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DIARY FOR OCTOBER.

1. Fri .....William D. Powell, 5th C.J. of Q. B. 1816.
3. Sun.....15*th Sunday after Trinity.*
4. Mon....C. C. term and sittings for trial of non-jury cases begin (except in York).
7. Thur ..Henry Alcock, 3rd C.J. of Q. B. 1802.
8. Fri.....R. A. Harrison, 11th C.J. of Q. B. 1875.
9. Sat .....C. C. term (except in York) ends.
10. Sun ....16*th Sunday after Trinity.*
11. Mon... C. C. York term begins.
13. Wed...Battle of Queenston 1812. Lord Chancellor Lyndhurst died 1863, æt. 92.

TORONTO, OCTOBER 1, 1886.

THE word *West* seems to be almost synonymous with freedom from old-time traditions, and emancipation from what are generally supposed to be useless forms and ceremonies. The jurisdiction of Judge Lynch, the type of rough and ready justice, has gradually followed the setting sun, and so the traveller to the Far West scarcely expects to find at the jumping-off place on the extreme western limit of the continent the Bench and Bar adorned with the horse-hair wigs we were once familiar with at Westminster Hall. Judging from some of the sights between Toronto and Victoria, scalp-locks might be suggested as more in keeping with the environment, unless indeed it were thought desirable for the Judges and the Bar of the Supreme Court of British Columbia to wear wigs in view of the story told of an officer, whose bloodless scalp, in the shape of a wig, once remained in the grasp of a terror-stricken brave, who never raised a scalp with so much ease before.

The matter before the Supreme Court at Victoria when we happened there last month and had the honour of seeing the wigs, was the appeal from the judgment of Chief Justice Begbie in the case of *Edmonds* v. *Canadian Pacific R. W. Co.*, in the which the learned Chief had granted an injunction restraining the Company from extending their line from Port Moody to the City of Vancouver. This judgment was upheld by the majority of the court (Crease and McCreight, JJ.,) against the dissenting opinion of Mr. Justice Gray. We confess that we failed to follow the latter in his reasoning. The law of the case certainly has nothing to do with what, if anything, is due to such an energetic and patriotic corporation as the C.P.R., which he apparently thought ought to be encouraged, rather than damped, in their pursuit of the setting sun. The judgment delivered by Mr. Justice Crease, on behalf of himself and Mr. Justice McCreight, took up and followed in a clear and sensible manner what seems to be the plain meaning of the statute, and from the result, which the majority of the court arrived at, there would seem to be no escape. Of course it is only a question of time with the Company in getting to Vancouver, as we presume the Legislature would soon cut the Gordian knot, and nobody be the worse, except a few land speculators who own pieces of rock at Port Moody.

WHILE the Commissioners for the Consolidation of the Statutes are revising the Real Property Acts, we think there are one or two matters deserving of their attention, and which they might fittingly recommend to the legislature as proper subjects for amendment.

The first is the making of estates tail liable for the debts of the tenant in tail. This was accomplished in England by

1 & 2 Vict. c. 110, ss. 11, 13, 18, 19; but this legislation appears not to have been adopted in this Province. Estates tail are exempted (unwisely, we think,) from the recent statute which provides for land passing on the death of the owner to his personal representative. If the public were generally to learn that by entailing their real estates they could also protect them from liability to creditors, it is possible that an unwholesome impetus might be given to the creation of estates tail, a species of tenure which the tendency of modern ideas is in favour of abolishing, rather than surrounding with exceptional privileges.

The facilities which the legislature has already placed within the power of the tenant in tail of barring the entail and converting the estate into a fee simple, have practically made him the owner in fee, with this extraordinary exception, that although he himself has complete dominion over the estate in all cases as against the issue in tail, and even against remaindermen where there is no protector of the settlement, yet so far as his creditors are concerned, they can only sell an estate for his life in the land entailed. For all practical purposes of ownership his rights are absolute and unconditional, but when his creditors come to realize their debts against him he is entitled to say: You can only sell my life estate. We have no hesitation in saying that the amendment of the law should be made if the estate tail is to be continued at all. It would be far better to abolish this species of estate altogether by declaring that every tenant in tail shall be *in esse* what he is already *in posse*, viz.: the owner of the fee.

The next point to which we would crave the attention of the commissioners is the advisability of recommending the abolition of the right to consolidate mortgages. This right is a creation of equity, and one that has not inequently been a source of practical injustice. In England the right has been abolished by 44 & 45 Vict. c. 41, s. 17.

One other suggestion we have to make, and it is this, that the R. S. O. c. 106, s. 36, which provides that on the death of a deceased mortgagor his mortgage debts shall primarily be chargeable on the mortgaged lands, should, as in England under 40 & 41 Vict. c. 34, be made applicable to mortgages of leaseholds, and to liens for unpaid purchase money due on land purchased by the deceased.

Owing to the change which has recently been made in the law of descent, this amendment may not be of quite so much importance as it would formerly have been; at the same time, even now it is necessary in order properly to adjust the rights of specific devisees of the incumbered property, and those who take the undisposed of residue.

