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DIARY FOR JANUARY.

16. Sun....2nd Sunday after Epiphany.
18. Tues..Heir and Dev. sitt. ends. Second Intermedt'e Exam.
19. Wed...Second Intermediate Examination.
20. Thurs.First Intermediate Examination.
21. Fri.....First Intermediate Examination.
23. Sun....3rd Sunday after Epiphany.
25. Tues..Primary Examination.
26. Wed...Primary Examination.
27. Thurs.Primary Examination.
30. Sun....4th Sunday after Epiphany.

TORONTO, JANUARY 15th, 1881.

DEATH OF CHIEF JUSTICE MOSS.

It is with feelings of the greatest sadness that we record the death of Thomas Moss, Chief Justice of Ontario. He never quite rallied from a severe illness which attacked him about eleven months ago. His physician recently recommended him to try the effect of a change of climate, and he left Toronto last November for the South of France, accompanied by his wife and family. The accounts were at first re-assuring, but the decree had gone forth that he should never again see his native land. He died at Nice on the 4th inst.

His brother, Mr. Charles Moss, left for France on hearing of the alarming nature of his last attack, which in a few days terminated fatally. Our sympathies are with his sorrowing wife and children, left to mourn over a devoted and loving husband and father in a foreign land.

Whilst it needs no words of ours to tell of the kindly worth and pre-eminent abilities of the deceased, who was known far and wide throughout this Dominion, it will be a labour of love to speak hereafter at greater length of one who was beloved by all who knew him, and who shed the lustre of his great intellect on every department of labour in which he was engaged in his short but busy life.

At the request of several of our readers we have decided to continue the numbering of the volumes as before. The present volume will therefore be known as Vol. 17. We are glad to know from a rapidly increasing circulation and from many congratulations that our efforts to increase the usefulness and interest of this Journal have been fully appreciated.

THE S S collar, lately worn by Lord Coleridge, as Chief Justice of the Common Pleas, is said to be the same worn by Lord Coke. It may not be amiss here to mention, for the benefit of the unlearned in such matters, that the S S. chain, or collar, worn as a distinctive badge of honour by the Chiefs of the English Courts, is said, according to some old traditions, to be named from Sanctus Simplicius, a Christian judge and martyr of the time of Diocletian. It is usually passed down from retiring, or deceased chief justices to their successors. Lord Coleridge, we presume, takes his Common Pleas S S. with him to the Queen's Bench.

WE are in receipt of the first number of the *Canadian Law Times*, and we welcome it into the ranks of legal journalism. It is a small, but neatly got up, monthly, in magazine form, the first number containing some forty-two pages, single column, equal in amount of matter to about twenty pages of this journal. The contents of the first number are, "The law of allegiance in Canada," by Mr. Thomas Hodgins, Q. C.; part of an article by Mr. A. H. Marsh, discussing whether a power to sell implies a power to mortgage; some short edil torial notes, and a selection of head notes of some cases, old and new, on criminal law. We wish our contemporary a full measure of

success, and trust that the field may prove large enough for both of us.

IT is provided by section 5 of the D. C. Act, 1880, that in all suits in which "the sum sought to be recovered" exceeds one hundred dollars, the judge shall (if no agreement not to appeal) take down the evidence in writing. It has recently been held by His Honor Judge Sinclair, in *Bank of Montreal* v. *Statten*, that this duty is not required in interpleader issues, as the right of property in goods, and not the recovery of a money demand, is the question to be tried. We understand, however, that it is the practice of many experienced judges to take down the evidence in any important issues of the kind spoken of, so as thus to be on the safe side; and it is evident that such a course might, under certain circumstances, be conducive to the ends of justice.

THE JURISDICTION OF DIVISION COURTS.

The note of a decision of Judge Ardagh, referred to in our last number (*ante* p. 3) presents a point of much interest in connection with the D. C. Act of 1880. For, although we consider there is no ground for the claim of increased jurisdiction, yet, men high in the profession, and whose opinion is entitled to weight, take the contrary view. For our own part we entirely agree with the learned judge referred to.

The point is this: Under section 14 of the Act above mentioned, it is provided that in all cases where the jurisdiction is not contested or disputed by defendant, primary debtor, or garnishee, by means of a notice left with the clerk, the jurisdiction shall be considered as determined and established.

It is now attempted to be set up that a claim for an amount in excess of the sums mentioned in sections 54, &c., of the D. C. Act, may be recovered in this Court if no objection is made as required by section 14 of the late Act.

Although the subject has been already treated elsewhere, a few words here may help those not already convinced to arrive at what we submit is a proper conclusion.

It will be observed that section 10 of the Act in question provides that, "any suit *within the jurisdiction of the Division Court* may be entered, tried, and fully disposed of by *the consent* of all parties, in any Division Court."

After drafting this section no doubt it occurred to the framer of the Act to provide for two contingencies—the first, where the jurisdiction was objected to, and secondly, where it was not objected to. Section 11, evidently, is intended to cover the first case; for, though nothing is said about any dispute as to the jurisdiction, still, in view of the section presently to follow (treating of such dispute), it can only refer to a case where the proper objection has been taken.

Section 14, then, provides for the second contingency, and it is no doubt inserted to give legal effect to the saying that "silence gives consent." It is very improbable that a plaintiff could ever obtain the *consent* of a person against whom he was about to take legal proceedings to *any* step he (plaintiff) was about to take. So that it would be the duty of the judge before whom the case might be tried, upon its being shown to his satisfaction that that particular Court had no jurisdiction to order the transfer of the case to its proper Court, provided *no consent were filed.*

To do away with the necessity for this, and still with reference to section 10, section 14 was added; and we must therefore treat this latter section as if the words used in section 10, "any suit within the *jurisdiction* of the Division Court," had been imported into it. It must be clear, then, that the words "disputing the jurisdiction," in section 14, must refer to jurisdiction as *between the several Division Courts* in the province, and not as between a Division Court and a Court of higher jurisdiction—in short, a jurisdiction as to

place only. This is abundantly proved by the concluding words of the section—"the juris diction shall be considered as established, &c., as if the said suit had been properly commenced, entered, or taken in such Court." If a case is entered for an amount beyo nd the jurisdiction of the Division Court, it is not *properly* entered, &c.

"The jurisdiction of *any* Division Court," in the beginning of the section, seems to point in the same way. It is not said "the jurisdiction of the Court," which possibly might have a broader application, but "*any* Division Court," that is, *one of many*, and having a reference to other Division Courts.

Sections 11 and 14, then, are the necessary complements, as it were, of section 10, the one providing for the case where objection to the jurisdiction was taken, the other for the case where no such objection was taken.

Section 11 refers to the transfer of a case (where objection *has been taken* to the jurisdiction), "which might *properly* have been *entered* in some other Division Court." If this case was for an amount in excess of the jurisdiction it could not "properly have been entered" in *any* Division Court.

Section 14, then, must clearly refer to proceedings in a case which might "*properly* have been entered" in any Division. The same reasoning holds good with both.

Mr. O'Brien in his Division Court Manual, 1880, arrived at the same conclusion as that now formally decided by Judge Ardagh. (See O'B's. D. C. Manual, 1880, pp. 35, 36) In the course of his remarks on this section he says:

"A hasty glance at the words used in this section might lead to the supposition that the mere omission to give the notice spoken of in this section would establish and determine the jurisdiction to the court to the extent of the claim made, although that claim might be largely in excess of its jurisdiction. . . . . This section does not refer to the question of amount at all, and there is only, if anything, an implication to countervail a precise, express and exact definition of the general jurisdiction of these courts. It is much more reasonable to conclude that this section 14 refers only, as do those by which it is immediately surrounded, to the question of locality."

CHATTEL MORTGAGES.

In our November number we published, and again in this issue appears, a letter commenting on Mr. Barron's work on chattel mortgages. Criticism, when born of careful thought and study, is both useful and desirable, and this journal asks for and encourages such. As much good results from a good critic as from a good author; though the critic has great advantages over the author, and works on a different line. Care and prudence is particularly demanded when questioning an annotated work, for, if properly annotated, the fault (if any) will lie, not with the text of an author, but with the decisions of a court. And thus an annotated work (as we believe Mr. Barron's work only professes to be) disarms criticism, except to the extent that the same may be improperly annotated. Thus, for example, if "Lex" (*ante* vol. 16, p. 338), had read the cases referred to by Mr. Barron (which he said he had not) in support of the view "that registration of an assignment of a chattel mortgage was notice to the mortgagor," he would have had more difficulty in questioning the accuracy of that gentleman's work on this point. Whatever difference there may be between real and personal property in this respect, Mr. Barron has, in his support, no less an authority on the subject than Mr. Herman, who, at page 426 of his work, says: "an assignment of mortgage of personal property need not be recorded, but its registration is notice to the mortgagor." We are not prepared however at present to state any positive opinion on the subject.

