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DIARY FOR DECEMBER.

15. Wed.....Christmas vacation in Sup. Ct. of Can. and Exch. Ct. begins.
19. Sun.....*4th Sunday in Advent.*
22. Wed.....Shortest day.
24. Fri.....Christmas vacation begins in H. C. J.
25. Sat.....*Christmas Day* Sir M. Hale died 1676, æt. 67.
26. Sun.....*1st Sunday after Christmas.*
27. Mon .....First meeting Ont. Leg. '67. J. G. Spragge, 3rd Chan. '69.
28. Tues .....Lord Macaulay died 1859.
29. Wed.....W. E. Gladstone born 1809.
30 Thur.....Holt, C. J., born 1642.

TORONTO, DECEMBER 15, 1886.

RECENT ENGLISH DECISIONS.

We continue the cases in the November number of the *Law Reports* :—

STATUTE OF LIMITATIONS—MORTGAGE—PAYMENT OF INTEREST—EVIDENCE.

Newbould v. *Smith* has already been referred to, *ante* p. 373, on the main point. The case, however, gives light on another. The defendant's assignor, in 1863, had mortgaged to one Alderson, a client of Newbould's. Newbould paid interest on this mortgage, and charged the mortgagor with it in account till 1866. After 1866 Newbould went on paying interest to Alderson, who believed it came from the mortgagor, but it was not shown that Newbould had ever acted as solicitor for the mortgagor after 1866; nor was there anything to show that Newbould was authorized to make the payments as agent for the mortgagor; and it was therefore held that the payments by Newbould after 1866 did not take the case out of the Statute of Limitations, and it was also held that a letter from Newbould to Alderson, stating that he had paid to the latter's account a sum received from the mortgagor for interest, was not an admission against interest so as to be admissible as evidence of payment by the mortgagor.

GRANT OF LAND BOUNDED BY RIVER—GRANT OF HALF OF BED OF RIVER.

The facts in the case of *Micklethwait* v. *Newlay Bridge Co.*, 33 Chy. D. 133, are somewhat difficult to follow without the aid of a chart. The principal point in contention was whether a grant of land on one side of a river by a person who owned the land on both sides of the river, carried with it the right to half the bed of the river. The Court of Appeal (reversing an order for an injunction granted by Bacon, V.-C.) held that the deed containing no reservation, and describing the lands as bounded by the river the presumption that the grant extended to half the bed of the river was not rebutted because circumstances afterwards arising, but which were not in contemplation of either party at the time of the grant, showed that it would be disadvantageous to the grantor to part with the half-bed, and, if contemplated, would probably have induced him to have reserved it. Nor yet by the fact that the area of the land conveyed was stated to be 7,752 sq. yds., and to be delineated on a plan drawn on the deed, and thereon coloured pink; whereas the part coloured pink extended only up to the edge of the river, and the area including the half bed was, in fact, 10,031 sq. yds. instead of 7,752.

Cotton, L.J., thus states the rule of construction followed in this case, at p. 145:

> In my opinion the rule of construction is now well settled, that where there is a conveyance of land, even although it is described by reference to a plan, and by colour, and by quantity, if it is said to be bounded on one side either by a river or by a public thoroughfare, then on the true construction of the instrument half the bed of the river, or half the road passes, unless there is enough in the circumstances, or enough in the expressions of the instrument, to show that that is not the intention of the parties. It is a presumption that not only the land described by metes and bounds, but also half the soil of the road or of the bed of the river by which it is bounded is intended to pass, but that presumption may be rebutted.

It is perhaps needless to say that his observations, so far as public highways are concerned, do not apply in this Province. Another point determined in the case was, that a proviso that nothing in the grant should take

away the grantor's right to take tolls over his bridge, which connected the land conveyed with the grantor's land on the other side of the river, did not preclude the grantee from taking away custom from the grantor's bridge by the erection of a new bridge; and the reservation to the grantor of a right to enter on the land conveyed for the purpose of repairing his bridge did not preclude the grantee from erecting a new bridge, so long as its erection did not interfere with the grantor's reasonable access for the purpose of repairing his bridge.