COMMON CARRIERS IN ONTARIO.

(Continued from p. 297).

THE extent to which carriers may lawfully limit their liability for negligence was exhaustively ventilated in the English courts shortly before the argument of *Hamilton* v. *The G. T. R.* here.

The English case was *Peek* v. *The North Staffordshire Ry. Co.* (10 H. L. 473); and although the issue there arose on a construction of the Railway and Canal Traffic Act, it was found necessary to examine the history of common carriers fro its common law origin onwards.

This case was not referred to in the argument of *Hamilton* v. *The G. T. R.* It is mentioned in the judgment of Draper, C.J., but no extracts are made from it.

Mr. Justice Blackburn, in giving his opinion to the House, at p. 493, says:—

"Mr. Justice Story, in his Commentaries

on the Law of Bailments, section 549 (published in 1832 after the Carriers Act, but in America, where that Act had no effect), states, as I think, accurately, what was the effect of the decisions up to that time. 'It was,' says he, 'formerly a question of much doubt how far common carriers on land could, by contract, limit their responsibility, upon the ground that, exercising a public employment, they are bound to carry for a reasonable compensation, and had no right to change their common law rights and duties. And it was said that, like innkeepers, they were bound to receive and accommodate all persons, as far as they may, and could not insist upon special and qualified terms. The right, however, of making such qualified acceptances by common carriers seems to have been asserted in early times. Lord Coke declared it in a note, *Southcote's Case* (4 Co. Rep. 84), and it was admitted in *Morse* v. *Slue* (1 Vent. 238). It is now recognized and settled beyond any reasonable doubt.' So far the passage is cited and adopted in the judgment of the Court of C. P. in *Austin* v. *Manchester, etc., Ry. Co.* (10 C. B. 473), a case decided in 1850, to which I shall hereafter have to call attention; and so far I think this, according to the decisions subsequent to 1832, still remained law in 1854, when the Railway and Canal Traffic Act was passed. But Mr. Justice Story proceeds to say, 'Still, however, it is to be understood that common carriers cannot by any special agreement exempt themselves from all responsibility, so as to evade altogether the salutary policy of the common law. They cannot, therefore, by a special notice, exempt themselves from all responsibility in case of gross negligence and fraud, or, by demanding an exorbitant price, compel the owners of the goods to yield to unjust and oppressive limitations of their rights. And the carrier will be equally liable in case of the fraud or misconduct of his servants as he would be in case of his own personal fraud or misconduct.' In my opinion the weight of authority was, in 1832, in favour of this view of the law, but the cases decided in our courts between 1832 and 1854 established that this was not law, and that a carrier might, by a special notice, make a contract limiting his responsibility even in the cases here mentioned of gross negligence, misconduct or fraud on the part of his servants; and, as it seems to me, the reason why the legislature intervened in the Railway and Canal Traffic Act, 1854, was because it thought that the companies took advantage of those decisions (in Story's language) 'to evade altogether the salutary policy of the common law.'"

Lord Wensleydale, in pronouncing his judgment, at p. 574, says:—

"Mr. Justice Blackburn, in his very able and clear opinion has fully stated and explained most of the various decisions which have taken place as to the liability of carriers. . . . Numerous subsequent cases between the years 1832 and 1854 established that a carrier might make a contract limiting his responsibility, even in cases of gross negligence or misconduct. At length, such having become frequent, it was suggested in the case of *Carr* v. *The Lancashire*, etc. (7 Ex. 707), that the legislature . . . might . . put a stop to this mode which the carriers had adopted to limit their liability. The legislature apparently answered that appeal by passing the Railway and Canal Traffic Act, 1854."

It is to be noted that the opinion given by Mr. Justice Blackburn was adopted by the House, and it displays a very careful search through all previous decisions upon the subject. The extract from Story is all the more valuable as being an accepted authority contemporaneous with the passing of the Carriers Act.

How far the opinions of these two eminent judges are supported by authority may be seen in the following cases. And, first I will refer to those which are mentioned in the Canadian decision.

In *Lyon* v. *Mells*, 5 East 428, decided in 1804, the notice relied upon by the defendant was "that he would not be answerable for any damage unless occasioned by want of ordinary care in the master or crew of the vessel, in which case he would pay £10 per cent. upon such damage, so as the whole did not exceed the value of the vessel and freight;" and it was held that a loss happening by the personal default of the

carrier himself was not within the scope of such notice. Judgment was accordingly given for the plaintiff. Lord Ellenborough, in delivering judgment, said:—

"It is impossible, without outraging common sense, so to construe the notice as to make the owners of vessels say, 'We will be answerable to the extent of 10 per cent. for any loss occasioned by the want of care of the master or crew; but we will not be answerable at all for any loss occasioned by our own misconduct, be it ever so gross and injurious.'"

Garnet v. *Willan*, 5 B. & Ald. 53, decided in 1821, was also referred to. There the defendants had given notice that they would not be responsible for any package containing specified articles, or which, with its contents, should exceed £5 in value, if lost or damaged, unless an insurance were paid; and it was held that notwithstanding this notice, the carriers were responsible for the parcel in question, in consequence of their having delivered it to be carried by another coach, of which one of the carriers only was proprietor.