Another correspondent, "M. I. G.," in our last number (and he writes as one who was

familiar with the subject) draws attention to the fact that at page 51 Mr. Barron "devotes considerable space to prove the right of a mortgagee to take possession of mortgaged goods at any time after execution and before default," and suggests that *Bingham* v. *Bettison* on this point should have been noticed. Beginning with *Porter* v. *Flintoff*, 6 C. P., ending with *Bunker* v. *Emmany*, 28 C. P., (and with *Ruttan* v. *Beamish*, 10 C. P., *McAulay* v. *Allen*, 20 C. P., and *Samuel* v. *Colter*, 28 C. P., in the interim), the law in Ontario was settled to be as the author annotates it. It is a pity, as "M. I. G." remarks, that the late case of *Bingham* v. *Bettison* was not referred to in the work, but we have ascertained from a reference to dates that this could not have been expected. It is not clear, however, that this case does decide what "M. I. G." contends for. If we read the text correctly, the case went off on another point, and on the effect of no redemise clause. The Chief Justice of the Court of Common Pleas said: "We do not interfere with the decision in *Porter* v. *Flintoff*, as it has been followed by the two later cases referred to * * * In any future case arising I am not prepared to say, *speaking for myself alone*, that I shall feel compelled to follow it." But, that this point has always been involved in considerable doubt, is shown by Mr. Barron at pp. 52, 53, and 54 of his work, where he quotes the dissentient judgments of Mr. Justice Gwynne, and gives the view, hitherto opposed to that of our Courts, held by many of the U. S. Courts.

On the question of the rights of subsequent purchasers our correspondent refers to the late case of *Hodgins* v. *Johnston*, 5 App. R. 449. A reference to p. 187 of Mr. Barron's book shows that the law there laid down is that set out in *Hodgins* v. *Johnston*, but theretofore undecided by any of our Courts, viz: "That the omission to refile a mortgage will not render it invalid as against a subsequent mortgagee with notice, or as against purchasers or mortgagees intermediate the original filing and the time prescribed for refiling." And the American cases there cited settling this point, will, in the work, be found as referred to by Mr. Kerr, Q. C., in his argument in *Hodgins* v. *Johnston*.

A desire has been expressed by some that the Legislature should pass an entirely new act governing conveyances on chattel property, and we are not prepared to question the propriety of such being done, although beset with many difficulties. A careful study of the various decisions on the act we are speaking of will show how, owing to piecemeal legislation, it is in many respects inconsistent.

We have another letter referring to the same subject from Mr. Kehoe, which will be found among the correspondence.

We notice in the *Irish Law Times* a commendatory notice of Mr Barron's book. The writer says, "We find the work satisfactory in a high degree, and on subjects relating to the general law common to this country, well worthy of collation with the text books familiar to practitioners here." We are not only glad that we have men in our profession who can write books worthy of commendation in the old country, where a strict criticism prevails, but that we have others in our midst who can intelligently and in a kindly spirit criticise them on points of doubt or difficulty.

THE JUDICATURE ACT.

We understand that a meeting has recently been held by the Middlesex Law Association looking to relief from the inconvenience and expense of Toronto agency business. We will however await further details before discussing the views set forth at the meeting. But in the meantime we must express our belief that the new clauses in Mr. Mowat's amended bill will give all the benefit which outside practitioners can reasonably look for, and that they will fully satisfy (as we think they ought) the great body of the profession

outside of Toronto. We refer to the clauses giving new and additional powers to County Judges to be exercised *in their several localities.*

We have received from a valued correspondent the subjoined remarks on the proposed Bill, in some of which we heartily concur, aud all of which are entitled to consideration by the Legislature :—

Sections 7, 9, &c. These claims as to jurisdiction do not seem to be wide enough, being in effect limited to the jurisdiction, authority and power now exercised in pursuance of any "statute or law," and again "by any statute." Without going into a historical dissertation on the subject, it is clear that some considerable powers and functions of judges (such as the power of committing for contempt of Court) cannot be traced back to any statute, and can hardly be considered as powers given by the Common Law, but have sprung from the unwritten practice of the courts themselves. General words should be introduced to cover such powers.

Section 14. Appeals as to costs. This should be expressed to be subject to the terms of order L. which introduces exceptions to the general rule. The section is inartistically worded, and does not cover the case of an order which deals *not with costs only*, but with other matters, although an appeal might be attempted against that part only which related to costs.

Section 18, sub-section 4, appears to confer upon a defendant the right of claiming an equitable set-off concerning matters disconnected with the plaintiff's cause of action. The policy of this appears very doubtful, as it would encumber the pleadings and give many facilities to a defendant in delaying his creditor.

Section 19, sub-sec. 5. The construction of this sub-section appears to be awkward. To whom is the notice referred to, to be given—to the mortgagor, or to the tenants, or both?

Section 19, sub-sec. 6. Could not this clause be extended so as to embrace the case of a policy of insurance settled on the insured's wife or children under the Ontario statute? Cases in which such statutory settlement is disputed by an assignee in insolvency are of not infrequent occurrence.

Section 19, sub-sec. 10. The word "generally" is ambiguous; "lastly" would be preferable.

Section 21. Is this section intended to empower the courts to sit outside the Province? I presume not, and it should be so expressed.

Section 24. Are no qualifications to be named for the persons who may be appointed to act on commissions of assize?

Section 34. Is it intended to perpetuate the varying "course and practice" of the different Divisions in matters of appeals from orders made by a single judge? Surely if this amalgamation is to be more than a mere form. This is one of the points on which the practice may be made uniform.

Section 54, sub-sec. 3. The dual power given to the Lieutenant-Governor in Council and the Judges appears objectionable. The profession would be better satisfied, I think, if the power were left to the Judges alone.

Sections 58 & 59. What is to be the practice as to appeals from the decisions of County Court Judges acting as Official Referees? Section 58 says they shall be subject to appeal *as heretofore*, but the office now created is a new one.

Section 61, sub-sec. 2. For "penalty" (last word in sub-section) read "penalties."

Section 75, sub-sec. 2. What is the meaning of the words "not exceeding two-thirds of the *said sum.*" If $1000 is meant by the expression "said sum," why not say, "not exceeding $666"?

Order VI. Rule 1. (p. 42). Surely this should read that service is not to be required where a solicitor agrees to accept service and *undertakes* to enter an appearance. It would appear from order VIII, Rule 11, that a breach of such an undertaking is to be punished by attachment. The present chancery practice of noting bill pro confesso is far more effectual and satisfactory.

Ib. Rule 2.—"*Wherever it is practicable*"—This is a most objectionable criterion and one which is sure to cause much trouble to the Courts in interpreting and applying it.

Ib. Rule 4. (p. 43), Is the necessity for taking out an order appointing a guardian ad litem to infant defendants done away with? It is presumed so from Order IX. Rule 2. (p. 48),—as to which rule the remark suggests itself, what is to happen if an appearance *has* been entered for an infant defendant by some other than the official guardian? Are the infant's interests to

be considered as sufficiently represented by any person who volunteers to appear for him?

Order IX. Rule 6, (close of rule) add "and subsequent interest."

Order XVI. Rule 2, p. 60, end of line 3—for "defendant," read "plaintiff."

Order XVII., Rule 2, p. 62.—Eight days is very short time to prepare and deliver defence, seeing plaintiff has no less than three weeks to reply, and a defendant in Chancery has now four weeks to put in answer.

Order XXVII., Rule 4, p. 70. The change from the Chancery practice by which an order for production is obtained on præcipe appears to me very objectionable. The order will be applied for and probably granted as of course, and in every contested case, but the cost of affidavit and application will be so much loss to the litigants. The affidavit will probably be a stereotyped form by the solicitor as to his belief that the other side has papers, &c. The multiplication of formal and unnecessary affidavits is very objectionable and runs counter to the current of modern legislation. All the variations from the present Chancery practice as to production are changes for the worse.

Order XXXV., Rule 2, p. 80. How are the shorthand writer's notes to be procured in four days after trial?

