and points out that the contention of the mortgagee in the present case went further than either justice or authority warranted, for that (p. 702), "it is against all principle that a vendor should be enabled, after parting with his whole interest in particular property, to impose an additional burden upon it without the purchaser's consent, not by any express contract (which might in some cases prevail, if protected by a legal estate without notice), but indirectly, and without any contract at all." If *Tassel* v. *Smith*, 2 De G. & J. 713, could rightly be regarded as an authority in favour of the mortgagee, the Peers refused to follow it. Both Lord Selborne and Lord Watson express doubts as to the equitable character of the considerations which have led to the growth and development of the doctrine of consolidation, as against purchasers of the mortgagor's equity of redemption.

DEPOSIT OF TITLE DEEDS WITH BANK—VENDOR AND PURCHASER.

The next case, *London and County Banking Co.* v. *Ratcliffe*, p. 722, is also connected with the law of mortgage. The owner of land, after depositing the title deeds with a bank, as security for all sums then or thereafter to become due on the general balance of his account with the bank, contracted, with the knowledge of the bank, to sell the land to one who had notice of the terms of the deposit. The vendor afterwards paid into his own account, at the bank, sums, which, in the whole, exceeded the debt due to the bank, on his balance, at the time of the contract of sale, so that on the principle of *Clayton's Case* (1 Mer., 585), that debt was discharged. The bank, without giving notice to the purchaser, continued the account and made fresh advances to the vendor, so that on the general balance there was always a debt to the bank. The purchaser, who never had notice of the fresh advances, paid the purchase-money, by instalments, to the vendor, and the House of Lords held, affirming the decision of the Court of Appeal, that, (1) on the principle of *Hopkinson* v. *Rolt*, (9 H. L. C., 514),

the bank had no charge on the land as against the purchaser, for the fresh advances; and (2) that the bank had no charge upon the purchase-money. When, says Lord Selborne, p. 727, the mortgagor exercised, with notice to the mortgagee, his undoubted right of selling, subject to the then existing charge of the bank, "a line was, in my opinion, drawn, which was applicable to the security as a whole; and the bank could not make further advances so as to prevent or intercept (without any new agreement with B. [the vendor] or any notice to the respondent [the purchaser] beyond that which he had of the original security), the fulfilment, in the ordinary course, of the terms of the contract between B., as vendor, and the respondent, as purchaser." And Lord Blackburn, p. 739, states generally, that a purchaser of land, with notice that the title deeds have been deposited with a bank, as security for the general balance on the vendor's present and future account, is not bound to inquire whether the bank has, after notice of the purchase, made fresh advances. The burden lies on the bank advancing on the security of the unpai[d] vendor's lien, to give the purchaser notice that it has so done or intends to so do.

RIGHT TO LATERAL SUPPORT—PRESCRIPTION ACT.

By far the greater part, however, of this number of the appeal cases is taken up by the great case of *Dalton* v. *Angus*, in which the whole subject of the right to lateral support from adjoining land, its nature and acquisition, is exhaustively discussed. The point actually decided in the case is that a right to lateral support from adjoining land may be acquired by 20 years' uninterrupted enjoyment for a building proved to have been new built, or altered so as to increase the lateral pressure, at the beginning of that time; *and it is so acquired if the enjoyment is peaceable and without deception or concealment and so open that it must be known that some support is being enjoyed by the building.* The case was twice heard in the House of Lords, the second time in the presence of the following judges: Pollock, B. Field, Lindley, Manisty, Lopes, Fry and Bacon, J.J., to whom a series of questions were put. All we can do is to take the two principal questions and very briefly note some of the contents and conclusions arrived at, in the elaborate opinions and judgments with reference to them. The first question was:—

(1.) Has the owner of an ancient building a right of action against the owner of lands adjoining, if he disturbs his land so as to take away the lateral support previously afforded by that land?

All the judges answered this question affirmatively. Pollock, B., said: "It appears to me that by a long series of decisions, and by the opinions expressed by learned judges, during a period extending over very many years, the common law affecting this question must be taken to have been settled in favour of the right. The right to lateral support of soil by adjoining soil, is a natural right which exists wherever the lands of adjoining owners are in contact. The grounds upon which it is based are fully explained in the cases of *Humphries* v. *Brogden*, 12 Q.B. 739, and *Rowbotham* v. *Wilson*, 8 E. & B. 123. Where the soil is encumbered by buildings, it is obvious that a different question arises, although the character of the rights when acquired is in each case the same." He then proceeds to notice those cases and *dicta* which in his judgment establish the conclusion at which he had arrived. Passing on to consider the nature of the right to the support for a house and the mode by which it may be acquired by law, he defends, both on principle and authority, the view that it "must be taken as a rule of law not resting upon fiction or upon implied grant, but as a right of property, viz., an enjoyment of support which after twenty years becomes indefeasible in the same manner as the occupier of land may, by

bare possession for a sufficient period of time, acquire a good title." At p. 749 he observes that so far as the right gained by prescription for ancient lights affords any analogy, it is in favour of the view that the right for the support of a house may be obtained without any actual acquiescence by the owners of the adjoining land.