PRACTICE—ACTION TO PERPETUATE TESTIMONY—DEFAULT OF DEFENCE—EVIDENCE HOW TAKEN.

Bute v. *James*, 33 Chy. D. 157, was an action to perpetuate testimony, and the defendant having failed to deliver any defence, a question arose as to how the action was to proceed. The plaintiff moved for an order that the action might proceed notwithstanding the default of the defendant in not delivering a statement of defence, and asked the appointment of a special examiner to take the evidence of the plaintiff's witnesses, as if the pleadings were closed. Bacon, V.-C., made the order for leave to proceed, but refused to name a special examiner, and directed the examination to be taken before one of the official examiners.

TRUSTEE—SOLICITOR TRUSTEE—PROFIT COSTS.

The point involved *In re Corsellis*, *Lawton* v. *Elwes*, 33 Chy. D. 160, was whether a solicitor, who was one of two trustees under a will containing no power authorizing him to charge for professional services, was entitled to charge profit costs against the trust estate of legal proceedings in which the trustees were parties, and in others which the solicitor trustee, as surviving trustee, alone was a party, and which had been conducted by the firm of solicitors of which he was a partner, and their London agents. It was held by Kay, J., upon the principle that a trustee is bound to check all charges against the estate, and must not place himself in a position where his interest conflicts with his duty, that none of such profit costs ought to be allowed out of the estate to the firm of which the solicitor trustee was a member. There was also a further point determined in the case. The trustees appointed a partner of the solicitor trustee to be steward of a manor which was part of the trust estate, and fees for manorial business were paid by the tenants of the manor to the partner as such steward, a share of the profit costs of which was claimed by the solicitor trustee, who also claimed a share of certain profit costs paid to his firm by lessees and others in respect of leases and agreements for leases of portions of the trust estate granted by the solicitor trustee, and prepared and carried out by him or his firm. Mr. Justice Kay held that neither the solicitor trustee nor his firm were entitled to any of such profit costs, but that the solicitor trustee must account to the trust estate therefor.

It will be observed that in the latter branch of the case the profit costs were not payable out of the estate, but had been paid by third parties, and the court not only deprives the solicitor trustee of all right thereto, but compels him to account for them to the trust estate, in which respect it seems to carry the law against a solicitor trustee deriving any profit from his trust to a point beyond what our own courts seemed disposed to do in *Meighen* v. *Buell*, 25 Gr. 604, where it was considered, not without doubt, that there was a distinction between costs payable out of the estate and costs payable by third parties.

COMPANY—WINDING UP ORDER—JURISDICTION—FOREIGN COMPANY WITH BRANCH OFFICE IN ENGLAND.

A question which has been frequently considered of late in our own courts came up for consideration *In re Commercial Bank of S. Australia*, 33 Chy. D. 174, viz., the jurisdiction of the court to make a winding up order against an Australian company having a branch office in England. Two petitions were presented by English creditors, and on the hearing of the petitions an order had been made appointing a provisional liquidator whose powers were limited to the taking possession of, and collecting and protecting, the assets of the company in England, and the further hearing of the petitions was adjourned for a time. When they came on again to be heard it appeared that a petition to wind up the company had in the meantime been presented in Australia, and that a provisional liquidator had been appointed there; but it was not proved that a winding up order had been made there, and it was held by North, J.,

that there was jurisdiction at the time the petition was first presented to make the order, and that the jurisdiction could not be affected by the subsequent proceedings in Australia, and a winding up order was accordingly made, limiting the powers of the provisional liquidator to the English assets; the learned judge expressing the opinion that the winding up in England would be ancillary to a winding up in Australia, and that if the circumstances remained the same the powers of the official liquidator ought to be restricted in the same way.