Order XXXIX., p. 86. Why not embrace this opportunity to remodel the law of executions, abolish the distinction between *fi. fa.* goods and *fi. fa.* lands and do away with the necessity of the *ven. ex*? Let there be one writ, a *fi. fa.* goods and lands, affecting and binding both moveables and immoveables—but not enforced against the lands until after the year. When the year is up, let the duty be cast upon the sheriff, if plaintiff desires lands to be sold, of procuring a proper description of the lands, of advertising them sensibly, and of conducting the sale with some regard to the interest of the defendant as well as of the plaintiff, and, generally speaking, in a mode somewhat similar to Chancery sales. The result would be a vast saving in expense, half the number of writs doing the work; and great reform would be effected by making the sheriff's sale a judicial proceeding, instead of a hole-and-corner piece of jugglery for giving the plaintiff the defendant's land for five dollars. There would be no necessity for postponing the sale, as no *ven. ex.* would be required. Of course, the sheriff's fees would have to be remodelled, to cover the additional expense of the proper advertising, &c., &c.

Order XLIX., Rule 7 (p. 95). The right of removal appears unnecessary and uncalled for, and may tend to embarrass a plaintiff.

Do., Rule 12. What is to prevent a clashing of the jurisdictions of the local master and the County Court Judge?

Do., Rule 13 (p. 96). Why not by notice instead of summons? See Order XLVIII.

Order L., Rule 5 (p. 97). I must protest against the introduction of this principle into our practice. Why should not the solicitor be permitted (as at present) to make his copies from his adversaries' papers? It is, in the first place, a large addition to the head of disbursements if one must pay for these copies, and may prevent many lawyers from being able to do so much for a poor client as they might otherwise do. My experience of the system, and of the complicated cross accounts between solicitors for copies, as it worked in England, leads me emphatically to condemn it. On the question of extracts alone, a lawyer may be driven to order a copy of a long account or document, the greater part of which is utterly worthless to him, simply because to order a certain limited extract would be to disclose his entire case (or some vital point of it), to his adversary.

NOTES OF CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

QUEEN'S BENCH.

IN BANCO.—MICHAELMAS TERM, 1880.

BERNARD v. COUTELLIER.

Malicious prosecution—Rejection of evidence—New trial—C. L. P. Act, s. 289.

In an action for malicious prosecution, on the opening of the defence, the defendant was called, and stated that he had learned some facts from certain persons upon which he had caused the plaintiff to be arrested; but on proceeding to state what he had heard, the learned Judge ruled that this was inadmissible, and that the persons who had told him these facts

should first be called. They were then called and examined, and afterwards the defendant gave his evidence. The jury found a verdict for plaintiff with $500 damages.

Held, by the Court, while disapproving of the ruling of the learned Judge at *Nisi Prius*, that nevertheless, no substantial wrong or miscarriage having been occasioned by the ruling, and the verdict being satisfactory, a new trial should be refused under s. 289 of the C. L. P. Act.

ARMOUR J. dissented.

J. Reeve, for plaintiff.

Bigelow, for defendant.

DAVIES v. FUNSTON.

Promissory note—Guarantee—Sufficiency of—Parol evidence.

The defendant, after a note had become due, and while it remained unpaid, endorsed upon it the following words:—"I guarantee the payment of the within note to Messrs. J. D. & Co., (the plaintiffs) on demand." The evidence showed that the consideration for this guarantee was the giving of time to one C., for whose debt to the plaintiffs the note was given as collateral security.

Held, that the evidence that the giving of time to C. was the consideration for the guarantee, did not contradict the latter, though it was expressed to be "on demand:" these words referred to a demand upon the guarantor after forbearance to press C.; and that such forbearance was a good consideration.

Per HAGARTY, C. J. Since R. S. O. c. 117, s. 10, such consideration need not appear on the instrument.

J. Reeve, for plaintiffs.

McCarthy, Q. C., for defendant.

WHITELAW v. TAYLOR.

Guarantee—Sufficiency of.

Plaintiff agreed with M. to repair a boiler in the latter's saw mill. During the progress of the work he received the following letter from defendant:—"As Mr. Morden's saw mill, at Bismark, is about to come into my hands right away, and as I am to assume expense of repairs to the boiler, be good enough to push forward the work to be done by you on the boiler as fast as possible, everything is at present at a stand still, waiting on you. Please push on the work and oblige, yours truly, R. Taylor." Plaintiff, without communicating with defendant, went on with the work. The contemplated work was not carried out.

Held, that the defendant had not rendered himself liable by the above letters for the price of the work done, and a non-suit was properly entered.

Bethune, Q. C., for plaintiff.

J. E. Rose, for defendant.

IN RE HIGH SCHOOL BOARD OF DISTRICT OF STORMONT, DUNDAS AND GLENGARRY, AND THE TOWNSHIP OF WINCHESTER AND IN RE THE SAID BOARD AND THE TOWNSHIP OF WILLIAMSBURG.

High School District—Alteration of boundaries—Continuance of liability for High School in severed part.

On 29th April 1878 High School District number four of the United Counties of Stormont, Dundas and Glengarry, being composed of the village of Morrisburg and the townships of Winchester and Williamsburg, the Board of Education of the incorporated village of Morrisburg, resolved that the sum of $7000 be levied on the said district to enable them to erect a school-house. On the 27th of May 1878 it was resolved that the Chairman of the Board be authorized to make a requisition on the municipalities forming the district, to provide their rateable proportion of the sum of $7000. In pursuance of this resolution, the Chairman, in writing under his hand and the seal of the Board, required the municipalities of the townships of Winchester and Williamsburg to raise their proportions. The request was served on the Reeve of Williamsburg on 18th July, and on the Reeve of Winchester on the 19th July. At a meeting of the Board on the 24th of June 1878, it was resolved that the Chairman should levy on these municipalities a further sum of $400 for High School maintenance, which was demanded on the 19th July 1878. On the 27th June 1878, in compliance with a request of a majority of the reeves of the County of Dundas, the Council of the United Counties passed a by-law enacting that district number four should be composed of the village of Morrisburg only. This by-law was quashed on the 5th February 1879; but under special circumstances the rule was reopened and the by-law was on the 2nd February

1880 finally quashed in so far as it changed the limits of the High School Districts.

Held (HAGARTY, C. J. dissenting), reversing the decision of GALT J. that the municipalities of the Townships of Winchester and Williamsburg were still liable to contribute their proportion towards the erection of the High School.

McCarthy Q. C. for the appeal.

Bethune Q. C. contra.

CAMPBELL V. VICTORIA MUTUAL INSURANCE COMPANY.

Fire insurance—Misrepresentation—Incendiarism.

Action on a fire policy dated 21st May, 1879, on ordinary contents of a barn, which was at the time of the insurance, empty, and on other articles of personal property. In the application for the insurance, dated 13th May, 1879, plaintiff answered "No," to the question, "Is there reason to fear incendiarism, or has any threat been made?"

At the trial it appeared that one M. had threatened to beat the plaintiff, and the latter being alarmed, had sent for the defendant's agent and had the premises insured, that he would not have insured but for his fear of M., and that he had sat up and watched for a week, and that he believed the premises had been set on fire, and that he had admitted this to an officer of the defendant's after the fire, which occurred on 28th Oct., 1869. At the time of the fire the barn contained some grain and hay, and a threshing machine, for the loss of which an action was brought. One of the conditions on the policy was, that if the assured "misrepresent or omit to communicate any circumstance, which is material to be made known to the Company in order to enable them to judge of the risk," the policy would be avoided.

Held, ARMOUR J. dissenting, that the plaintiff could not recover, on the ground that, the insurance having been effected solely on account of his fear of M., the answer to the above question was untrue.

Per CAMERON, J., the question is equivalent to "have you reason to fear, or do you fear incendiarism?" and, though the bodily threat does not furnish valid grounds for believing that incendiarism was to be feared from the person threatening, yet, since the insurance was effected on account of such fear, there was a clear misrepresentation in answering the question, and it made no difference that the property to be covered by the policy was not yet in existence.

Per ARMOUR, J., the word "incendiarism" commonly applies to buildings only, and its meaning ought not to be extended in this case to cover personal property. The property insured was not of an inflammable nature, and the question would be insensible if so extended. The question should be construed strictly with reference to some particular ground of fear; otherwise, the answer "No" referring to the first part only, viz: "Is there reason to fear incendiarism?" would be in every instance untrue; for every insurance is effected because the assured fears the happening of fire by accident, neglect, or design. And the evidence in this case showed that there was no such reason as, operating on the minds of the majority of prudent men, would cause them to fear incendiarism, and therefore the question was truly answered.

The question was also properly answered as to property intended to be covered by the policy, but not then in existence, as to which no fear could exist.