Wyld v. *Pickford*, 8 M. & W. 443, decided in 1841, was also referred to. The following extract from the lengthy headnote will indicate how far it stops short of deciding, even under the Carriers Act, that a carrier can contract himself out of all liability:—

"A carrier is not bound to convey goods except on payment of the full price for the carriage according to their value; and if that be not paid it is competent to him to limit his liability by special contract. And, therefore, where a carrier receives valuable goods to carry, after notice to the bailor that he will not be responsible for loss or damage to them unless a higher than the ordinary rate of insurance be paid for the carriage, he receives them on the terms of such notice, which amounts to a special contract. But he is not exempted thereby from all responsibility; but is, notwithstanding the notice, bound to take ordinary care in the carriage of the goods, and is liable, not only for any act which amounts to a total abandonment of his character of a carrier, or for wilful negligence; but also for a conversion by a misdelivery arising from inadvertence or mistake, if such inadvertence or mistake might have been avoided by the exercise of ordinary care."

In delivering judgment Parke, B., said:—

"We agree that if the notice furnishes a defence, it must be either on the ground of fraud or of a limitation of liability by contract, which limitation it is competent for a carrier to make, because, being entitled by common law to insist on the full price of carriage being paid beforehand, he may, if such price be not paid, refuse to carry upon the terms imposed by the common law and insist upon his own; and if the proprietor of the goods still chooses that they should be carried, it must be on those terms; and probably the effect of such a contract would be only to exclude certain losses, leaving the carrier liable *as upon the custom of England* for the remainder."

Austin v. *Manchester*, 10 C. B. 454, was also referred to. This case was decided in 1850, at a time when the conditions imposed by carriers in England were becoming almost intolerable, and yet were held to be valid under the Carriers Act. But the following quotation from Mr. Justice Cresswell's judgment shows that even then the carriers did not claim immunity for wilful damage done by themselves or their servants. He says, at p. 475:—

"The question, therefore, still turns upon the contract, which, in express terms, exempts the company from responsibility for damages, however caused, to horses, etc. In the largest sense those words might exonerate the company from responsibility even for damage done wilfully—a sense in which it was not contended that they were used in this contract."

The next case referred to was *Morville* v. *G. N. Ry.*, 16 Jur. 528, decided in 1852. It was very similar to the last mentioned. The only other cases which appear to have been at all relied upon in the judgment of *Hamilton* v. *The G. T. R.* were *Carr* v. *Lancashire*, 7 Ex. 707, cited *supra*,

and *McManus* v. *Lancashire*, 4 H. & N. 327, but as these were decisions under the Railway and Canal Traffic Act, they cannot support a case in our courts.

There were, however, many other cases which might have been referred to, and among them were the following:

(*a*) *Ellis* v. *Turner*, 8 T. R. 531, decided in 1800, was an action against ship owners for damages for loss of goods, occasioned by the accidental sinking of the vessel in the river Trent; and it was held that the defendants were liable for the full amount of the loss, notwithstanding their notice that they would not be answerable for losses in any case, except the loss were occasioned by the want of care in the master, nor even in such case beyond 10 per cent., unless extra freight were paid. No extra freight was paid. The negligence complained of consisted in carrying the goods past the point where they should have been landed.

(*b*) *Beck* v. *Evans*, 16 East 244, decided in 1812. The defendants had given notice that they would not be answerable for cash, bank notes, jewels, etc., *or any other goods of what nature or kind soever*, above the value of £5, if lost, stolen or damaged, unless a special agreement was made, and an adequate premium paid over and above the common carriage. The plaintiff delivered a cask of brandy valued at £70 to defendants for carriage, and paid 1*s*. 6*d*. at the time for booking, which was the common charge independent of the carriage price. No special agreement was made.

Lord Ellenborough said (p. 247):—

"But upon the other point, I think the carrier does not stipulate for exemption from the consequence of his own misfeasance; and if goods are confided to him, and it is proved that he has misconducted himself in not performing a duty which by his servant he was bound to perform, that is such a misfeasance as, if the goods thereby become damaged, his notice will not protect him from."

(*c*) *Bodenham* v. *Bennett*, 4 Price 31, decided in 1817. There the defendants were proprietors of a coach, and had given the usual notice that they would not be liable for parcels above £5, unless insured and paid for accordingly. The plaintiff's clerk took a parcel, containing notes to the amount of £347 11*s*., to the coach office to go by the coach to Brecon. He paid a halfpenny for carriage and booking. No insurance was demanded or paid. On the following morning the parcel was entered in the way bill and put in the back seat of the coach. The coachman on that day was intoxicated, but not so as to be unable to attend to his business. The parcel was lost. The jury found for the plaintiff.