TRUSTEE AND CESTUI QUE TRUST—RIGHT OF CESTUI QUE TRUST TO PRODUCTION OF TITLE DEEDS.

In re Courin, Courin v. *Gravett*, 33 Chy. D. 179, it was determined by North, J., that a *cestui que trust*, though only interested in the proceeds of a sale, has a *prima facie* right to the production and inspection of all title deeds and documents relating to the trust estate which are in the possession of the trustees; and one *cestui que trust* can enforce this right against the trustees without bringing the other persons beneficially interested before the court when they have no higher right than himself.

WILL—MORTGAGED ESTATE—INCUMBRANCE—EXONERATION—LOCKE KING'S ACT (17 & 18 VICT. C. 113).

In re Smith, Hannington v. *True*, 33 Chy. D. 195, is a decision under Locke King's Act (see R. S. O. c. 106 s. 36). A testator, the whole of whose real estate was subject to a mortgage, after directing payment of his debts devised a freehold house to his wife absolutely, "to do with as she thinks proper"; and he directed his executors to sell whatever other freehold property he possessed, and collect all debts due to him, and apply the proceeds in payment of certain legacies. The question was whether the devise to the wife showed "a contrary or other intention," so as to exclude the operation of Locke King's Act, so as to make the other real estate primarily liable for the mortgage debt. North, J., held that it did not, and that the house devised to the wife must bear its rateable proportion of the mortgage debt.

WILL—CONSTRUCTION—SUPPLYING OMISSION BY INFERENCE.

The case of *Mellor* v. *Daintree*, 33 Chy. D. 198, is an illustration of the extent to which the court will go in supplying by inference an apparent omission in a will. The scheme of the will in question appeared to be a division by the testator of his estate between two persons. As to one moiety the will expressly provided that the devisee should become absolutely entitled in case he should attain twenty-five, but in the disposition of the other moiety this provision was omitted, though in other respects the terms of the devise was similar. The omission, North, J., held, might be supplied by inference.

MORTGAGE—CONSOLIDATION.

The case of *Bird* v. *Wenn*, 33 Chy. D. 215, is a decision of Stirling, J., upon the question whether a mortgagee was entitled to consolidate his mortgages as against a subsequent incumbrancer under the following circumstances: The plaintiff was third mortgagee of a leasehold property, A, on which there was a first mortgage to a company of £1,000. The company subsequently took a mortgage on a property, B, from the same mortgagor. The lease of A was nearly out, and by arrangement between all parties the company advanced £1,000 for a new lease which was granted to the mortgagor, and was then mortgaged by him, first to the company to secure £2,000 and advances, and subject thereto to the plaintiff. By a memorandum between the company and the plaintiff, given at the time, it was agreed that the company was to have priority for their £2,000, and advances not to exceed in the whole £2,300. The mortgage to the company stipulated that the restriction on the consolidation of mortgages created by the Conveyancing Act of 1881 should not apply to the securities held by the company for the moneys due from the mortgagor. The company having assigned both mortgages on A and B to the defendant, he claimed the right to consolidate them as against the plaintiff who brought his action to redeem property A. Stirling, J., held that the defendant had no greater right than his assignors, and as the latter could not have required the plaintiff to redeem both mortgages, so neither could the defendant.

HUSBAND AND WIFE—EQUITY TO SETTLEMENT—MISCONDUCT OF HUSBAND.

Reid v. *Reid*, 33 Chy. D. 220, is another decision of Stirling, J. The plaintiff was en-

titled to £1,500. The action was brought claiming to have the whole fund settled on the usual trusts for herself and children; her husband had disregarded an order of court for restitution of conjugal rights, and had stated that he and his wife should not again live together. Under these circumstances it was held that the conduct of the husband amounted to aggravated misconduct so as to entitle the wife to have the whole fund settled.

COSTS—NEXT FRIEND—REVERSION.