Lount, Q. C., for plaintiff.

McCarthy, Q. C., for defendant.

IN RE LEIBES V. WARD.

Prohibition—Deputy Judge—Jurisdiction of—Powers of to give judgment outside of Division to which his deputation refers.

Under the authority of the following deputation:—"Belleville, Ont., 24th July, 1880. I "hereby appoint E. B. Fralick, Esq., Barrister-"at-Law, as my Deputy to hold the 2nd Divi-"sion Court of the County of Hastings on Mon-"day the 26th day of July instant at the Town "Hall in the Township of Sidney.—T. A. Lazier, "Junior Judge, C. H.," the learned gentleman therein named tried the case at the time and place appointed but delivered his judgment according to a postponement made for that purpose on the 2nd August following at the judge's chambers, Belleville, outside the limits of the 2nd division, but within the county, without having named a subsequent day and hour for delivery thereof in writing at the clerk's office.

Held (1) That the word "Judge" in s. 20 of R. S. O., cap. 47, includes the Junior Judge, and

that the deputation was therefore valid. (2) That the proper construction of the same was "to hold the 2nd Division Court of the County of Hastings to be holden on Monday, &c.," and that his appointment continued until he had performed the purpose for which it was made. (3) That the effect was to clothe Mr. Fralick with all the powers of the Junior Judge during the time of his appointment, wherever he might be within the county. And the rule was therefore made absolute to rescind the order made by GALT, J. for a prohibition, CAMERON, J. dissenting.

G. B. Gordon, for the rule.

Holman, contra.

ROBINS v. CLARK.

Interpleader — Chattel mortgage — Defective registration—Fraudulent preference—R. S. O., cap. 118.

G. & E., bakers, on the 18th May, 1880, agreed with defendants that if the latter would advance them a quantity of flour they would give them a chattel mortgage on their horses, waggons, and baking utensils. Defendants accordingly delivered from day to day a quantity of flour to G. & E. On 26th May, the chattel mortgage not having been executed, the defendants wrote to G. & E. to have it done. The mortgage was accordingly drawn, covering the sales made, and was executed by the mortgagors only on 10th June, 1880, and filed on 12th. G. & E. absconded on the 12th, and on the 14th defendants took possession under a clause in the mortgage which allowed them to do so "in case mortgagors should attempt to sell, dispose of, or in any way part with the possession of the goods," and removed them to their own warehouse. The mortgage also contained a redemise clause. The jurat of the affidavit of *bona fides* was not signed by the commissioner. The defendants swore that they would not have advanced the flour if this security had not been promised, and that they had no intention of getting a preference over other creditors. The plaintiff's writ of attachment issued on the 17th June, and the sheriff seized the goods thereunder on the 30th June.

Held, that the mortgage must be considered as having been given when the contract to give it was entered into, viz., when the flour was first sold on credit on the 18th May, and therefore there was no preference of defendants, who became creditors only by this act.

Held, also, on the authority of *Risk* v. *Shemin*, 21 Gr. 250; and *Allan* v. *Clarkson*, 17 Gr. 560, that the agreement being one to enable the mortgagors to carry on their business, the transaction did not come within the mischief aimed at by R. S. O., Cap. 118; and the mortgage being therefore a valid security the defendants had the right to retain the goods, subject only to the liability to an action of trespass at the suit of the mortgagors for taking possession pending a demise to the latter.

J. E. Rose, for plaintiff.

E. D. Armour, for defendants.

REGINA v. MCALLEN.

Certiorari—Validity of, questionable on motion to quash conviction.

In showing cause to a rule nisi to quash a conviction, objection may be taken to the regularity of the certiorari, and a separate application to supersede it need not be made.

Where, therefore, on an application made after notice to the convicting justices for a rule for a certiorari the rule was refused, and on a subsequent *ex parte* application on the same material the rule was obtained, it was

Held, affirming the decision of GALT, J. that the notice of the first application would not enure to the benefit of the defendant in his second application, and that the certiorari was irregularly obtained for want of notice to the convicting justices; and a rule to quash the conviction was therefore discharged.

CAMERON, J. dissente', being of opinion that a substantive motion should be made to quash the writ of certiorari; and that the conviction being before the Court under a writ of certiorari unsuperseded, the validity of the conviction should be inquired into.

BARBER v. MORTON.

Bill of exchange—Principal and surety—Withholding of facts from surety—Discharge of latter.

The defendant agreed with plaintiff and P., the acceptor of a bill of exchange, that he would become responsible for the price of such goods as P. should order of the plaintiff. P. sent a written order to the plaintiff, stating

the number of articles he wished to purchase, and naming the prices he would pay for some of them. The plaintiff, having obtained the defendant's consent to fill this order, shipped P. a larger quantity of goods than was specified in the order. He also invoiced those as to which prices were specified at a higher price than that mentioned in the order, and thereafter without disclosing to defendant these facts, presented to him for signature a bill of exchange for the price of the goods shipped, representing to him that it was for the price of the goods ordered.

Held, that the defendant, being a surety, was entitled to be informed of the plaintiff's action in the premises, and that having been deceived by the plaintiff, he was discharged from liability.

HAGARTY, C. J. dissented.

Falconbridge for plaintiff.

E. D. Armour, for defendant.

HARPER v. DAVIES.

Wrongful dismissal—Contract for yearly hiring—Nonsuit—New trial.

Held, that an action for wrongful dismissal cannot be maintained on a verbal agreement for a hiring by the year, it being "an agreement not to be performed within the space of one year from the making thereof."

Where the plaintiff, in addition, claimed under the common counts a balance due partly for wages and partly on an account, and the jury gave the plaintiff a "lump sum" which would include some damages upon the count for wrongful dismissal, a new trial was directed.

J. Macgregor, for plaintiff.

Allan Cassels, for defendant.

REGINA v. WHELAN.

Certiorari—Effect of—Right to proceed for objects other than that for which certiorari was obtained.

Held, that a conviction once regularly brought into, and put upon the files of the court is there for all purposes; and that a defendant may move to quash it in whosesoever interest it may have been brought there.

Regina v. Levecque, 30 U. C. R. 509, distinguished.

Cattanach, for the Attorney-General.

Meek, for defendant.

IN RE BLAND v. ANDREWS; HOWARD, GARNISHEE.

Prohibition—Division Court Clerk—Garnishing money in hands of.

Semble, that money upon being paid to a Division Court clerk on the final disposition of a case, is paid in to the use of a suitor and is garnishable.

Per CAMERON, J. It does not become a debt from the Division Court clerk to the suitor till demand made.

Where the garnishee, who was clerk of the 1st Division Court of the county of York, had submitted himself to the jurisdiction and had paid the money in his hands into the 10th Division Court of the county, from which latter Court the summons issued, and since the judge of the Division Court had acted within his jurisdiction in determining whether the garnishee was indebted to the primary creditor and whether the debt was attachable.

Held, that the order of GALT, J. discharging a summons for a prohibition was right; and a rule *nisi* to rescind the same and for a writ of prohibition was discharged. *Dolphin* v. *Layton*, L. R., 4 C. P. D. 130 remarked upon.

Murdoch, for the Rule.

Williamson and *Patterson* contra.

COMMON PLEAS.

IN BANCO.—MICH. TERM, 1880.

CULVERWELL v. CAMPTON.

Principal and agent—Right to double commission.

An agent, employed by his principal to effect an exchange of property with another, cannot retain for his own benefit a commission received from that other in the transaction. But where the principal is aware that the agent has received such commission, and makes no objections to his retaining it, but with full knowledge of the fact negotiates with him for a settlement of the amount of his remuneration, he cannot, in an action for remuneration, set off the amount received by the agent from the other party.

J. E. Rose, for the plaintiff.

Beaty, Q. C., and *A. Cassels* for the defendant.

SKIRVING v. ROSS.

Slander—Medical practitioner—R.S.O. Ch. 142, Sec. 21.

A gentleman registered as a medical practitioner in Scotland, but who has neglected to comply with the provisions of R.S.O. ch. 142, sec. 21, is not in a position to maintain an action against a person for slandering him in his profession.

Bethune, Q.C., for the plaintiff.

Ball, Q.C., for defendant.

OLIVER v. NEWHOUSE.

Lease of farm and stock—Power to sell.

A father made a lease of his farm stock and implements of husbandry to his son for the term of five years determinable at will, with power to the son to sell or exchange the stock and implements in his discretion, so however that any goods sold should be replaced by others of equal value.