Field, J., in supporting the same view, discussed very loudly the manner in which the right arises, saying, p. 756, "Whatever may be the correct view as to the origin of the right, all the authorities seem to agree that after 20 years' enjoyment, the right is acquired; in the one case, the view being that it arises from a presumption of origin by grant, to be made in each particular case, from long uninterrupted possession; in the other case, that it has become an universal settled rule of law that the open enjoyment uncontradicted and unexplained, is sufficient by itself, and that there is, in modern times, at least, no necessity for presuming, in each particular case, a thing which everybody knows is a mere fiction. That in any view the enjoyment must not be "clam" is clear; for to hold that a man is bound by a right of the growing acquisition of which he had neither knowledge, nor the means of knowledge, would be unjust and inequitable." He discusses the right, in connection with other rights of a more or less analogous character, dividing the authorities into four classes, according as they relate to (1) vertical or lateral support of land or buildings; (2) light and air; (3) water; (4) way or common, or rights of that nature. As to the first two classes, he deduces from the authorities the conclusion, that the *de facto* enjoyment is the origin of the respective rights. As to the third class, he says, p. 759, that cases of percolating water were greatly relied on, in the argument, as shewing that no right at all could exist in the case of support; one of the reasons given for not implying any grant in those cases being, that there could be no resistance on the part of the servient owner. But, he says, he conceives the principle which underlies all these cases to be that, until defined and confined, there is, in those cases, as in light and air in its natural state, no subject matter capable of being the subject of a lawful grant, nor from the very nature of them can there be any definite occupation or enjoyment. As to the fourth class, he says the distinction between such easements and the right to air and light and support, is, that the former are unlawful in their origin. The first of the acts is a trespass; whereas in the case of the latter, the acts are in themselves lawful acts, done in the lawful occupation and uses of a man's own land.

Manisty, J., at some length defends the view that the right to the lateral support for buildings from adjacent soil is not a right to an easement, but a right of property, but he says, no doubt for many years the right was considered and treated as a right to an easement, and consequently in order to maintain the right the fiction of a lost grant was resorted to.

Fry, J., in a lengthy judgment maintains that, in the matter of this right, as acquired otherwise than by actual contract between the parties, principle and authority are in direct opposition to one another; that on principle it might well be held that every man must build his own house upon his own land, and that he cannot look to support from the land of adjoining proprietors, for the only principle on which rights of the kind in question can be acquired is that of acquiescence, but he who cannot prevent cannot acquiesce; yet the authorities show that it has been decided that an ancient house does possess the right in question; that a new house does not possess this right; and consequently, that the right is one which may be acquired independently of express covenant.

Passing now to the Peers, Lord Selborne takes a view as to the point raised in the first

question in favour of the right that regards it as an easement. "Land," he says, p. 792, "which affords support to land is affected by the superincumbent or lateral weight, as by an easement or servitude; the owner is restricted in the use of his own property, in precisely the same way as when he has granted a right of support to buildings," and at p. 796 he says:—"The policy and purpose of the law on which both prescriptions and the presumptions which have supplied its place, when length of possession has been less than immemorial, rest would be defeated, or rendered very insecure, if exceptions to it were admitted on such grounds as that a particular servitude (capable of a lawful origin) is negative rather than positive; or that the inchoate enjoyment of it before it has matured into a right is not an actionable wrong; or that resistance to or interruption of it may not be conveniently practicable."

Lord Penzance also holds reluctantly in favour of the right, agreeing with Fry, J., that the circumstances under which the claim is held to arise are incapable of giving rise to it in accordance with any known principle of law. "It is this sudden starting into existence of a right," he says, p. 803, "which did not exist the day before the twenty years expired, without reference to any presumption of acquiescence by the neighbour, (to which the lapse of that period of time without interruption on his part might naturally give rise), which I find it impossible to reconcile with legal principles."

Lord Blackburn expresses his agreement with the result at which the judges had arrived, that the right claimed was, according to the established law of England, one which might be acquired by prescription. At p. 817 he expresses his disagreement with the view that acquiescence or laches is the only ground on which prescription is or can be founded. He then proceeds to discuss this with the greatest elaboration, and at p. 818 he quotes the passage from Dig. lib. 41, tit. 3—"Bono publico usucapio introducta est ne scelicet quarundam rerum diu et fere semper incerta dominia essent, quum sufficeret dominis ad inquirendas res suas statuti temporis spatium," and says (p. 826) that if the motive for introducing prescription is that given in the above passage of the Digest, it seems to follow irresistibly that the owner of a house, who has enjoyed the house with a *de facto* support for a period and under the conditions prescribed by law, ought to be protected in the enjoyment of that support; and should not be deprived of it by showing that it was not originally given to him.

Before quitting this first portion of *Dalton* v. *Angus*, it may be observed that the right to support for *soil*, which is a right *ex jure naturæ*, was illustrated by the case of *Snarr* v. *The Granite Rink Co.*, recently heard before Ferguson, V.C., in the Cancery Division, but not yet reported.

The second question put to the judges in *Dalton* v. *Angus* was as follows:

(2.) Is the period during which the plaintiffs' house has stood, under the circumstances stated in the case, sufficient to give them the same right as if the house was ancient? The evidence showed that since 1849 there had been no alteration in the plaintiffs' premises, but that in that year their predecessor openly, notoriously, and without concealment, converted the same into a coach factory, in which their business had been since that time so openly carried on.

It was agreed on all hands that this second question should also be answered in the affirmative. Pollock, B., says, p. 751—"The presumption arising from 20 years' enjoyment cannot, no doubt, be treated as conclusive, that is, as a *presumptio juris et de jure*, which is not to be rebutted by evidence; it is conclusive only when the evidence of enjoyment is uncontradicted and unexplained. Thus it might be shewn that no grant could have been legally made

by the owner of the servient tenement . . . . In the present case, however, no evidence appears to have been offered on the part of the defendants to contradict or explain the user by the plaintiffs which ought to have been submitted to the jury. For the reasons which I have already given, evidence which merely shewed that there had been no actual acquiescence by the defendants would have be irrelevant."

Lindley, J., says, p. 766, "The only way in which I can reconcile the authorities on this subject is, to hold that a right to lateral support can be acquired in modern times by an open uninterrupted enjoyment for twenty years, and that if such an enjoyment is proved, the right will be acquired as against an owner in fee of the servient tenant, unless he can show that the enjoyment has been on terms which exclude the acquisition. Whether he has assented or not, even if he has dissented, appears to me immaterial, unless he has disturbed the continued enjoyment necessary to the acquisition of the right."

Fry, J., propounds his opinion, p. 773, that the whole law of prescription and the whole law which governs the presumption or inference of a grant or covenant rest upon acquiescence; he then proceeds to consider of what ingredients acquiescence consists, and how the true grounds and principles of acquiescence can be applied to the question of the right of a house to be supported by the adjoining land. He observes that the authorities show that some notion of acquiescence was in the minds of the learned judges in establishing the existence of the right, but that he regards the right as resting, not on any principle, but solely on a series of authorities which disclose no clear ground for their existence.