The only remaining case to be noted is *Damant* v. *Hennell*, 33 Chy. D. 224, which was an action brought by an infant plaintiff by his next friend for the protection of a trust fund in which the plaintiff had only a reversionary interest, and a question arose as to how the solicitor and client costs should be paid. Stirling, J., made an order that the costs of the plaintiff should be taxed as between solicitor and client—the taxing officer to distinguish which of such costs are party and party—that the next friend should have his party and party costs out of the fund forthwith, with liberty to apply for the difference when there is a fund to which the plaintiff is absolutely entitled.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

SUPREME COURT OF CANADA.

Ontario.]

THE ATTORNEY-GENERAL OF ONTARIO, Appellant, and

THE ATTORNEY-GENERAL OF CANADA, Respondent.

Statement of claim in Exchequer Court—Insufficiency of—Summons to fix trial and hearing discharged—Appeal to Exchequer Court from order of a judge in chambers.

A statement of claim was filed by the Attorney-General for the Province of Ontario in the Exchequer Court of Canada, praying that "it may be declared that the personal property of persons dying, domiciled within the Province of Ontario, intestate and leaving no next of kin or other person entitled thereto, other than Her Majesty, belongs to the Province or to Her Majesty in trust for the Province." The Attorney-General for the Dominion of Canada in answer to the statement of claim made prayed, "that it be declared the personal property of persons who have died intestate in Ontario since Confederation, leaving no next of kin or other person entitled thereto except Her Majesty, belongs to the Dominion of Canada, or to Her Majesty in trust for the Dominion of Canada."

No reply was filed, and on an application to Mr. Justice GWYNNE in chambers for a summons for an order to fix the time and place of trial or hearing, the summons was discharged on the ground that the case did not present a proper case for the decision of the court. A motion was then made before the Exchequer Court, Sir W. J. RITCHIE presiding, by way of appeal from the order of Mr. Justice GWYNNE, for an order to fix the time and place of trial. The motion was dismissed without costs, on the ground that he was not prepared to interfere with the order of another judge of the same court.

On appeal to the full court,

Held, affirming the decisions appealed from, that the pleadings did not disclose any matter in controversy in reference to which the court could be properly asked to adjudge, or which a judgment of the court could affect.

Appeal dismissed without costs.

Irving, Q.C., for appellant.

Burbidge, Q.C., for respondent.

Nova Scotia.]

CONFEDERATION LIFE ASSOCIATION OF CANADA v. O'DONNELL.

Life insurance—Delivery of policy—Escrow—Instructions to agent—Policy not countersigned—Payment of premium—Admissibility of evidence—Entry in books of deceased against interest.

In an action on a policy of life insurance the defence was that the policy was never delivered, that it was not countersigned by the agent, contrary to a condition upon its face, and that the premium was never paid. On the trial an entry in the books of a payment to the agent was received in evidence, and the statement of the agent, made at a former trial, that the premium was not paid, was allowed to be read, the agent having since died.

The policy offered in evidence contained the following condition:

"This policy is not valid unless countersigned by————, Agent at———. Countersigned this ——— day of ——. ———, Agent.

The evidence of the agent which was read, in addition to stating the non-payment of the premium, was to the effect that the policy was only delivered to the deceased to be examined, and that he did not countersign it because it was not actually delivered. The jury found a verdict for the plaintiff, but included in it a finding that the agent was instructed not to deliver the policy until it was countersigned. The Supreme Court of Nova Scotia sustained the verdict. On appeal to the Supreme Court of Canada,

Held, *per* RITCHIE, C.J., and GWYNNE, J., that the policy was in the agent's hands merely as an escrow, not to be delivered until countersigned, and that condition not having been complied with, it was never an instrument duly executed and delivered by which the defendants could be bound.

Per STRONG, J. That the entry in the books of the deceased as to payment of the premium was improperly received in evidence, and there should be a new trial.