Held, following the older authorities, that the lease gave the son only a limited interest in the goods during the term; that such goods as he did not part with remained just as if no power to sell had been given; that all goods brought on the premises in lieu of the demised goods sold or exchanged under the power, became subject to the terms of the demise.

And even assuming that the property in the goods passed to the son, yet the lease having been determined by re-entry of the father, the residue of the original goods and the substituted goods became vested in him as the original goods had been before the execution of the lease, and an execution creditor who had recovered judgment after such re-entry had therefore no claim to the goods.

Ferguson, Q.C., and *McFadden* for the plaintiff.

McCarthy, Q.C. and *Milligan* for the defendant.

POSTMASTER-GENERAL v. MCCOLL.

Damage—Proximate cause of.

One Cæsar, a postmaster at Ramsgate, took from the mail matter in his charge, a letter containing several cheques, and having forged the endorsements, presented them to a bank, where they were cashed upon Cæsar's giving an undertaking as to the genuineness of the endorsements. On a special case as to the liability of the sureties of Cæsar in a bond conditioned that the postmaster "should not commit any theft, larceny, robbery, or embezzlement of, or lose, or destroy, or commit any malfeazance, misfeazance or neglect of duty, from which may arise any theft, larceny, robbery, embezzlement, loss or destruction of any money, goods, chattels, valuables or effects, or of any letter or parcel containing the same,

Held, that the bank on whose behalf the Postmaster-General prosecuted this action was entitled to nominal damages only, for the larceny of the letters; and could not recover for the loss occasioned by the payment of the charges, as the forgery and not the larceny was the proximate cause of the damage so resulting.

Semble that the doctrine of estoppel by executing instruments in blank is confined to negotiable instruments, and does not apply to deeds.

Hodgins, Q. C., for the Crown.

Robinson, Q. C., contra.

FISHER v. GRAHAM.

Breach of promise of marriage—Evidence.

In an action for breach of promise of marriage the evidence showed that the plaintiff who had been seduced by the defendant, had told her father that she was going to get married to the defendant; and that plaintiff's father had said to defendant "and you promised to marry her," to which the defendant replied, "I will marry her if it is mine." The jury found a verdict for plaintiff, with $200 damages.

Held, on motion for a non-suit, that the admissions of the defendant, and the statement of the plaintiff to her father, her apparent acquiescence, coupled with her probable desire under the circumstances to bring about a marriage, were sufficient evidence to go to the jury, of a mutual agreement to marry, though there was no actual promise proved on plaintiff's part. Where the promises were laid in the first count of the declaration to marry within a reasonable time, and in the second count to marry on a day now past, and the evidence given in support of them was that defendant had said he would "marry if the child were his," and that "he would not do anything until he got some part of the land off the old man and he would marry her then," that the child was his, and that he had admitted

some time before the alleged promise, that he had got 50 acres off his father's land and owned it,

Held, sufficient to sustain both counts.

B. H. Doyle, for the plaintiff.

Falconbridge, for the defendant.

NORTH OF SCOTLAND CANADIAN MORTGAGE CO., (LIMITED) v. GERMAN.

Mortgage—Release of equity of redemption.

Where a mortgagor, unable to pay his interest, gave a release of his equity of redemption to the mortgagees by ordinary short form "to save the costs of a sale," and it was proved that if there were any surplus after a sale it was to have gone to defendants.

Held, (GALT, J. dissenting) that there was no merger of the mortgage debt.

Per WILSON C. J. From their liability to account for the surplus the plaintiffs had, from being mortgagees strictly, become trustees substantially.

Per OSLER, J. Whether there was a merger of the mortgage debt is a question of intention; what the intention of the parties was is a question of fact.

Bethune, Q. C., for the plaintiff.

Crickmore, for the defendant.

MITCHELL v. MCDUFFY.

Illegal distress—Trespass—Damages—2 W. & M., Sess. I, ch. 5.

Defendant leased land to plaintiff for a term, during which the latter was to make improvements, and at the end of the term the amount of rent payable to the defendant was to be fixed by arbitration. Defendant distrained during the term. The action was tried twice in each case, the jury finding for the plaintiff and assessing damages at double the value of the goods.

Held, that the defendant having no right to distrain on account of there being no fixed rent agreed upon, he was a trespasser and liable to damages, but not to pay double the value of the goods; as it was not a case coming within the Statute 2 W. & M., Sess. I. ch. 5, which refers to a wilful abuse of the power of distress; and it could not be said that in this case there was nothing due, *i. e.*, payable, until the accounts had been taken by arbitration.

J. K. Kerr, Q. C., for the plaintiff.

Ferguson, Q. C., for the defendant.

NEILL v. THE TRAVELLERS' INSURANCE COMPANY.

Accident policy—Violation of conditions—Death from voluntary exposure to unnecessary danger.

I. N. being insured with defendants against death by accident was killed by a railway train in the yard of the Northern Railway Company at Toronto, which it was unlawful for him, not being an employee of the company, to enter, and into which he had unaccountably driven. He was last seen by a witness who watched him driving over and among a network of tracks, and who, while he was entangled in the switch gate, warned him not to go further as he would be killed, to which deceased made no answer. By certain of the conditions of the policy it was stipulated that it should not "extend to any bodily injury where the death or injury may have happened in consequence of voluntary exposure to unnecessary danger, hazard or perilous adventure, or of violating the rules of any company, etc., or while engaged in or in consequence of any unlawful act." The jury found a verdict for plaintiff.

Held, on motion for a nonsuit pursuant to leave reserved, that the plaintiff could not recover and a non suit was entered.

Ferguson, Q. C., and *Watson*, for the plaintiff.

McCarthy, Q. C., and *Creelman*, contra.

MCCARTHY v. ORBUCKLE.

Ejectment—Mesne profits—Improvements under mistake of title—Referring back to Master in Chancery.

In an action of ejectment where the defendant claims a lien for improvements under R. S. O. cap. 95, sect. 4,

Held, that the plaintiff is entitled to account of rents and profits to be set off against the value of the improvements.

Where it was referred to the Master in Chancery to ascertain the value of the defendant's improvements and he simply reported their value, being of opinion that under the terms of the rule he could not take an account of mesne profits,

Held, that the court had power to refer the matter back to him for this purpose.

SILSBY V. THE CORPORATION OF THE VILLAGE OF DUNNVILLE.

Municipal Corporation—Contract not under seal—Liability of, for acceptance of fire engine by resolution of Council not under seal.

The defendants having invited tenders for the supply of a steam fire engine accepted the plaintiff's tender, whereupon an engine was forwarded for acceptance subject to test. A by-law passed by the council to raise the necessary amount to pay for it was submitted to the ratepayers and carried, but being informal, was repealed, and another by-law was submitted to them and rejected. Before the second by-law was voted upon, the engine arrived and was tested on behalf of the defendants, placed in their engine house, subject however to customs duty, and accepted by resolution of the council in writing not under seal.

Held that the plaintiff could not recover because: (1) It was not a common, ordinary, or insignificant matter for which it was not worth while to contract under seal. (2) Because there had been no acceptance under seal. (3) Because there was no satisfactory evidence of acceptance in any manner. (4) Because the ratepayers for whose benefit the intended contract was made had repudiated it, and a verdict was entered for the defendants.

Mackelcan, Q.C., for the plaintiff.

A. Bruce (Hamilton), for the defendants.

STEVENSON V. CITY OF KINGSTON.

Salaried attorney—Right of to recover costs from opposite party.

The defendants paid their solicitor a fixed salary to cover all his professional services to the city, exclusive of counsel fees and other disbursements paid by him; the solicitor to have the right to costs from parties against whom the corporation should succeed, and to be entitled to disbursements only when he should fail.

The defendants entered judgments against the plaintiff and the usual costs were taxed. A rule was taken out on behalf of the plaintiff to refer back the bill with a direction to the deputy clerk to disallow all costs but disbursements.

Held (WILSON, C.J., dissenting), that inasmuch as costs were awarded to the defendants who, under their agreement, were not liable for these specific costs to their attorney, disbursements only should be taxed; following *Jarvis* v. *G. W. R. Co.*, 8 C.P. 280.

Holman, for the plaintiff.

Riordan, for the defendants.

DANCY V. BURNS.

Shipping—Stranding to save crew—General average.

Where a vessel was driven on a lee shore, and becoming disabled so that she could not work off, and after the anchors had been let go and had dragged until the vessel began to pound on the bottom, the master, with the view not of saving the cargo, but of enabling the crew to escape, headed her round to the shore, and in consequence of the stranding the cargo was saved.

Held, that the cargo was not liable to general average.