Bowen, J., maintains that there is no reason why, in the case of support to buildings, the same doctrines should not regulate the quality and nature of the user required, as apply to the mode of acquisition of affirmative easements and of light, *e. g.*, that the user should be open and uninterrupted. But he agrees that the period during which the house had stood was sufficient to give the plaintiff the same right as if his house was ancient, provided the engagement fulfilled the conditions, and provided it was not shewn by the defendant that the right had no lawful origin.

Lord Selborne, L. C., expressed his divergence from all the Judges before whom the case had come (see per Lindley, J., p. 764) by holding, that, inasmuch as he regarded the right of support as an easement not purely negative, capable of being granted, it followed that it must be within the 2nd section of the Prescription Act, Imp. 2 and 3 Will. IV., c. 71, (R. S. O., c. 108, sec. 35), unless that section is confined to rights of way and rights of water, which he did not believe it could be without unjustifiable violence to the express terms of the Act; but he says, p. 801, if the Act does not apply, the same result would practically be reached by the doctrine, that a grant, or some lawful title equivalent to it ought to be presumed after twenty years' user.

(3.) The third question put before Judges was as follows:—

"If the acts done by the defendants would have caused no damage to the plaintiffs' building as it stood before the alterations made in 1849, is it necessary to prove that the defendants, or their predecessors in title, had knowledge or notice of those alterations, in order to make the damage done by this act in removing the lateral support, after the lapse of 27 years, an actionable wrong?

As to this, we have only space to say that the general opinion of the judges and peers seems embodied in the words of Bowen, J., at p 789, viz., "It was necessary to prove that the plaintiff had openly enjoyed the additional support rendered necessary by his alterations. It would, of course, be an open

enjoyment if the defendants or their predecessors in title had express knowledge or notice of the alterations and of their character. But the enjoyment of the additional support would also be open, if the appearance of the altered building was such as to afford a reasonable indication to the adjoining owner of the alterations that had taken place. Except to this extent, it was not necessary, in my opinion, to prove either knowledge or notice to the adjoining owner."

TRUSTS—SEVERANCE OF FUNDS FOR INVESTMENT.

Of the remaining cases in this number of Appeal Cases, the only one which need be noticed is *Fraser* v. *Murdoch*, p. 855, which was a case concerning the severance of funds for investment for behoof of distinct parties. The trustees sought to indemnify themselves for payment of calls made upon them by an insolvent bank (in which they had invested part of the money), out of the whole trust estate. But it was held that they had the power to sever, and had severed, the two legacies, and had placed them in separate investments for behoof of the respective beneficiaries, and therefore had no right to relief from liabilities incurred in the manner described.

It is necessary to postpone any notice of the remaining numbers of the December Law Reports until our next issue.

LAW SOCIETY.

The following are extracts from the proceedings of the Benchers in Convocation during last Michaelmas Term :—

RULE FOR THE ESTABLISHMENT OF A LAW SCHOOL.

1. The Law Society hereby establishes a Law School for the period of two years.

2. The Staff of the Law School shall consist of four Lecturers, who shall be Barristers-at-Law.

3. The course in the School shall consist of Lectures, Discussions, and Examinations, between the 12th December and the 1st May, during the first term thereof, and the 1st October and the 1st April, during the second term thereof.

4. The attendance in the School shall be voluntary, the students will be divided into the Junior and Senior class. Any Student or Articled Clerk, not being a University graduate, who shall not have entered his fourth year before the commencement of any term of the School, shall be entitled to admission to the Junior Class, and every University graduate, being a Student-at-Law or Articled Clerk, and every other Student-at-Law and Articled Clerk who shall have passed through the Junior Class or entered his fourth year before the commencement of any term of the School, shall be entitled to admission to the Senior Class.

5. At the end of each term an examination shall be held by the lecturers upon the subject of the lectures.

6. The duties of the Lecturers shall be to deliver *viva voce* lectures, to prepare all questions for Law School Examinations, whether oral or written, to select all questions for discussion, to preside in turn at meetings for discussion, unless other arrangements be made by the Committee on Legal Education, and to attend all Law School Examinations and report the results thereof to Convocation.

7. The Legal Education Committee shall arrange the subjects and books for lectures, the branches to be treated upon by each lecturer, the days and the hours for holding lectures and discussions in the Law School during the term, and shall provide as far as practicable for the delivery of additional lectures by Judges, Benchers and other members of the Profession, and shall have power from time to time to sanction any change of duty among the lecturers.

8. The Examiners in Law shall, until otherwise ordered, be the Lecturers in the Law School, and their salaries shall be $200 per annum each, in addition to their salary as Examiners in Law, such salaries to be paid quarterly.

9. The Lecturer, for the time being, holding the position of Seniority at the Bar shall be the Chairman at the Law School.

10. The first course in the Law School shall commence on the 12th day of December, 1881.

11. To entitle students attending the lectures in the School to be awarded prizes in Law Books under the provisions of the rule of the Society as to Legal and Literary Societies, the Junior and Senior Classes shall be deemed two classes of competitors for such prizes within the meaning of sections 7 and 8 of the said Rule, and the other provisions of the said Rule shall, so far as necessary, be applicable to students in the School in the same manner as if the lectures and examinations thereon were held under the authority of the said Rule, provided, however, that section 9 of said Rule is not to take effect during the continuance of the School.

12. The Report of the Lecturers of the results of the Examination in the School shall be deemed proof of results of the examination within the meaning of section 6 of the said Rule.

REPORT OF LEGAL EDUCATION COMMITTEE.

The Report of the Legal Education Committee respecting the days of examination was adopted, and is as follows:—

The Committee on Legal Education have considered the memorial of the Law Examiners, asking to have the Law Examination take place during the week next before each term, as the new Examination Hall will hereafter be available.