Wood, B., said at p. 34:—

"I see no ground to disturb the verdict. By the common law, the carrier was liable for losses arising from accident or robbery; nay, from irresistible force. The case of *Morse* v. *Slue* (1 Vent. 238), pressed extremely hard on common carriers. Then special conditions were introduced, for the purpose of protecting carriers from extraordinary events; but they were not meant to exempt them from due and ordinary care. It cannot be supposed that people would entrust their goods to carriers on such terms. It only means, that they will not be answerable for extraordinary events; but we need not in this case lay down that rule.

"Here has been gross negligence, and in all cases of that sort carriers are liable."

(*d*) *Smith* v. *Horne*, 8 Taunt. 144, decided in 1818. This was an action of *assumpsit* against a carrier. And it was held that gross neglect will defeat the usual notice given by carriers for the purpose of limiting their responsibility.

Park, J., in delivering judgment, said:

"The doctrine of carriers exempting themselves from liability by notice has been carried much too far."

Burrough, J., said:—

"The doctrine of notice was never known until the case of *Forward* v. *Pittard*, (1 T. R. 27), which I argued many years ago. Notice does not constitute a special

contract; if it did, it must be shown upon the record; it only arises in defence of the carrier; and here it is rebutted by proof of positive negligence. I lament that the doctrine of notice was ever introduced into Westminster Hall."

(*e*) *Forward* v. *Pittard* was decided in 1785, and it was there held that a carrier who undertakes for hire to carry goods is bound to deliver them at all events, except damaged or destroyed by the act of God or the king's enemies.

(*f*) *Sleat* v. *Fagg*, 5 B. & Ald. 342, decided in 1822.

The head-note of this case is as follows: "A parcel containing country bankers' notes, of the value of £1,300, and addressed to their clerk, in order to conceal the nature of its contents, was delivered to the carrier, without any notice of its value, to be carried by a mail coach, and was accepted by him to be so carried. The parcel was sent by a different coach, and was lost. The carriers had previously given notice that they would not be answerable for any parcel above £5 in value, if lost or damaged, unless an insurance were paid. No insurance having been paid in this case, "*Held*, notwithstanding that the carrier was responsible for the loss."

Holroyd, J., said (p. 349):—

"The question is whether the carrier is protected from the loss in question by the terms of his notice. I think that in cases of misfeasance a carrier is not thereby exempted from loss. This is clearly a case of misfeasance.

(*g*) *Riley* v. *Horne*, 5 Bing. 217, decided as it was in 1828, must have been one of the latest cases occurring before the passing of the Carriers Act, and the publication of Mr. Justice Story's work on Bailments. It is all the more interesting, as it was the result of long deliberation, and it contains a *resumé* of the law on the point under discussion.

The defendants were the owners of a coach running from London to Kettering and back daily. They had advertised the usual notice at the London office; but the question was whether the notice applied to a parcel sent from Kettering to London.

In delivering the judgment of the court, Best, C.J., at p. 224, said:

"We have established these points,—that a carrier is an insurer of the goods which he carries; that he is obliged for a reasonable reward to carry any goods to the place to which he professes to carry goods that are offered him, if his carriage will hold them, and he is informed of their quality and value; that he is not obliged to take a package, the owner of which will not inform him what are its contents, and of what value they are; that if he does not ask for this information, or if, when he asks and is not answered, he takes the goods, he is answerable for their amount, whatever that may be; that he may limit his responsibility as an insurer by notice; but that a notice will not protect him against the consequences of a loss by gross negligence."

Let us now see how this question has been dealt with in the United States, where the law was similar to our own in 1830, and where, except in a few States, no changes have been made by statute.

The latest work upon the subject, so far as I am aware, is Wood's Railway Law, 1885, and the following quotation, amply verified by authorities, seems to entirely support the view I have taken. In section 425 the author says:—

"In addition to the exemption from liability referred to in the last section" (*i.e.*, from losses arising from the act of God, public enemies, the fault of the party, or the inherent qualities of the property itself) "a carrier may, by express contract, limit his liability, provided the limitation is just and reasonable. But the limitation must be imposed by express contract, and as a rule cannot be imposed by a mere general notice—at least unless actual knowledge of the terms of such notice is brought home to the shipper at the time he enters into the contract, the burden of establishing which is upon the carrier. But in most of the States, while the carrier may by special contract limit his liabilities as an insurer—as, for the loss of the goods by fire and other casualities which are not

the result of his negligence—yet he cannot restrict it so as to excuse himself from loss or damage resulting from the negligence of his servants or agents."

In support of the same principles reference may be made to the following cases, taken from Redfield's Leading American Railway Cases (1872), in volume 2 at pp. 47 and 247: *Judson* v. *The Western*, 6 Allen 486, and *Hooper* v. *Wells*, 5 Am. L. Reg. N.S. 16.

It may be said, however, that there was no reason why carriers in this country should not go on reducing their common law liability without the aid of a Carriers Act, and that *Hamilton* v. *G. T. R.* may be supported on this ground. The answer to this is twofold:

First, the learned judges did not so regard it; for their language shows that they did not suppose they were extending or sanctioning an extension of the powers of carriers in any way. On the contrary they arrived at their decision very unwillingly, and expressed regret that they found the law as they did.