Per HENRY and FOURNIER, JJ. That the countersigning of the policy was not a condition to which it was subject, and the defendants are estopped from denying that the premium was paid; and the jury having found that the policy was delivered, the plaintiff is entitled to retain his verdict.

The court being thus divided in opinion, a new trial was granted.

The report of this case on a former appeal will be found in 10 Can. S. C. R. 92.

Beatty, Q.C., and *C. H. Tupper*, for the appellants.

Weldon, Q.C., and *J. H. Lyon*, for the respondent.

Manitoba.]

FEDERAL BANK OF CANADA v. CANADIAN BANK OF COMMERCE.

Writ of execution—Payment of amount to sheriff—Application of proceeds—Interest of third party in defendant's lands—Interpleader.

In August, 1881, the H. B. Co. executed an agreement for the sale of certain lands to A. In March, 1883, A. conveyed the land to R., manager of the Federal Bank. The trustees of a church corporation wishing to purchase the land, R. re-conveyed it to A., to enable him to get a deed from the Co., and A., on Aug. 4th, 1883, having obtained such deed, executed a deed to said trustees. It was agreed that the bank should receive a portion of the purchase money from the church. On the same day that the deed to the trustees was executed the Bank of Commerce, having a judgment against A., placed an execution in the sheriff's hands. The trustees paid to the sheriff the amount of the execution, believing that the same was a charge upon the land bought from A., and received a certificate from the sheriff that the land was free from execution. The Federal Bank gave notice to the sheriff that they claimed the money, and an interpleader order was issued to try out the title to it.

Held, affirming the decision of the court below, 2 Man. L. R. 257, that the money having been paid to the sheriff on an execution duly issued must be paid to the execution creditors, and a third party could not claim it.

Semble, that the lands were neither "taken or sold" within the meaning of the Interpleader Act, and the proceedings were therefore improper.

Appeal dismissed with costs.

McCarthy, Q.C., for appellant.

Robinson, Q.C., for respondent.

CHANCERY DIVISION.

Proudfoot, J.] [Oct. 23.

ARCHER v. SEVERN.

Will—Specific bequest of a mortgage indebtedness—Right of executors to refuse to discharge until other indebtedness paid—Assent of executor to specific legacy—Administration proceedings.

A testator by his will directed his executors to cancel and entirely release the indebtedness of his son, W. S., upon and by virtue of a mortgage to the testator, such release to operate and take effect immediately on and from the said testator's death. In an action for the administration of the testator's estate W. S. claimed the discharge of the mortgage, but the executors contended that they were not bound to give it until W. S. paid the amount of his other indebtedness to the estate. The master found in favour of the executors. On appeal from the master it was

Held, that the executors were not entitled to insist on payment of the other indebtedness before discharging the mortgage.

Held, also, following *Northy* v. *Northy*, 2 Atk. 77, that although at law the assent of the executor is necessary to the vesting of a specific legacy, in equity he is considered as a bare trustee, and if he refuse his assent without cause he may be compelled to give it, and that here the executors' refusal was without cause.

Held, also, that a decree in an administration suit, although it may enure to the benefit of all creditors of an estate, does not prevent the statute of limitations from running against debtors to the estate.

Held, also, that a clause in the answer of W. S. expressing his willingness that the will should be construed by the court, and the rights of the parties thereunder determined had not the effect of waiving any right that might have accrued to him during the progress of the suit.

W. H. P. Clement, for the appeal.

S. H. Blake, Q. C., and *H. Cassels*, contra.

Ferguson, J.] [Nov. 29.

HOLMES v. MURRAY.

Will—Devise—Republication of will by codicil—Mortmain—R. S. O. c. 216—38 Vict. c. 75 (O.).