The Committee considering it desirable that a change in the time of holding these examinations should be made, recommend that Convocation approve of the following resolution, namely:—

Resolved, That the days of the week next before term, hereinafter mentioned, be appointed for the several law examinations.

Tuesday. For certificate of Fitness and First Intermediate, candidates to present themselves at 9 a.m. of that day.

Wednesday. At 3 p. m. the Examiners shall declare to candidates for Certificate of Fitness and First Intermediate, respectively, the results of their examinations, and proceed with the oral examinations of such of those candidates as may be entitled to an oral.

Thursday. For Call and for Second Intermediate, and for honours and scholarships of the First Intermediate, candidates to present themselves at 9 a.m. of that day.

Friday. At 3 p.m. the examiners shall declare to the candidates for Call and Second Intermediate, respectively, the results of their examinations, and proceed with the oral examinations in connection with Call and Second Intermediate.

Saturday. For honours and rewards of merit in connection with Call, and for honours and scholarships of the Second Intermediate, candidates to present themselves for examination at 9 a. m. of that day.

REPORT OF BUILDING COMMITTEE.

The Report of the Building Committee on the opening of the New Hall was received, read, and adopted, and is as follows:—

The Building Committee, upon the reference to it as to ceremonies connected with the opening of the New Hall, beg leave to report that they have considered the subject, and recommend the following plan:—

1. That the Hall be opened by the holding of a conversazione, on a day to be fixed by the committee hereinafter mentioned.

2. That the Government be requested to allow the use, for the occasion, of the other parts of the building.

3. That each Barrister, Solicitor, Student, and Articled Clerk, be entitled to attend, with one lady, and that additional tickets for ladies be supplied to Barristers and Solicitors on application. That public notice be given in the newspapers requesting those Barristers, Solicitors, Students, and Articled Clerks who desire to attend, to apply for tickets before the 27th day of January, 1882, the tickets to be presented at the door.

4. That invitations be given to the Lieutenant-Governor, the Judges, the members of the Local Government, the members of the Local Legislature, the members of the Senate of the University of Toronto, the members of the Council and Faculty of University College, the members of the Corporation of Trinity College, the members of the Council and Faculty of St. Michael's College, the members of the

members of the Council and Faculty of McMaster Hall, and to the Students composing the Glee Clubs of the University of Trinity College, Toronto, and Toronto Medical School.

5. That the proceedings at the conversazione consist of a reception till 8.30 p. m., at 8.30 p. m., five minutes speeches from the Treasurer, the Chairman of the Building Committee, and the President of the Osgoode Legal and Literary Society.

Presentation of medals, if any are gained.

During the evening, music in the Hall and Library by the bands of the Queen's Own and Grenadiers, and (if they will accept the invitation) by the Glee Clubs.

Refreshments, consisting of tea, coffee, ices, cakes, and sandwiches, served in the new luncheon room, and in present lecture and examination room.

6. That, to carry out these arrangements in every detail, a joint committee be appointed, of six Benchers, with instructions to apply to the Bar to name six members, and to the Osgoode Legal and Literary Society, to name six members, to act with the Benchers; and that such joint committee have power to add to their numbers, and to form sub-committees for the purposes of the reference, provided that all proposed expenditure be subject to report to and sanction by the Finance Committee.

On motion of Mr. L. W. Smith, it was ordered that the following gentlemen be named as members of the committee from the Bench, and that they be authorized to apply to the Bar and the Legal and Literary Society for the appointment of their members, namely,—Messrs. L. W. Smith, Murray, Read, Irving, James F. Smith, and the Treasurer.

REPORT OF COMMITTEE ON REPORTING.

The Report of the Committee on Reporting was adopted, and is as follows:—

The Committee on Reporting beg leave to report as follows:—

The Reporting continues to be done promptly and efficiently, and there are no arrears except in Chancery, and these not considerable.

2. The Committee, finding that the Editor had great doubts of the successful working of the plan adopted by Convocation in Trinity Term for bringing out the Reports of the High Court as one series, and having received from him a statement of the difficulties he apprehended, have reconsidered the whole matter, and they adhere to the opinion that the change resolved upon is very desirable, and they think the difficulties anticipated can be overcome.

3. The Committee have also had under consideration the salaries of the reporters, in consequence of applications from some of them for an increase, but your Committee are unable to recommend any change to be made in the salaries, although it may perhaps be just to grant a bonus to the Chambers reporters if it shall appear that their labours were more onerous for a time owing to the coming into force of the Judicature Act.

4. Your Committee have also had under consideration an application by certain Students and Articled Clerks to receive the reports on the same terms as the members of the profession, and your Committee recommend that every Student and Articled Clerk, on payment in advance during Michaelmas Term in each year of a fee of fifteen dollars to the Society, be entitled to receive the reports, not including the Supreme Court Reports, in the same manner as members of the profession, and the Committee recommend that any payment made before the end of Hilary Term next be regarded as of Michaelmas Term last. All which is respectfully submitted.

PROPOSED RULES FOUNDED ON ABOVE REPORT.

Repeal section 3 of Rule 109, and substitute the following therefor:—A reporter for the Court of Appeal for Ontario. Three joint reporters for the High Court of Justice for Ontario, and two joint reporters of decisions on matters of practice both in the Court of Appeal and in the High Court.

Repeal Rule 113, and substitute the following therefor:—The salary of the Editor shall be two thousand dollars per annum. The salaries of each of the reporters for the Court of Appeal, and the High Court, shall be twelve hundred dollars per annum. The salary of Council and Faculty of Knox's College, the

each of the reporters for decisions on matters of practice shall be three hundred dollars per annum.

Repeal Rule 114, and substitute the following therefor :—The salaries of the respective reporters shall be payable monthly, but not without a certificate of the Editor that the work of the reporter has been done to his satisfaction.