Second, the legislature did not so regard it; for if such an encroachment upon the common law had been requisite to protect carriers, the sweeping provisions of the Railway Acts on this point would have been unjustifiable.

The object of the legislature in prohibiting railway companies from setting up notices, conditions or declarations in cases of negligence, may have been to alter the law as interpreted in *Hamilton* v. *The G. T. R.* and subsequent cases, or it may have been to declare the law, as opposed to those decisions. It must be confessed that the language used in the Railway Act does not read like a declaratory enactment. On the other hand, the language used in the Act Respecting Carriers by Water (37 Vict., cap. 25) strongly supports the declaratory hypothesis. The first section of this Act defines the liabilities and rights of carriers by water, and places them in very much the same position as that of carriers in England prior to the passing of the Carriers Act. It provides amongst other things that carriers by water "shall be liable for the loss of or damage to goods entrusted to them for conveyance be aforesaid, except that they shall not be liable to any extent whatever to make good any loss or damage *happening without their actual fault or privity, or the fault or neglect of their agents, servants, or employees*, (1) to any goods," etc., etc. (enumerating the exceptions).

If the fact that the Carriers Act has never had any application in Ontario, and therefore that decisions under it are inapplicable here, had not been almost entirely lost sight of, the following expression of opinion could scarcely have fallen from the late Chief Justice Moss in *Fitzgerald* v. *The G. T. R.*, 4 App., at p. 618:

"It thus appears to me that as the law applicable to this case is the same as governed the English Courts before the passing of the Railway and Canal Traffic Act, 1854, there is an overwhelming body of authority to show that the carrier may, by conditions aptly framed, protect himself against the consequences of negligence."

The decision in *Hamilton* v. *The G. T. R.* was directly followed in *Spettigue* v. *The G. W. R.*, 15 C. P. 315, and *Bates* v. *The G. W. R.*, 24 U. C. R. 544, where the necessity of legislative redress was remarked on by the judges. Then began the course of legislation which formed the subject of so much discussion in *Vogel* v. *The G. T. R.*, 10 App. 162 (recently affirmed by the Supreme Court). How strenuously, and for a time successfully, this legislation was resisted by the railways may be seen in *Scott* v. *The G. W. R.*, 23 C. P. 182, and *Allan* v. *The G. T. R.*, 33 U. C. R., 483.

If railway companies were our only

carriers, the decision in Vogel's case would seem to have finally settled the question, and the above inquiry would be interesting only as a matter of history. There are, however, many classes of carriers, unaffected by the provisions of the Railway Acts; and possibly the question of *their* liability for negligence may, on some future occasion, necessitate a review of the case which I have above attempted to analyse.

A. C. GALT.

RECENT ENGLISH DECISIONS.

The *Law Reports* for August include 17 Q. B. D., pp. 309-413; 11 P. D., pp. 73-119; 32 Chy. D., pp. 397-524; and 11 App. Cas., pp. 229-415.

CONFLICT OF LAWS—ASSIGNMENT OF CHOSE IN ACTION.

Taking up the cases in the Queen's Bench Division, the first to be noted is *Lee* v. *Abdy*, 17 Q. B. D. 309, which was an action against an English Company upon a policy of life insurance, which had been assigned to the plaintiff by her husband, who at the time of the assignment and until his death was domiciled at Cape Colony, by the laws of which colony the assignment was invalid by reason of the assignee being the assignor's wife. The court (Day and Wills, JJ.), held that the assignment was governed by the law of Cape Colony, and therefore that the plaintiff was not entitled to recover. Day, J., at p. 312, says:

The subject-matter of the assignment is a chose in action which has no locality. The general rule, subject to exceptions which do not seem to me to apply to the present case, is that the validity and incidents of a contract must be determined by the law of the place where it is entered into. The assignment here in question is an assignment that exists, if at all, by virtue of a contract between assignor and assignee, and I cannot see how, if there was no valid contract between them, there can be any valid assignment.

Wills, J., confessed that he felt some doubts with regard to the case, owing to the difficulty in deducing the principle from the authorities cited; but if there were no authorities he thought the rational view was that "this assignment being invalid according to the law of the country where it was made, and where the parties to it were domiciled, it must be treated as invalid here."

MARINE INSURANCE—RISK OF CRAFT TILL GOODS LANDED—TRANSHIPMENT TO LIGHTERS FOR RESHIPMENT.

Houlder v. *Merchants' Marine Insurance Co.*, 17 Q. B. D. 354, is a decision of the Court of Appeal affirming the judgment of Field, J. The action was brought on a policy of marine insurance, which insured the plaintiff against "all risk of craft until the goods are discharged and safely landed." The goods in question arrived at their destination, and instead of being landed, were then transferred to lighters with a view to their reshipment for exportation; while on the lighters awaiting reshipment they were lost. The Court of Appeal held that the loss was not covered by the policy. Bowen, L.J., who delivered the judgment of the court, says, at p. 356:

Cargo discharged upon lighters for transhipment to an export vessel is accordingly exposed to a peril which is not the same as that which it encounters if discharged upon lighters to take it to the shore at once. It is perfectly true that by taking delivery short of the shore the consignee determines the risk insured. But this is not because in such a case the risk is terminated by an actual landing, but because the consignee waives the landing, and himself terminates the risk instead, by taking delivery short of the land. Nobody, in commercial or business language, can say that goods are landed which are transhipped without landing, or that goods which are placed in lighters for transhipment are placed in lighters to be landed.