A testator made his will, dated February 2, 1884, in which was contained the following devise:—"To the congregation of Burns Church. . . . I bequeath the sum of $2,000, to be used by the trustees of the said church towards the purpose of purchasing land for a glebe, in any place that they may judge suitable, and for erecting thereon a manse, all for the use of the said congregation through their trustees forever." He added two codicils on September 21st and December 5th, 1885, respectively, and died on the 27th of December following.

Held, that as nothing appeared in the codicils to show a contrary intention, their executions operated as republications of the will at their respective dates, and that the will having been so republished within six months of the death of the testator the gift, notwithstanding the provisions of R. S. O. c. 216, and 38 Vict. c. 75 (O.), was void.

Oliver, for the plaintiffs, the executors.

Maclennan, Q.C., for the defendants, the trustees.

Ferguson, J.] [Nov.

RE ONTARIO LOAN AND SAVINGS CO. AND POWERS.

Will—Devise—Appointment—Estate—R. S. O. c. 109.

A. by his will devised as follows:—"I give and bequeath to my nephew B., and C., his wife, (describing the land) to their use for the term of their natural life, and at their decease

to be divided among their children as they may see fit." C., the wife, died, and after her death B. conveyed to one of his children, D. B. and D. then mortgaged to the company, and the company sold to E. under the power of sale in the mortgage, but E. refused to take the company's title.

Held, that B. and C. took an estate for life only, that the appointment in favour of one child to the exclusion of the rest was not a valid appointment, and that the title offered was not one that the purchaser could be compelled to accept.

S. H. Blake, Q.C., for the vendors.

Robert Armour, for the purchaser.

Proudfoot, J.] November 22.

MCMULLEN v. POLLEY.

Principal and agent—Solicitor and client—Right of solicitor to receive money for client.

M., a solicitor, on the pretence of obtaining an advance of $6,200 for the plaintiff on mortgage of the plaintiff's lands procured the plaintiff and his wife to execute a mortgage for that smount. P., the mortgagee, actually paid the money to M., and got from him a mortgage and had it registered, but M. absconded without paying over the money to the plaintiff, who now sued the defendant for the said sum of money, or in the alternative, a release of the mortgage, and reconveyance of the lands.

Held, that the mortgage being left in the hands of M. did not prove that he was an agent of the plaintiff to receive the money from the defendant, and since the plaintiff denied having given M. any authority to receive the money, and the defendant had not proved the agency of M. to receive the money (the onus of proving which rested on him), therefore the plaintiff was entitled to judgment, with costs.

Walkem, Q.C., and *McIntyre*, Q.C., for the plaintiff.

Britton, Q.C., and *Whiting*, for the defendant.

Boyd, C.] [November 24.

BERRIE v. WOODS.

Landlord and tenant—Covenant running with land—Covenant to pay for permanent improvements at termination of lease.

J. B. demised certain lands to the defendant for ten years by deed of lease, which lease contained the following clause: "At the expiration of the lease the lessor, his heirs and assigns will pay or cause to be paid to the said lessee, etc., one half of the then value of any permanent improvements he may place upon the said lands; provided, however, if the said lessor, his heirs and assigns, at the expiry of the term, grant a new lease for a further period of five years, said improvements shall belong to said lessor, his heirs or assigns." Pending the term of ten years, J. B. conveyed the lands to the plaintiffs in fee as tenants in common, who at the expiration of the said term demanded possession from the defendant, who thereupon made a claim in respect to improvements under the above clause in the lease.

Held, that the liability to pay for the improvements ran with the land and attached as an equitable lien thereon against the plaintiffs. Judgment given that possession was to be delivered forthwith to the plaintiff, subject to a lien on the property for the value of the defendant's improvements under the terms of the lease. Lien to attach on the title which J. B. had prior to the deed to the plaintiff. Reference to the master to fix value of improvements.

Moss, Q.C., and *Meek*, for the plaintiff.

Millar, for the defendant.

Boyd, C.] [November 29.

RE LEGARIE ET AL. v. THE CANADA LOAN AND BANKING CO.