Repeal Rules 143 to 149 inclusive, and substitute the following therefor :—143. It shall be the duty of the Editor to determine what decisions ought to be published, to peruse and settle the reports thereof prepared by the reporters, and to superintend the preparation and publication of such decisions. He is also to make such arrangements with the Judges and Officers of the Courts that a report of all important decisions may be secured to the profession ; and he shall oversee the whole work of reporting, so as to ensure its efficient and prompt execution.

144. It shall be the duty of the reporters to attend their respective courts personally, and to prepare a report of each important, case including the arguments of counsel, the authorities cited, and the judgment, whether oral or written, and to furnish the same without delay to the Editor.

145. It shall also be the duty of the reporters, under the direction of the Editor, to deliver the reports in fair, legible manuscript to the printers, to read and correct the proof, and to see them through the press with despatch.

146. It shall also be the duty of the reporters to prepare and furnish short notes of all important decisions for early publication, under such regulations as may from time to time be made by Convocation.

147. Every report shall state the short style of the action or proceeding, the judge or judges who presided, the counsel and solicitors for the parties, and the date of the argument and of the judgment.

148. The Reports shall be issued in three series, in volumes to be numbered consecutively. The first series shall consist of decisions of the Court of Appeal, and shall be called the "Ontario Appeal Reports." The second series shall consist of decisions of the High Court, and shall be called the "Ontario Reports," and the third series shall consist of decisions in the Court of Appeal, and in the High Court on questions of practice, and shall be called "The Ontario Practice Reports."

149. The Appeal and Practice Reports shall respectively be issued, as nearly as possible in monthly numbers, and the Ontario Reports in semi-monthly numbers; but so as no case shall remain unpublished for more than two months after judgment, and the volumes shall be of the same size and in the same style as heretofore with index and digest.

149 (a). The Editor and reporters shall also, if and whenever required by Convocation, prepare and publish decisions in contested election cases, under such regulations as may from time to time be made by Convocation.

149 (b). The Editor and reporters shall also prepare and publish a triennial digest of the reports published by the Society, including appeals to the Supreme Court and the Privy Council from Ontario. The materials for the digest shall be prepared *pari passu* with the reports, so that it may be published promptly at the end of each triennial period.

Add the following section to Rule 156. (11). By paying fifteen dollars to the Secretary during the Michaelmas term of any year, any Student or Articled Clerk shall become entitled to receive the numbers of the Ontario Reports, the Ontario Appeal Reports and the Ontario Practice Reports published by the Society during the ensuing year, in the same manner as members of the profession.

The Rules were read a first time—

Ordered, That they be read a second time on the second day of next term.

LONG VACATION.

Resolved, That, in the opinion of the Benchers of the Law Society, it would be a very great benefit to the Legal Profession to have the Summer Vacation commence on the first day of July and end on the first day of September, and that there should be a Christmas Vacation, to commence on the 23rd of December and end on the 6th of January, and that a copy of this resolution be sent to the Chief Justice of Ontario, and to the Presidents of the Queen's Bench, Chancery, and Common Pleas Divisions of the High Court of Justice.

CANADA REPORTS.

ONTARIO.

CHAMBERS.

PAGE v. PROCTOR.

Witness Fees—Con. Stat. Can., cap. 79, sec. 8.

A certificate under the above section will not be granted unless the conduct money has been tendered to the witness at the time of service of subpœna upon him. Is it not sufficient that he received unused fees for a former trial which did not take place.

McPhillips moved, pursuant to sec. 8, C. S. C., ch. 79, for a certificate, that one Cox, who had been duly served in the Province of Quebec with a subpœna, to attend and give evidence upon the trial of this cause, at Toronto, had not appeared according to the urgency of the writ, but had made default, &c.

It appeared that the witness had been served with a subpœna to attend the trial at a former assize, at which the case did not come on, and he did not attend, having been duly notified not to do so. He had then been paid a sufficient sum for his conduct money.

On being served with the subpœna on the present occasion, he admitted to the person who served it the receipt of the money so paid, and that he had not attended upon the subpœna, and he made no objection to attending, on the ground of non-payment of conduct money with the subpœna now served.

OSLER, J.—This is a matter which concerns the liberty of the subject, and however unreasonable the conduct of the witness may have been, I think I am precluded by the express terms of the 9th sec. of the Act, from granting the certificate moved for. That section enacts that no such certificate of default shall be transmitted by any Court, nor shall any person be punished for neglect or refusal to attend any trial . . in obedience to any such subpœna, etc., unless it be made to appear to the Court transmitting and also to the Court receiving such certificate, that a reasonable and sufficient sum of money, to defray the expenses of coming and attending to give evidence, and of returning from giving such evidence, had been tendered to such person *at the time* when the writ of subpœna, &c., was served upon him.

The money which had been paid to the witness, with the former subpœna, was a debt due by him to the plaintiff, recoverable as such in the ordinary way, and may no longer have been available to defray the witnesses' travelling expenses upon the sudden call of a subpœna. I think, at the very least, he should have been asked whether he required the fees to be again paid to him, or if he would treat those already paid as sufficient for the present emergency. Something of that kind ought to be deemed equivalent to a tender, although I am not prepared to say what an actual tender must not, in any case, be shewn under the statute, in order to punish the party for a contempt.

The matter mast be passed upon by the Quebec Court, and it would be extremely unsatisfactory if that Court should decline to act upon our certificate, because, in the opinion of such Court, nothing less than actual tender would do.

I shall be quite ready to re-consider the question, if it should come before me in the full Court; but as it strikes me at present, the motion must be refused.

NOTES OF CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

QUEEN'S BENCH DIVISION.

IN BANCO, DECEMBER 24, 1881.

GOODALL v. SMITH.

Sale of Goods—Waiver of Condition.

The defendant at Toronto having by telegram and letter offered the plaintiff at Landsdowne twelve carloads of barley, f. o. b. at Toronto, at 60c. per bushel, of the quality of barley previously shipped by the defendant to the plaintiff, subject to inspection by the plaintiff at his own expense at Landsdowne, the plaintiff answered by telegram, "All right; will take the lot. Ship one car on receipt, quick." The car was sent by defendant, as well as several other cars, all of which were paid for. The defendant, however, still asked for inspection, but the plaintiff did not inspect.