CRIMINAL LAW—BLOW AIMED AT ONE PERSON ACCIDENTALLY WOUNDING ANOTHER.

In the *Queen* v. *Latimer*, 17 Q. B. D. 359, the question submitted to the court was whether when the prisoner, in unlawfully striking at a man, accidentally struck and wounded a woman beside him, could be convicted of unlawfully and maliciously wounding the woman, and the court (Lord Coleridge, C.J., Lord Esher, M.R., Bowen, L.J., and Field and Manisty, JJ.,) held that he could, and affirmed the conviction.

TRIAL WITH JURY—DISCRETION OF JUDGE AS TO COSTS.

The case of *Huxley* v. *West London Extension R. W. Co.*, 17 Q. B. D. 373, is chiefly remarkable for the extraordinary character of the judgment of Lord Coleridge, which is nothing less than a somewhat hot-tempered counter-blast against the recent decisions of the Court of Appeal, *Re Jones* v. *Curling*, 13 Q. B. D. 262, wherein it claimed the right to review the

discretion of a judge who had deprived a successful party of costs, on the ground that the existence of "good cause," upon which the right to exercise the discretion depends, is a question of fact. This Lord Coleridge conceives to be a mischievous interference with the discretion of the judges of first instance, and instead of its being a question of fact, and therefore appealable, he considers it to be a mere question of opinion. We venture to doubt the propriety of an inferior tribunal undertaking to criticise the decisions of a superior court at all, and certainly we do not think Lord Coleridge has set a very praiseworthy example in either the manner or temper in which his criticisms are couched. How would Lord Coleridge like to see the judgments of his own court criticised in a similar strain by, say, a Judge of a County Court? Would the spectacle be edifying, or for the public good? What seems to have roused the ire of the Chief Justice was the fact that one of the judges in appeal had said that "the proper *order* for the Court of Appeal to make is to *allow* the Chief Justice, with the expression of their opinion, to exercise his discretion as to the costs of the action." "Such language," he says, "speaks for itself; nor is it, perhaps, worth the time it has taken to mention it."

WILL—REVOCATION—OBLITERATION OF CODICIL—R. S. O. c. 106, s. 22.

Turning now to the cases in Probate Division, the first case we think it necessary to notice is *In re Gosling*, 11 P. D. 79. In this case the testator had obliterated the whole of a codicil, including his signature, by thick black marks, and at the foot of it had written the words signed by himself and two witnesses: "We are witnesses of the erasure of the above," and it was held that this constituted a valid revocation of the codicil, and that the words above mentioned were "a writing declaring an intention to revoke."

WILL—ATTESTATION.

In *Re Leverington*, 11 P. D. 80, a will was propounded which was attested by two witnesses, but one of the witnesses had, at the testator's request, signed her husband's name instead of her own, the husband not being present. It was held that the attestation was invalid, and probate was refused.

WILL—UNDUE INFLUENCE.

In *Wingrove* v. *Wingrove*, 11 P. D. 81, Sir James Hannen laid down the law that to establish undue influence sufficient to invalidate a will, it must be shown that the will of the testator was coerced into doing that which he did not desire to do; and the mere fact that in making his will he was influenced by immoral considerations does not amount to such undue influence so long as the dispositions of the will express the wish of the testator.

DEVISE OF INCUMBERED AND UNINCUMBERED ESTATES—TENANT FOR LIFE—INTEREST—REPAIRS.

Turning now to the reports in the Chancery Division, we think *In re Hotchkys*, *Freeke* v. *Calmady*, 32 Chy. D. 408, deserving of a brief notice. A testatrix devised to trustees "all my real and personal estate upon trust, at their discretion to sell such parts thereof as shall not consist of money," and out of the proceeds to pay her debts, etc., and invest the residue; and further provided that the trustees should "stand possessed of such real and personal estate, moneys and securities," upon trust to pay the rents, interest, dividends and annual produce thereof," to T. during her life, with a clause of forfeiture on alienation, and after the death of T. she gave her "real and personal, and the securities" in which the same might be invested to V. C. absolutely. At the death of the testatrix she was entitled to the P. estate, which was unincumbered. Some time after her death a remainder in fee to which she was entitled in the B. estate, which was subject to mortgages made by prior owners, fell into possession. This estate was out of repair, and the income, though sufficient to pay the interest on the mortgages, was inadequate to make the repairs. The Court of Appeal held that the will did not create a trust for conversion, but only gave the trustees a power of sale; that the trustees had no power to apply the rents of the P. estate in making repairs on the B. estate, to the prejudice of the tenant for life, though the court if applied to would sanction the doing of such repairs as were expedient, on terms which would be equitable as between the tenant for life and the remainderman. The court further held (in this respect reversing Bacon, V.C.,) that the tenant for life was not at liberty to accept the devise of the P. estate and refuse the other.