Division Court—Prohibition—Equitable claim—Surplus in hands of mortgagee.

Held, that a Division Court had jurisdiction to entertain a claim for less than $100 made by a mortgagor upon the surplus proceeds of a mortgage sale which realized less than $400. Such a claim is an equitable cause of action for money had and received.

Washington, for the defendants.

C. J. Holman, for the plaintiffs.

Boyd, C.] [Nov. 30.

NATIONAL INSURANCE COMPANY v. MCLAREN.

Insurance—Subrogation—Action against wrongdoer—Estoppel by judgment—Res inter alias acta.

The defendant, who owned a lumber yard, insured his property with a number of insurance companies, the value of his whole insurance amounting to $50,000.

In May, 1879, his said property was set on fire by sparks from an engine of the Canada Central Railway Company, and a large portion destroyed. The amount of his loss exceeded the $50,000 insured, and he claimed and obtained from the insurance companies the whole amount of his insurance, viz.: $50,000. Afterwards, on September 22nd, 1879, he commenced an action for damages against the railway, and in March, 1882, he recovered against the railway $100,000 damages and his costs of suit. It appeared that the jury in this last mentioned action had been asked specifically what was "the actual value of the lumber destroyed," to which they gave the answer "$100,000, including ties and rails." The plaintiffs in the present action, who were some of the said insurance companies, now claimed that the defendant obtained from the railway company by his said verdict a sum larger than the difference between the amount of the insurance and the amount of his loss; and that he, the defendant, was a trustee for that excess for the plaintiffs respectively in proportion to the amount of their insurances. They contended that their right to be subrogated into the benefit of a compensrtion received by the defendants from the wrongdoers (the railway company), arose when they (the plaintiffs) made payment of the insurance money to the defendant, and that he then became trustee for them *pro tanto*, and in this character prosecuted his litigation against the railway company, and as a consequence from this they argued that the finding of the jury as to the actual total loss was binding and conclusive on McLaren as well as on them (the plaintiffs), because as beneficiaries they were privies to that judgment, and therefore they said the defendant was now estopped from proving in this action that his actual loss was more than $100,000. The defendant, however, denied that $100,000 correctly represented the whole of his loss, which he asserted exceeded the whole $150,000 which he had received from the insurance company and the railway.

Held, that the defendant was not concluded by the finding of the jury in his action against the railway company, and that the utmost right of the plaintiffs here was to have the amount recovered as damages from the railway company brought into account together with the moneys previously paid by the plaintiff for insurance, in order to ascertain whether the defendant had been more than fully compensated for his total loss by fire and other loss and outlay connected with the litigation, and for these purposes the matter was referred to the master.

The right of subrogation, being an equitable right, partakes of all the ordinary incidents of said rights, one of which is that in administering relief the court will regard not so much the form as the substance of the transaction. The primary consideration is to see that the insured gets full compensation for the property destroyed and the expenses incurred in making good his loss. The next thing is to see that he holds any surplus for the benefit of the insurance company, but it is a begging of the question to assert that he is a trustee from the time of payment by the insurers.

C. Robinson, Q.C., and *J. F. Smith*, Q.C., for the plaintiffs.

D. McCarthy, Q.C., and *Creelman*, for the defendants.

PRACTICE.

Ferguson, J.] [November 10.

TAYLOR v. THE SISTERS OF CHARITY OF OTTAWA.

Appeal—New affidavits—Ex parte order.

Upon an appeal by the defendants from an order obtained *ex parte* by the plaintiff, the defendants were permitted to read affidavits which were not before the master who made the order appealed from.

Hoyles, for the defendants.

W. M. Douglas, for the plaintiff.

Ferguson, J.] [November 16.

CHAMBERLAIN v. CHAMBERLIN.

Pleading—Claim arising since action—Set-off—Counter-claim—O. J. A.

The O. J. A. has not changed the law so as to allow of a claim arising since the commencement of the action being pleaded as a set-off, although it may be made the subject of counter-claim.