The defendant subsequently refused to deliver the remainder of the twelve cars except at an increased price, the rates for freight having advanced.

Held, that the contract was subject to the plaintiff inspecting before shipment, and that the shipment of the one car was not a waiver of the condition for inspection at Landsdowne of the balance, and that defendant was not, therefore, bound to deliver.

CAMERON J., dissented.

Bethune, Q.C., for plaintiff.

W. H. P. Clement, for defendant.

VETTER v. COWAN.

Writ of Capias—Ont. J. Act.

It is not necessary that an action should have been already commenced by writ of summons, before the issue of a writ of capias, which is not affected by the Judicature Act.

Shepley, for defendant.

Aylesworth, for plaintiff.

COMMON PLEAS DIVISION.

RE WIDMEYER v. MCMAHON.

Division Courts—Jurisdiction—Married woman—Separate estate—Title to land.

The plaintiff sued upon a promissory note for $176.44, payable with interest at 10 per cent., the principal and interest amounting together to $185.65.

Held, following *McCracken* v. *Creswick*, 8 Prac. R. 501, that under the Division Court Act 1880, the amount of fixed legal damages in the nature of interest for non-payment of a promissory note need not be under the signature of the defendant, and the above claim would therefore be recoverable in a Division Court.

In an action against a married woman the obligation on the part of the plaintiff to prove that she is possessed of separate estate does not, when it is shewn that she is possessed of such estate, necessarily bring the title thereto in question, so as to oust the jurisdiction of the Division Court. At all events the possession of separate personal estate is sufficient to enable a permanent judgment to be given; and although the absence of proof of any personal estate may be urged as a ground of defence, it does not oust the Court of jurisdiction.

Aylesworth, for the plaintiff.

Holman, for the defendant.

THE EXCHANGE BANK v. STINSON.

Chose in action—Action by assignee—Set-off. —R. S. O. ch. 116, secs. 7, 10—Judicature Act, secs. 12, 16, Rule 127.

Held, that to an action by an assignee of an account for the price of timber and staves delivered by the assignor to the defendant, under two certain contracts therefor, the defendant, under the Act relating to assignments of choses in action, R. S. O., ch. 116, secs. 7, 10, and the Judicature Act, secs. 12, 16, and Rule 127, can set up a claim for damages for the non delivery by the said assignor to the defendant of certain other timber and staves specified in the contracts.

In this case, the learned Judge at the trial having refused to entertain such defence, a new trial was ordered.

Falconbridge, for the plaintiff.

McCarthy, Q. C., for the defendant.

JONES v. DUNBAR.

Principal and surety—Notice—Evidence.

Held, that when sureties for a debt give to the creditor a second mortgage on land as additional security, on foreclosure proceedings being taken by the first mortgagee, the creditor, on being notified thereof, must either make himself a party to the suit and prove his claim, or give notice to the sureties of such proceedings, to enable them, if they so desire, to prove at their own expense; but *held*, that the evidence set out in the case showed that the sureties had notice, and even if they had not notice before the foreclosure decree was made, they had such notice some three months before the day of payment, that such decree had been made.

The evidence showed that one of the alleged sureties, H., originally occupied the position of a principal debtor. *Held*, that the fact of his changing his position as between his co-debtor and himself could not affect the creditor.

The other surety, D., admitted his liability as

a principal debtor to a portion of the debt, and set up as a defence in substance that he could not be called upon to pay until and unless the creditor executed a proper release, not only of the money then paid, but of anything else arising out of the claim.

Held, clearly no defence.

Guthrie, Q.C., for the plaintiff.

Macdonald (of Guelph), for the defendant.

COURT v. SCOTT.

Foreign judgment—Cause of action—22 Vict., ch. 5, sec. 58—Defence on merits—Jurisdiction.

Under 22 Vict., ch. 5, sec. 58, consolidated in C. S. L. C., ch. 83, sec. 65, sub-sec. 2, a judgment may be recovered in the Province of Quebec, on a personal service in Ontario in a suit or action, in which the cause of such suit or action arose in Quebec, so as to render such judgment conclusive on its merits.

A note made in Ontario, payable at a particular place in Quebec, is a contract deemed to be made in Quebec, the place of performance, and under C. S. C., ch. 57, sec. 4, is payable at the particular place named, the C. S. U. C. ch. 42, requiring the use of the restrictive words, nor otherwise or elsewhere, applying only to notes made and payable in Ontario.

The note in this case was made in Toronto, payable at the Mechanics' Bank, Montreal, and was sent to Montreal and there held until maturity, when it was presented for payment and payment refused.

Held, that the contract being performable in Quebec and the breach occurring there, the cause of action arose there, so as to bring the defendant under the operation of the 22 Vict., ch. 5, sec. 58, and to make a judgment recovered against him in Quebec, on a personal service in Ontario, conclusive on its merits.

In an action brought here on such judgment, the defendant was held precluded from setting up any defence on its merits, the only defence allowed being one in the jurisdiction of the Court.

Semble, that personal service referred to in R. S. O., ch. 50, sec. 145, refers to personal service in the Province of Quebec.

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

Snelling, for the defendant.

MERCHANTS BANK v. CAMPBELL.

Execution against lands—Sale—Sheriff's fees—Poundage.

Held, (WILSON, C. J., dissenting,) that a sheriff has no right to poundage upon an execution against lands, unless there has been an actual sale.

Bethune, Q. C., and *Allan Cassels*, for the sheriff.

Walter Read, contra.

GREAT WESTERN RAILWAY CO. v. LUTZ.

Ejectment—Proof of title—Possession—Evidence.

Where land was taken by the Great Western Railway Company, for the purpose of the railway, under the Act 9 Vict., ch. 81, sec. 30, and 16 Vict., ch. 99, the company, in ejectment brought by them, can rely on the title acquired thereby, and are not driven to prove a strict legal right by conveyance from the patentees to the grantors.