Falconbridge, for the plaintiff.

Ferguson, Q. C., for the defendant.

ONTARIO CO-OPERATIVE STONE CUTTERS' ASSOCIATION V. CHARLES ET AL.

Co-operative association—Power to incur credit—Necessity for agreement under seal.

Held, that sec. 15 of R. S. O., ch. 158, which requires the business there referred to to be a cash business, while appropriate to the case of buying and selling goods and other property, does not apply to an association formed for the purpose of carrying on a "labor" or a "trade," which can enter into contracts necessary for and incidental to such trade or labor.

To a declaration alleging that the plaintiff entered into an agreement with the defendants to perform certain stone work which they partly performed, and averring as a breach that the defendants had prevented them from carrying on and completing the work, whereby, etc., the defendants pleaded that the agreement was not under seal.

Held, that the plaintiff being a trading corporation enough was not shown to make the absence of a seal fatal to the validity of the agreement.

Falconbridge, for the plaintiffs.

J. E. Rose, for the defendants.

SMALL V. RIDDLE ET AL.

Action for benefit of joint endorser—Partnership—Contribution—R. S. O. ch. 116, secs. 2, 3, 4.

A promissory note made by the president and

secretary of a syndicate, formed for the purpose of completing the Hamilton and Dundas Street Railway, in favor of O., S. and the defendants, was by them endorsed to the Canadian Bank of Commerce. On the day the note fell due O. and S. paid the same, S., at the time of so doing, directing the bank to endorse it to the plaintiff, who gave no consideration therefor. This was accordingly done, and the present action brought against the defendants as endorsers of the note.

Held, as a fact that S. by his payments, intended to satisfy the note; and therefore the plaintiff by this endorsement to him took just such rights as S., after such payment, had with respect to the note, and that inasmuch as the defendants were co-partners with S. in the above mentioned railway undertaking, and the note was made for a purpose directly relating to and not in a matter merely collateral to the partnership, they were not liable to S. in an action against them as endorsers, and so therefore the plaintiff could not recover against them.

In an action by a third person holding for the benefit of a joint endorser against his co-endorsers who are sued as endorsers, such joint endorser cannot claim contribution under R. S. O. ch. 116, secs. 2, 3, and 4, for he should sue each of the defendants separately for his share of the contribution, and not the two jointly, and should also declare specially for that proportion of contribution, and should not sue the defendants as endorsers for the full amount of the note.

Held, further, that the statute above referred to, is not applicable to partnership transactions.

Ferguson, Q. C., for the plaintiff.

Bruce, for the defendants.

JOHNSTON v. CHRISTIE, J. SKINNER, P. SKINNER & FOYLE.

Trespass to land—Title.

Plaintiff agreed in writing on 18th Nov. 1878, with one Q. agent for St. G. to purchase the land in question. Q. had a power of attorney from his principal to protect and lease but not to sell and convey lands. Plaintiff paid one instalment only of his purchase money to Q. who said he had forwarded it to St. G. who had ratified the bargain. On the Monday after the 18th Nov. 1878, plaintiff went on the lot with Q's permission, and cut and removed some timber The defendants, Christie and J. Skinner, cut timber on the land under a mistake as to boundaries, but after the limits were ascertained offered plaintiff compensation for this, though Christie swore he meant his offer to be for plaintiff's interest in the lot. They also had offered to buy timber from the plaintiff.

Held that there was sufficient evidence of title to constitute the acts of entry made by the plaintiff on the land constructive possession.

It was objected that being in default to St. G. on his agreement and time being made thereby essence of the contract, the plaintiff's title had expired. But,

Held that the defendants, not claiming under St. G. could not set up his right to avoid the agreement.

It was suggested that St. G. might still be in a position to bring an action for the same trespasses, and it was therefore ordered that the rule should not issue until a release from St. G. to the defendant against whom the verdict went as to the trespass in question, should be filed.

The proceedings were irregular as against J. Skinner and Foyle and the verdict against them was set aside.

Lount, Q. C. for plaintiff.

McCarthy Q. C. for defendant.

CARTER v. HATCH.

Investing money on mortgage—Breach of duty—Onus of proof—Pleading.

It is *prima facie* a breach of duty in a person entrusted with money, to invest on the security of a second mortgage, however good that security may apparently be; and the *onus* is on the defendant to prove that the plaintiff authorized such investment. Where the agent to invest derives his profits, not from the lender, but from the borrower, the proper mode of stating the consideration is to aver, that in consideration the plaintiff *would deliver to the defendant* the sum &c. to be invested by him for the plaintiff upon good and sufficient security upon real estate, *so as to enable defendant to charge the borrower of the money for his services in the premises*, the defendant promised, &c.

Dunbar, for plaintiff.

J. E. Rose, for defendant.

McMASTER, & Co., & THE BANK OF OTTAWA v. GARLAND.

Interpleader—Equitable assignment of proceeds of sale of goods—Registration of—R. S. O. cap. 119.

B., at the suggestion of McMaster & Co. his creditors consigned to S. S. & Co. for sale a quantity of goods. To enable him to do this McMaster & Co., advanced him $250 to pay certain claims, and S. S. & Co. accepted his draft for $800 on 31st. May, 1880, which the Bank of Ottawa discounted. B, on the 28th of May, 1880, sent to McMaster & Co. an order for $2,159 upon S. S. & Co., to be paid out of the proceeds of the goods, which S. S. & Co. by letter on 30th May, 1880, agreed to pay, if there were sufficient funds after paying their own charges and commission. On the 31st of May, 1880, S. gave an order in favour of the Bank of Ottawa upon S. S. & Co., for $1461.47 to be paid out of proceeds of sale, and S. S. & Co. were notified by telegram. The goods were advertised for sale on 11th June, 1880. On that day by virtue of a writ of *fi. fa.*, dated 8th June, 1880, against the goods of B., at the suit of defendants, the sheriff took possession of the goods and interpleaded. The defendants on ascertaining the amount of S. S. & Co's. claim, paid it.

Held, that by so doing they had not released the goods from the lien of S. S. & Co. for the benefit of other creditors, and to their own prejudice ; bnt that S. S. & Co. thereafter held the goods for the defendants' benefit to the extent of their claim, just as they did for the other creditors on their respective orders; defendants were therefore entitled to rank first for the amount, and then the plaintiffs according to their priority.

It was contended for defendants that the orders given to the plaintiff were within the Chattel Mortgage Act, and should have been registered ; but *held*, that the actual delivery of the goods by B. to S. S. & Co., followed by the actual and continued change of possession dispensed with the necessity for registration.

Per OSLER J.—Under the authority of *Paterson* v. *Kingsley*, 25 Gr. 425, such orders amount to equitable assignments, and are not within the spirit of the act.

J. K. Kerr. Q. C., and *W. R. Mulock* for McMaster & Co.

Beaty, Q. C., and *A. Cassels*, for the Bank of Ottawa.

McCarthy, Q. C., for the defendant.

REID v. MAYBEE.

Malicious arrest— Reasonable and probable cause—Termination of proceedings before magistrate—Endorsement of warrant—New trial.

Defendant went with plaintiff to get draft cashed for the latter; and during the journey the plaintiff boasted that he was going to get a much larger sum from Scotland, whence this draft came. It did not appear that the plaintiff made this statement with a view to obtaining credit with defendant. He deposited money with defendant, and obtained goods from him for some time, which were charged against the funds in deposit, and largely exceeded his deposit. Defendant had him arrested for obtaining goods under false pretences, thereby hoping to have his account settled. The plaintiff was allowed to go on his own recognizance to appear the next day, but, being unable, did not appear, and the charge not being pressed, the matter dropped, and the magistrate made his order, not in writing, for a discharge.

The warrant was issued in the united counties of Northumberland and Durham, and was endorsed by a magistrate of the county of Peterboro, as follows: "This is to certify that I have endorsed this warrant to be executed in the county of Peterboro," and it was executed in the latter county. There was no evidence of any proof to the Peterboro magistrate of the handwriting of the issuing magistrate, and the endorsement did not follow the schedule K, of 32 and 33 Vic. c. 30, sec. 23. A verdict was entered for the defendant at the trial.

Held, that on account of the warrant being defective the arrest was illegal, and the plaintiff was entitled to recover in trespass.

Held, also, that by the production of the papers and proceedings before the magistrate, it apparently appeared that the proceedings on the warrant had terminated.

A new trial was therefore directed

Kerr, Q. C., (Cobourg,) for the plaintiff.