Recent English Decisions.

Injunction obtained by misrepresentation.

The only point for which we think it needful to refer to in *Wimbledon* v. *Croydon*, 32 Chy. D. 42, is the decision of North, J., that it is proper to move to discharge an *ex parte* injunction on the ground of its having been obtained by misrepresentation, and for a reference as to damages, notwithstanding the injunction is about to expire. He says, at p. 41:

> It seems to me here that the order is one which ought not to have been obtained for the reasons I have given, and that under those circumstances, inasmuch as it obvious from the affidavits that some damage has been sustained by the defendants, they would be entitled to apply for and are entitled now to have, a reference to inquire what the damage is, and therefore the motion for that purpose would be proper in any case.

Mortgage of realty and personalty—Redemption.

In *Hall* v. *Heward*, 32 Chy. D. 430, real and personal estate having been mortgaged together, the mortgagor died leaving a will of personal estate but intestate as to realty. It was unknown who was his heir-at-law, and the mortgagee entered into possession. The executrix then brought the action to redeem both the real and personal estate, which was resisted by the mortgagee on the ground that she was only entitled to redeem the personalty on payment of a proportionate part of the mortgage debt, but Bacon, V.C., held she was entitled to redeem both estates, and that on redemption by her the defendant should convey both properties to the plaintiff, subject to such equity of redemption as might be subsisting therein in any other person or persons. From this judgment the defendant appealed, but the Court of Appeal held that it was right, and that as the owner of the equity of redemption of one of two estates mortgaged could not have insisted on redeeming that estate separately, so neither could he be compelled to redeem it separately, his right being to redeem the whole, subject to the equities of the other person interested. It was also held that though the heir-at-law ought to have been a party, yet that the court should not delay making a decree until he was ascertained and added; and further, that though a mortgagee in possession, who voluntarily transfers his security, is liable to account for the subsequent rents, yet this is not the case when the transfer is made pursuant to the order of the court.

Bill of exchange drawn against firm—Acceptance by one of partners—Joint or separate liability—Administration.

In re Barnard, Edwards v. *Barnard*, 32 Chy. D. 447, was an application for an administration order, which was refused under the following circumstances: A bill of exchange had been drawn on a firm; B., one of the partners, accepted the bill, signing the firm's name, and adding his own underneath. B. died, and the holder of the bill, claiming to be a creditor, applied for the administration of his estate. It was proved that B.'s estate was insufficient for the payment of his separate debts. Bacon, V.C., made the usual administration order; but, on appeal, the Court of Appeal held that the acceptance of the bill was the acceptance of the firm, and that the addition of B.'s name did not make him separately liable, and as it was clear no part of his estate would be available for payment of the partnership debts, the order was discharged, and the application refused.

Vendors and Purchasers Act—Return of deposit—Costs.

In *Re Hargreaves* v. *Thompson*, 32 Chy. D. 454, the Court of Appeal decided that u, on an application under the Vendors and Purchasers Act, where the vendor fails to make out a title, the court may order him to return the purchasers' deposit, with interest, and order him to pay the purchasers' costs of investigating the title, in this respect affirming what was done by Hall, V.C., with some doubt as to his jurisdiction, in *Re Higgins & Hitchman*, 21 Chy. D. 95, and Pearson, J., in *Yielding & Westbrook*, 31 Chy. D. 344.

Mortgage—Foreclosure—Stop order—Plaintiff's first and last mortgage—Costs.

Several points were determined in *Mutual Life Assurance Co.* v. *Langley*, 32 Chy. D. 460. In the first place, the Court of Appeal (affirming Pearson, J.,) held that where a mortgage is made of two funds, one of which is in court, and the other in the hands of trustees, the assignee must, in order to complete his title, obtain a stop order as to the fund in court, and, as regards the fund in the hands of trustees, must give the trustees notice of his assignment; and an encumbrancer on a fund in court, who obtains a stop order, is entitled to priority over a prior encumbrancer who does not obtain a stop order, and

of whose encumbrance the subsequent encumbrancer had no notice when he took his security, although he may have had notice thereof prior to obtaining his stop order. The Court of Appeal, moreover, held (in this respect reversing Pearson, J.,) that where there are two funds mortgaged to A., and subsequently one of the funds is mortgaged to B., B. is entitled to redeem both funds, although his mortgage included only one; and, further, that where A., the first mortgagee of both funds, took subsequent incumbrances on one of the funds, and B. took subsequent incumbrances on the other, such incumbrances must be redeemed in the order of date, and one of A.'s (the plaintiff) being last in date, and he being thus in the position of first and last mortgagee, if he did not redeem, he must pay the costs of the suit.

COMPANY—WINDING UP—STAYING QUASI-CRIMINAL PROCEEDINGS AGAINST COMPANY—45 VICT. C. 23, S. 20 (D).