In this case the defendant set up a title by possession, but his evidence failed to establish it.

Robinson, Q.C., for the plaintiffs.

Ewart and *Campbell*, for the defendant.

DUNBAR v. MEEK.

Sale of land—False and fraudulent representation—Adding parties.

Action for a false and fraudulent representation as to the boundary of certain land on the sale thereof, and for a rescision of the sale, and for an account for improvements, and for damages. It appeared that by partition between the defendant and his brother of a village lot acquired from their father, the defendant got the west half on which an hotel was erected, and the brother the east half, on which a store was erected, each believing that the division line between the two halves ran between the two

buildings. Subsequently the defendant sold the hotel property to the plaintiff, who had lived opposite thereto for some years, the defendant representing, as claimed by the plaintiff, that the division line ran between the buildings, which the defendant denies, whereas it appeared that the hotel encroached some 34 inches on the east half. There was evidence given to show that the plaintiff knew of the encroachment, and stated it made no difference as the matter could be settled; at all events that he knew of it before the deed was executed, when nothing was said about it, the land being described therein as the west half of the lot, according to a plan, and that plaintiff had given a mortgage on the land; that the value of the 34 inches was of trifling amount; that the hotel could be moved on to the proper line for $40; and that the defendant had offered to procure for plaintiff a lease of the piece encroached upon at a nominal rent for the time the hotel would last, which was refused. At the trial it was expressly found that the representation was not false and fraudulent.

Held, under these circumstances there could be no recovery.

At the trial an amendment was made, adding the brother as a party and directing him to make a conveyance to the plaintiff of the piece encroached upon.

Held, that amendment should not under the circumstances have been made, and must be struck out.

Dunbar, (of Guelph,) for the plaintiff.
Meyer, (of Orangeville,) for the defendant.

CHAMBERS.

Mr. Stephens.] [Dec.

WORKMAN v. ROBB.

Appeal—Time—O.J.A., sec. 38—R.S.O., cap. 38, sec. 46.

On the 2nd April, 1881, a decree was pronounced in this cause dismissing the plaintiffs' bill with costs. On the 9th April due notice of appeal was given by the plaintiffs, and about the same time an arrangement was made that the defendants' solicitors should accept the undertaking of the solicitors for the plaintiffs instead of the usual bond to secure the costs of appeal and of the Court below.

On the 8th September the plaintiffs' solicitors wrote to the defendants' solicitors, enclosing their written undertaking.

On the 1st October the defendants' solicitors in answer, wrote, declining to accept the undertaking, stating that he thought the plaintiffs were debarred, by lapse of time, of their right to appeal. Execution was issued on the 10th November against the goods and lands of the plaintiff for the amount of the defendant's taxed costs of suit.

The plaintiff then applied for an order to set aside the execution with costs.

Held, that the agreement between the solicitors applied only to the nature of the security to be given, and not to the time within which it was to be furnished. That section 38 of O.J.A. did not limit to three months the plaintiff's right to appeal within the twelve months which existed under R.S.O., cap. 38, sec. 46.

Executions set aside with costs to be costs to the plaintiff on the final taxation.

Costs in the appeal in any result of the appeal.

Hoyles, for the motion.
Cassels, contra.

Hagarty, C. J.]

REG. EX REL. WATT v. LANG AND CHADWICK.

Municipal Act, sec. 194.

Held, per HAGARTY, C. J., on appeal from Mr. Dalton, that a disclaimer by an Alderman elected in a city is sufficient under the above section, if made within the six weeks from election, although the person elected has acted in his office.

Mr. Dalton.] [Dec. 23, 1881.

CAMPAN v. LUCAS.

Replevin.

The Judicature Act does not in general apply to actions of replevin.

Holman, for application.
Aylesworth, contra.

Mr. Dalton.] [Dec. 29, 1881.

WALLACE v. COWAN.

Notice of trial—Replevin.

In an action of replevin ten days notice of trial must be given instead of eight days, as under the old practice; the ground of this decision being that under the wording of Rule 4 the new practice is introduced as to notice of trial in replevin.

Akers, for defendant.

Meek, for plaintiff.

Mr. Dalton.] [January.

LOWSON v. CANADA FARMERS' MUTUAL INSURANCE CO.

Insurance—Judgment—Certificate of Court of Appeal—Fi. Fa.

At the trial defendants succeeded, but afterwards the decision was reversed by the Court of Appeal, and a decree for plaintiff pronounced. Plaintiff issued execution upon the certificate of the Court of Appeal immediately after issuing the certificate.

Held, that execution could not issue upon such certificate, and that under R. S. O., ch. 161, sec. 61, execution should not issue until three months after judgment.

H. Cassels, for motion.

Cattanach, contra.

Cameron, J.] [January 5.

IN RE ENGLISH v. MULHOLLAND.

Prohibition—Division Courts—Title to land.

In an action in a Division Court to recover $79.50, the rent and taxes of certain land, certain facts as to the terms and conditions of the tenancy were disputed, but the defendant did not dispute the plaintiff's title. On plaintiff obtaining judgment for the amount claimed, defendant applied for a prohibition on the ground that the title to land was called in question.

Held, that the amount was properly recoverable in a Division Court.

English, for plaintiff.

Bigelow, contra.

REPORTS.

RECENT ENGLISH PRACTICE CASES.

(Collected and prepared by A. H. F. LEFROY, ESQ.)

THE QUEEN v. HOLL.

Imp. Jud. Act 1873, *s.* 47—*Ont. Jud. Act. s.* 87, *O. No.* 484.

The decision of a Divisional Court discharging a rule for a mandamus to be directed to commissioners appointed to inquire into corrupt practices at a parliamentary election, ordering them to grant a certificate to a witness under s. 7 of Corrupt Practices Prevention Act, Imp. 26-27 Vict. c. 29, which certificate, if given, would be a protection to the witness against criminal proceedings for bribery, does not relate to a criminal cause or matter within Imp. Jud. Act, 1873, s. 47.