J. E. Rose, and *Ketchum*, for the defendant.

COMMON LAW CHAMBERS.

Cameron, J.]

EVANS v. SUTTON.

Division Court—Prohibition — Jurisdiction — Proof of claim.

The plaintiff residing within the limits of the Ninth Division Court of Wentworth sued, in that Court, the defendant who resided in St. Catharines, for a cause of action which partly arose in St. Catharines. The defendant put in a notice of defence disputing the claim and the jurisdiction of the Court. At the trial the defendant did not appear, and the Division Court judge gave judgment for the plaintiff for the full amount, without requiring any proof of the claim.

Held, that a prohibition should issue, and that the plaintiff should pay the costs.

Held, also, that the Division Court judge should have required the plaintiff to prove his claim.

Cameron, J.] Dec., 1880.

PECK v. SHIELDS.

Pleading—Insolvency.

Declaration:—1. The common counts; 2. That the defendants were guilty of fraud within the meaning of the Insolvent Act of 1875, in that they purchased goods knowing themselves to be insolvent; "and the plaintiffs claim four thousand dollars." Pleas:—(to first count) 1. Never indebted; 2. A deed of composition and discharge signed by a majority of the creditors and three-fourths in value; 3. (to second count) Not guilty; 4. That defendant did not purchase on credit as alleged; 5. That the said contract was not made in Canada; 6.(—to the whole declaration)—That before suit the plaintiffs released the defendant, by deed.

Held, on an application to strike out the pleas, that they were good.

Leave given to the plaintiffs to reply fraud to the second plea.

Rose, for plaintiff.

Aylesworth, for defendant.

Wilson, C. J.]

REGINA v. CLENNAN.

Certiorari—Conviction—32-33 Vict. ch. 31, sec. 25 D.

The defendant was convicted before a magistrate for that he did, in or about the month of June, 1880, on various occasions, knowingly and fraudulently, sell and supply to M. W., the possessor of a cheese factory, a large quantity of milk from which the cream had been taken, for the purpose of being manufactured into cheese contrary to the statute, and a fine was inflicted "for his said offence."

Held, that the conviction was bad under 32-33 Vict., ch. 21, sec. 25, D., as showing the commission of more than one offence.

RE F. & J., ATTORNEYS.

Wilson, C. J.] [Oct. 29, 1880.

Ejectment by mortgagee—Costs.

L, being the holder of a mortgage upon which an instalment of interest was due, instructed his attorney "to take legal proceedings on the securities unless the interest was paid on the 12th April." The mortgagor called on the 12th April, and told the attorneys that he intended shortly to pay off the mortgage, and hoped no costs would be incurred. On the 15th April the attorneys issued a writ of ejectment and notice of sale, and served them on the mortgagor on 23rd April, when he called to pay off the mortgage. They also refused to take the principal money.

Held, that the attorneys were entitled to the costs of the ejectment suit, but to no other costs whatever.

Crickmore, for attorneys.

Aylesworth, for mortgagor.

Cameron, J.] [Nov. 6, 1880.

PATULLO, *et al.*, v. CHURCH.

Attorney and client—Costs—Taxation.

Where a client applies for taxation of an attorney's bill after the expiration of a year from its delivery, he should show such circumstances as would have justified a reasonable man in refraining from seeking such taxation, or that he was prevented by some unreasonable cause. Where judgment had been signed against the client in an action on the bill during the pendency of negotiations for a settlement, this was

Held, a sufficient reason for opening up the judgment and directing a taxation.

Clement, for the attorneys.

Aylesworth, for defendants.

CHANCERY CHAMBERS.

Proudfoot, V. C.] [June, 1880.

RE. TOTTEN.

Taxation—Charges for attendances on—G.O., 608.

A master or a single judge has no discretion to allow more than $1.00 fee for attendances on the taxation of a bill of costs between solicitor and client, or party and party, the tariff being fixed at that rate by G. O., 608.

Boyd, Q. C., for appellant.

Hoyles, for Totten.

Proudfoot, V. C.] [June.

DODGE V. CLAPP.

Commission under G. O., 643—How apportioned—Objection to, when may be raised.

In partition and administration suits the commission in lieu of costs should be divided into equal fractional parts, and the parts allotted to the solicitors in proportion to the amount of work done by, and the responsibility imposed upon them.

Objections to the commission allotted may be raised on a motion for distribution without previous notice of appeal being given.

Plumb, for infants.

Hamilton, contra.

RAB V. TIME.

The Master.] [October.

Costs—Counsel fees before Master sitting for judge—Equity jurisdiction of County Court.

The County Court on its equity side had power to grant an injunction in any case coming within its jurisdiction. The fact of title to land coming in question did not oust the jurisdiction of the County Court on its equity side. The same fees are to be taxed to counsel appearing before the Master, taking evidence in place of a judge as before the Court itself.

Hoyles, for plaintiff.

Fisher and *Cassels*, contra.

LAW STUDENTS' DEPARTMENT.

HILARY TERM EXAMINATIONS.

Students are reminded of the days of examination as follows:—

Second Intermediate—Tuesday and Wednesday, January 18th and 19th, 9 a. m.

First Intermediate—Thursday and Friday, January 20th and 21st, 9 a. m.

Primary Examinations—Junior Class Students and Articled Clerks—Tuesday and Wednesday, January 25th and 26th, 9 a. m.

Graduates and Matriculants of Universities—Thursday, January 27th, 10 a. m.

The Final Examinations have been fixed for the following days.

Attorney—Wednesday, February 2nd, 9 a. m.

Call—Thursday, February 3rd, 9 a. m.

Call with Honours—Friday, February, 4th, 9 a. m.

The new rules respecting Scholarships and Call with Honours will come into force in the ensuing term of Hilary.

OSGOODE LITERARY SOCIETY.

The request of this Society for the use of the Miscellaneous Library at Osgoode Hall for Students on Tuesday and Friday afternoon, from two o'clock until half-past five o'clock has been granted by the Benchers. We understand however that the privilege might cease speedily if not taken advantage of; of which those concerned would do well to take notice.

EXAMINATION QUESTIONS.

FIRST INTERMEDIATE.

Common Law

1. What are the three necessary ingredients in a simple contract?

2. Where several parties, not partners, enter into a common liability to pay, and one pays more than his share, what remedy has he, and why?

3. Define trespass, and give examples of it?

4. Under what circumstances will representations as to the qualities of a horse made by the owners to the buyer amount to a warranty?

5. How may a partnership be dissolved? Answer fully.

6. Compare the liability of an infant (*a*) in case of a contract entered into by him, and (*b*) a tort committed by him.

CORRESPONDENCE.

Unlicensed Conveyancers.

To the Editor of THE CANADA LAW JOURNAL.

DEAR SIR,—I have read with a great deal of interest the letters that have from time to time appeared in your Journal on the subject of "Unlicensed Conveyancers" and I am glad to see that we have a staunch and true friend in your paper.

I read the letter from "S." last month, and wish his suggestion as to a clause being inserted in the Judicature Act could be carried out, but am sorry to have to say that as long as these unlicensed men have any political influence at all, whether individually or in the aggregate, I am afraid Mr. Mowat will not introduce this clause. Men in all other lines and walks of life whether national or social are more or less "clannish" and band together to help one another and protect themselves. Dentists, auctioneers, common hucksters, hawkers, and pedlars must have a license to carry on their business: but any man, however ignorant, as long as he can write, or hire clerks to write as they often do, can set up in a country town or village and, if he will work cheap enough, may make more money than those who have worked hard and paid heavy fees in order to enter the profession. A country solicitor's practice is to a great extent built up by conveyancing: but the fact is, nearly all the conveyancing outside the cities is done by non-professional men. For instance, the Registrars at Walkerton or Goderich, or any practitioner in either Huron or Bruce, will tell you that men like Mr.—, (a magistrate in a small village, who can hardly read and write) does more conveyancing—a great deal more—than all the solicitors in the county put together. The man in question has done nothing else for years except act as a lawyer, keeps several clerks, and has made a fortune out of his business. I could mention other cases of a similar kind. These men go further; disregarding the penalties laid down in R. S. O. cap. 140, they do nearly all the non-contentious, surrogate, and probate business in the county. (Query—Why do the Judges and Registrars of these Courts allow men to draw and file papers in their offices exactly the same as an attorney or proctor would?) They do a large collecting business, sending debt letters and charging costs in the same way that a solicitor does. They give advice and take pay for it. They are allowed to practise and do practise in the Division Courts. There is one of them who acts as a regular lawyer in Lucknow and attends nearly all the Courts in his own county, and comes frequently to the Wingham Courts to practise, and the Judge *sees* him, though his dress cannot be said to be in keeping with his assumed position; but then the Division Court Act says nothing about collar or cravat.