A defence which is wholly inapplicable may be struck out, unless amended, although it is neither scandalous nor tending to prejudice, embarrass or delay.

E. Douglas Armour, for the appellants.

Edmonson, for the respondents.

Ferguson, J.] [November 18.

DOMINION BANK v. HEFFERNAN.

Costs, scale of—Attacking fraudulent conveyance—Amount of claim—Creditors' Relief Act, 1880 (*O.*).

Where the plaintiffs had judgment and execution against one of the defendants for less than $200, and were seeking, though not on behalf of all creditors, to set aside a conveyance by that defendant to the other as fraudulent, and where there were other executions in the hands of the sheriff amounting to more than $200, and the action was dismissed at the trial,

Held, that if the plaintiffs had been successful all the executions must have been satisfied out of the property covered by the impeached conveyance, and the provisions of the Creditors' Relief Act would have applied to the case, and therefore the amount of the subject-matter involved exceeded $200, and the costs were taxable on the High Court scale.

C. J. Holman, for defendants.

Leeming, for plaintiffs.

Rose, J.] [November 26.

PURVIS v. SLATER.

Cause of action—Assets in the jurisdiction—Debts due defendant—Rule 45 (e).

Debts due to the defendant by persons resident in Ontario are "assets which may be rendered liable to the judgment," within the meaning of Rule 45 (*e*), O. J. A.

Shepley, for the defendant.

Walter Read, for the plaintiff.

Ferguson, J.] [November 27.

CAMPBELL v. MARTIN.

Con'pt of court—Imprisonment—Discharge—Costs.

Where a person has been imprisoned for contempt of court, the proper order upon an application for his discharge is that he be continued in prison for a definite period, unless the costs are sooner paid.

Hoyles, for defendant.

C. J. Holman, for plaintiff.

OSGOODE HALL LIBRARY.

List of books received at the Osgoode Hall Library during the months of August and September, 1886 :—

Angell on Highways, 3rd edition, Boston, 1886.
Annual Register, The, for 1885, London, 1886.
Bythewood's Conveyancing, 4th edi., London, 1884.
Chambers' Handbook of Public Meetings, London, 1886.
Colonial Statistical Tables, 1879-81, London, 1885.
Correspondence *re* Queensland, London, 1886.
Cassel's Digest Sup. Ct. Cases, Toronto, 1886.
Carpmael's Patent Laws of the World, London, '85.
Duryea's Assignments Patent Rights, Baltimore, '86
Dixon's Law of Probate, 2nd edition, London, 1885.
Digest of Cases in Sup. Ct. Scotland, Edinburgh '86.
Greene's Roman Law, 4th edition, London, 1884.
Greenwood's Real Property Statutes, 2nd edition, London, 1884.
Holland's Jurisprudence, Oxford, 1886.
Harris' Hints on Advocacy, 7th ed., London, '84.
Hayne's Students' Leading Cases, 2nd edition, London, 1884.
Johnson's Patentee's Manual, 5th ed., London, '84.
King's U. S. Mining Laws. Washington, 1885.
Lloyd's Law of Compensation, 5th ed , London, '82.
Law Journal Reports Digest, London, 1886.
New York State Library Catalogue, Albany, 1883.
Prideaux's Churchwarden's Guide, London, 1886.
Quebec Law Digest, vol. 3, 1886.
Routledge's Client and Solicitor in Legal Affairs, Gloucester, 1886.
Rogers on Elections, 15 ed., Pt. 2, London, 1886.
Stephen's National Biography, vol. 7, London, '86.
Stone's Justices' Manual, 23rd ed., London, 1885.
Taylor's Medical Jurisprudence, 3rd ed., Lon., '83.
Wade on Law of Notice, 2nd edition, Chicago, 1886.
Williams' and Bruce's Admiralty Practice, 2nd edition, London, 1886.

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