[June 30, C. of A.—L. R. 7 Q. B. D., 575.

The above head-note shews the decision on a preliminary objection taken to the hearing of the appeal in the above case.

Counsel for the respondents argued that a rule *nisi* was granted to compel the commissioners to give to the witness a certificate, which should indemnify him against criminal proceedings for bribery committed at a parliamentary election; and that it was therefore "a criminal cause or matter," within Imp. Jud. Act 1873, s. 47. They cited *Reg* v. *Steel*, L. R. 2 Q. B. D. 37.

BRAMWELL, L. J.—We all are of opinion that the present appeal does not relate to a "criminal cause or matter," and that we must hear it.

[NOTE.—*We have no section in our Judicature Act corresponding to s.* 47 *of the Imp. Act, but the case is noted for the same reason as the Queen* v. *Whitchurch, supra.*]

HARRISON v. CORNWALL MINERAL RY. CO.

Imp. O. 58, *r.* 6—*Ont. J. Act, s.* 39, *G. O. C. of App., No.* 16.

A respondent who has given cross notice of appeal under Imp. O. 58, r. 6, is in the same position as to costs as if he had presented a cross appeal.

Where there were two respondents to an appeal, one of whom gave cross notice of appeal affecting his co-respondent, the Court made an apportionment of the costs of the appeal.

[June 22, C. of A.—L. R. 18 Ch. D., 334.

This was an appeal from a decision of Hall, V. C., which was now substantially affirmed; but the contention raised by one of the respondents, on cross notice of appeal, was allowed. To understand the order as to costs, it is necessary to observe that *Medd* appeared for

the appellant, the defendant Fenton; *Pearson* appeared for the defendant Brassey, who had served cross notice of appeal, on a matter affecting his co-respondent; and *Kekewick* appeared for the plaintiffs.

JESSEL, M. R.—Under the present practice a notice is equivalent to a cross appeal. It is a mere accident whether Mr. Pearson's clients presented their appeal first, or Mr. Medd's client, because, if Mr. Pearson's clients had been first we should have got the notice from Mr. Medd's client, therefore there really is an appeal and a cross-appeal. I do not know how to divide the costs except equally. The result will be that the appellant, represented by Mr. Medd, will pay half the costs of all the respondents, and the respondents, represented by Mr. Kekewick, will pay the other half of the other respondents.

BAGGALLAY and LUSH, L.JJ., concurred.

[NOTE.—*Imp. O.* 58, *r.* 6, *is very similar to No.* 16 *of our G. O. Court of Appeal, which is incorporated into the new practice by Ont. Jud. Act, sec.* 39.]

PARKER v. WELLS.

Imp. O. 31 *r.* 19. *Ont. O.* 27 *r.* 17 (*No.* 235).

Where a defendant's answering an interrogatory cannot help the plaintiff to obtain a decree, but will only be of use to him, if he obtains a decree, the Court has a discretion, whether to oblige the defendant to answer it before trial, and will not do so where compelling such discovery would be oppressive.

[July 13, C. of A.—L. R. 18 Ch. D., 477.

The plaintiff, in this case, alleged that defendant E. held certain moneys which had been deposited with him in 1854, by G., in trust for S. and A. (deceased) successively, for their lives, and then for the plaintiff absolutely; but, that though E. paid the interest to S. and A., for their lives, he now refused to pay over the principal. E., by his defence, admitted the deposit, but denied the trust, and said he had only held the money for G. to draw upon, and had, many years ago, paid it away by G.'s directions; he denied payment of interest to S. and A.

The plaintiff delivered interrogatories, of which number 1 required E. to set out the dates and particulars of the payments made by him, out of the deposited sum; and number 3 required him to set out an account of all moneys paid by him since 1854 to S. and A., or either of them.

As to the 1st interrogatory, JESSEL, M. R., said:—A detailed account of the way in which the money was paid away will not help the plaintiff to prove the trust, and if she proves the trust, this detailed account is immaterial, since no payment made by the direction of G. would be a good discharge. The only use that could be made of the detailed discovery sought, would be to discredit the defendant's evidence, if he made any inaccurate statements, or failed to set out particulars. After this lapse of time, such a failure hardly would discredit him, and to require a man to go through his books for a number of years for such a purpose as this, would be oppressive.

As to interrogatory 3, he said:—An account of profits would not help the plaintiff to get a decree, and it would be oppressive to order it while the title of the plaintiff is in dispute. No inquiry is more difficult to work out than an inquiry that profits have been made by the employment of a particular sum of money in a business. . . It was urged by Mr. North, and I have often, when at the Bar, urged the same argument, that the defendant's answer may enable the plaintiff, if he succeeds, to get an immediate order for payment of the sum which the defendant admits; but that argument is worthless as regards such a point as this, for a defendant never makes such an admission of profits as the plaintiff could use for this purpose."

BRETT, L. J., said as to both interrogatories: "The answer to the interrogatories to which this appeal relates could not determine any issue in the action, and if they have to be given at all they ought not to be required to be given till after the issues have been decided."

COTTON, L. J., gave judgment to the same effect.

[NOTE.—*The Imperial and Ontario Orders are virtually identical.*]

CORRESPONDENCE.

Distress Clause in Mortgages.

To the Editor of the CANADA LAW JOURNAL:

DEAR SIR,—It appears that the case of *The Trust & Loan Co.* v. *Lawrason*, recently decided in the Court of Appeal, stands for argument in the Supreme Court. It is to be hoped that the position of several mortgages on the same property will be brought prominently to the attention of the judges. If a first, second, third and fourth mortgagee can, at the same time, be landlords of the same tenant, for the same lands, each armed with an independent power to distrain the goods of strangers, chattel property is exposed to a startling risk.

Perhaps the consideration of such a state of facts might assist in determining how far the purely feudal incident of distress can be annexed to a loan of money secured in any way whatever. The effect of attornment to several mortgagees, one after the other, would be well worth discussing.

Yours truly,

BARRISTER.