There is one of this sort who constantly practises in Bruce, and I actually saw a regular solicitor opposed in a country Division Court in Bruce some months ago by an unlicensed man, though the solicitor called the Judge's attention to the fact, and a counsel fee under the increased jurisdiction was actually taxed to this unlicensed man—I think $10.00. This same man, who is still living in Ripley, told me he would just as soon not be certificated—that everyone around thought he was a lawyer, and he acknowledged that he made as much money as if he was licensed, if not more.

Take away from a country solicitor his conveyancing, his surrogate practice, his collecting, and a great deal of his Division Court work, and often his advising, and what, I say, have you left him? This is a conundrum I would respectfully like to submit to that unselfish body the Law Society of Upper Canada in Convocation assembled.

We are not only not protected, but we are bound down and fettered by red tape and professional rules; we are not allowed to go down and meet these fellows in their own field, on their own ground.

We are not allowed to advertise the way they do in the local papers. Take up any country paper and see the "blow" they make about *accuracy* and CHEAPNESS! We can not go out into the world and advertise on slabs and posters all over the country.

Blazoned in gold letters on the arch running over the stage in the Brussels Town Hall are several full length conveyancers' cards, one of which I copied when I was attending Court there the other day; I give it verbatim—"W. Harris, dealer in Marriage Licenses, Music and Conveyancing."

The banker above referred to has immense red cards and posters all over the country, stating that he draws all "documents and all mortgages, deeds, agreements, marriage articles &c." in short

specifying every instrument that could possibly exist, and some that I never heard of till I saw this card, "cheaper and more accurately than any one in town!"

As one gets off the cars at Teeswater station on the narrow gauge, the first object that meets the eye is an immense sign-board the size of a railway bulletin board, which enumerates the many good qualities as conveyancer of one S. Softley, said to reside in that village, and ending thus—"For cheapness and legality (*sic*) I cannot be beat."

A private banker in Wingham previously mentioned, and Cameron & Campbell, Bankers, of Lucknow, both advertise after their banking card, "A general banking and conveyancing business done!" In fact nearly all the bankers round here put it in that mild way.

There would not be so much of this conveyancing done if these men were not "commissioners in B. R. &c." (as they are proud to advertise themselves).

These men never administer affidavits for use in the Superior Courts. There are enough of lawyers all over the province and more then enough for that purpose. I wonder if the Courts know when they grant these appointments right and left that these men are simply going to use their powers in conveyancing. There is not one commissioner but got the appointment for the purpose of conveyancing alone: truly, the Courts might put some restriction in the way. These men would soon have to give up conveyancing if they had to come to lawyers to be sworn—their customers would soon come to us too.

One rather amusing feature about this is the fact that these appointments are all on parchment with a big red seal affixed, and the commissioners keep them generally framed in a conspicuous position, and farmers often are led from this to believe that somehow or other he must be a lawyer, and possibly a good one, to get such a "diploma" as some of these commisioners speak of it! The same applies to their appointment as notaries. By the way, the banker I have so often mentioned has got big green labels stuck up in his office with this remarkable legend: "Notary by the *special* appointment of His Honour the Lieut-Governor, &c!"

I allow that in the early history of the province there might have been a need for say one commissioner in a village if there were no solicitor there, but never was there need for seven or eight as there are in some little villages, and there is no need for any non-professional commissioners now.

These notaries say that their appointment as notary gives them special power to draw all conveyances, whilst it only reads and means *mercantile* "instruments" such as charter-parties bottomry bonds, &c. Now as far as these commissioners are concerned there is no doubt these men were all appointed simply in an emergency and for the convenience of the Courts and that they may be removed at will: it is in the power of the Superior Courts or any one of them at any time to cancel and revoke these commissions, and the sooner it is done the better for the profession. Surely if this were once well understood the Courts would immediately do it, as the Judges cannot be influenced by politics, and these country conveyancers would have no lever to bring to bear on the Courts.

Let the Courts do this—it is a very simple matter—and country conveyancing would be dealt a blow from which it never could recover. I will guarantee two things: 1st. That not one of these unprofessional commissioners in either Huron or Bruce swears one affidavit for use in the Superior Courts in a year, and so he is of no use or convenience to the Court; and 2nd. that if these commissioners were cancelled now, the conveyancing would all be in the hands of the profession in two years.

Another plan which I have heard suggested is one which ought to have been the law here ever since the incorporation of the Law Society in 1832, and which has always been the law in England—I mean the prohibiting any unlicensed man under a heavy penalty from drawing any instrument *inter vivos*—(of course wills must necessarily be excepted), or the prohibiting the drawing of all instruments under seal by any other than a lawyer duly qualified under the Statute. And here I would take the liberty to ask the Law Society again why Canadian country solicitors should not be equally protected with English solicitors.

In reference to the position put forth by "S." as to registration, I think the following plan might perhaps work better,—Make it necessary that every deed or instrument to be registered should either come out of a solicitor's office, or should show that it had been examined by a solicitor. Of course the great

and almost insurmountable difficulty is, and I suppose always will be this, that any change in the law would not affect the practice of the lawyers in the House to any appreciable extent, but surely if they seriously considered the subject they could not be so utterly careless and selfish as to totally ignore the just rights and interests of their less fortunate brethren living in smaller towns and villages.

One word more and I am done—and this is *apropos* of the Judicature Act now on the *tapis*.

Laymen and even some learned Judges like the Senior Judge of Wentworth are always talking about the Division Court being the "poor man's court," and saying they do not wish to see it become a lawyers' court. Well, would you not rather it should be a "*licensed* lawyers' court" than an "*unlicensed* lawyers' court?" Let the suitors take their own cases if they like—but why should they be allowed to have pettifoggers plead there as you see all over the country. These latter charge their customers just as much as a lawyer would, but even if they charged less, it does not follow that the allowing them to act is helping the "poor man" or making or keeping the court his court.

As long as the poor man is bound to have an agent it is not at all prejudicing him to require that that agent should be an attorney. Under the increased jurisdiction one feels the weight of this argument even more strongly than before, and my only apology for the extreme length of this letter will be this fact—that now, before the Legislature meets, is the time for country lawyers to join together and take some action in the premises.

A Wingham Solicitor.

Chattel Mortgages.

To the Editor of The Canada Law Journal

Dear Sir,—In common with your correspondent "Lex" I observed in Mr. Barron's recent valuable work on Bills of Sale an Chattel mortgage a statement which in my opinion (and in that of your correspondent) is not law. namely;—that the registration of an assignment of mortgage is notice to the mortgagor., (see pages 95 and 208 of Mr. Barron's work). However, I can find no case in our reports in point, although your correspondent says that there are cases to the effect that such registration is not notice. In Mr. Leith's Real Property Statutes (page 398) the question is considered, but he does not cite any case on the subject, nor is there any case cited in the more recent work by Mr. Leith and Mr. Smith (see page 220 and 221). The cases of *Trust and Loan Company* v. *Shaw* 16 Gr. 446 and *Gilliland* v. *Wadsworth* 21 App. R. 82. come nearest to the decision of this question. In the former case the question did not actually arise, it being a suit between two mortgagees, and it was decided that the Registry Act did not apply to a person not acquiring, but parting with an interest in lands. In the latter case although the question arose, it was not necessary to decide it, but there is a *dictum* of the present Chief Justice of the Court of Appeal to the effect that resignation of an assignment of mortgage is not notice to the mortgagor, (see page 91 of the report of this case).

In my forthcoming work on "Choses in Action" in treating of this subject, I have followed the view taken by Mr. Leith, and taken exception to that expressed by Mr. Barron, but in common seemingly with Messrs Leith and Smith I have not found any decision exactly in point. Will your correspondent kindly mention the cases to which he alludes.

Yours truly

J. James Kehoe.

Stratford, Jan. 4, 1881.

FLOTSAM AND JETSAM.

British Columbia Law Society.—We learn from our correspondent in the Pacific Province, that at a special meeting called after the elevation of Mr. McCreight and Mr. Robinson to the Bench, Messrs. Johnson and Hett were appointed Benchers in their place. Mr. McCreight, who had been Treasurer, is succeeded by Mr. Hett. A committee was appointed to draw up an address of congratulation to the new judges, and another committee to consider and report on the new Supreme Court rules. It was also decided to give a dinner in honour of the judges, in honour of the dignity conferred upon them.

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