In *Re Briton, Medical and General Life Assurance Association*, 32 Chy. D. 503, a petition was presented for winding up the company; but before any order was made, summonses were taken out at a police court by a person not interested in the affairs of the company, to recover penalties for alleged offences, under certain Acts of Parliament. The company thereupon applied for an injunction to restrain the proceedings in the police court until the hearing of the petition, which was granted by Kay, J., under Sect. 85 of *The Companies' Act*, 1862, which provides that "the court may, at any time after the presentation of a petition for winding up a company under this act, and before making an order for winding up the company, upon the application of the company or any creditor or contributary of the company, restrain further proceedings in any action, suit or proceeding against the company upon such terms as the court thinks fit." (See 45 Vict. c. 23, s. 20 (D).

ATTACHMENT OF DEBTS—EFFECT OF GARNISHEE ORDER—PRIOR EQUITABLE ASSIGNMENT.

In re General Horticultural Co., 32 Chy. D. 512, Chitty, J., held that the service of an attaching order upon a garnishee, binds only so much of the debt owing from the debtor to the garnishee, as the debtor himself could honestly deal with at the time the attaching order was made, and consequently the attaching creditor is postponed to a prior equitable assignment of the debt, even though the assignee may not have given notice to the debtor of the assignment.

WILL—ERRONEOUS STATEMENT OF FACT IN WILL.

In re Wood, Ward v. *Wood*, 32 Chy. D. 517, the question was, How far a legatee is bound by a statement in a will that the testator had advanced him a sum of money named, which sum he is by the will required to bring into hotchpot for the purposes of the division of the testator's estate. The court (North, J.,) decided that the legatee was bound by the statement in the will, and was not at liberty to go into evidence to show that the advance which had been made was of a less amount than that named in the will.

PRACTICE—LEAVE TO APPEAL TO PRIVY COUNCIL.

In *Attorney-General* v. *Gregory*, 11 App. Cas. 229, the petitioner, who applied for special leave to appeal, had, by a special agreement in the court below, come in and consented to be made a party to the cause in appeal, and to be bound by the order of the Supreme Court of Canada to be made therein, but by the terms of the agreement the powers of the Supreme Court were defined and restricted, and its order was to be "considered a final disposition of all contentions whether now in litigation or not." Under these circumstances, their lordships were of opinion that the Supreme Court in deciding the case was acting under the terms of a special reference, and not in its ordinary jurisdiction as a Court of Appeal, and therefore its decision was not the subject of appeal, and leave to appeal to the Privy Council was therefore refused.

VENDOR AND PURCHASER—SALE BY COURT.

The case of *Boswell* v. *Coaks* has, under the name of *Coaks* v. *Boswell*, 11 App. Cas. 232, at last come to an end, the judgment of the House of Lords reversing the judgment of the Court of Appeal, 27 Ch. D. 424, and restoring that of Fry, J., the judge of first instance, 23 Chy. D. 302. It may be remembered that the action was brought to set aside a sale made in a cause in court, on the ground that the purchaser had been a solicitor for one of the defendants, and had thus acquired peculiar

knowledge as to the value of the property, and also on the ground that he had not made a full disclosure to the court of all the information he possessed in reference to the property in question. The defendant had obtained the leave of the court to bid. When the case was before the Court of Appeal that court set aside the sale, and laid down the rule that a person desirous of buying property which is being sold under the direction of the court, must either abstain from laying any information before the court in order to obtain its approval, or must lay before it all the information he possesses, and which it is material the court should have to enable it to form a judgment on the subject under its consideration;" but this their lordships considered too broad a statement of the duty of a purchaser, and they held that the withholding of information on some material point on which it is neither offered nor requested, and concerning which there is no implied representation positive or negative, direct or indirect, by the purchaser in what is actually stated, constitutes no breach of duty or good faith on his part which would invalidate his purchase. On the evidence, therefore, they held that the impeached sale was valid, although their lordships were all of opinion that the leave to the defendant to bid had been improvidently granted. The duty of a purchaser at a sale by the court is thus stated by Lord Selborne, at p. 235:—

> Every such purchaser is bound to observe good faith in all that he says or does with a view to the contract, and (of course) to abstain from all deceit, whether by suppression of truth or by suggestion of falsehood. But inasmuch as a purchaser is, generally speaking, under no antecedent obligation to communicate to his vendor facts which may influence his own conduct or judgment, when bargaining for his own interest, no deceit can be implied from his mere silence as to such facts, unless he undertakes or professes to communicate them. This, however, he may be held to do, if he makes some other communication which, without the addition of these facts, would be naturally or probably misleading. If it is a just conclusion that he did this intentionally, and with a view to mislead in any material point, that is fraud; and it is a sufficient ground for setting aside a contract, if the vendor was in fact so misled.

MALICIOUS PROSECUTION—REASONABLE AND PROBABLE CAUSE—CORPORATION.

Abrath v. *The North Eastern R. W. Co.*, 11 App. Cas. 247, was an action brought to recover damages against the defendant company for an alleged malicious prosecution. At the trial the judge (Cave, J.,) directed the jury that it was for the plaintiff to establish a want of reasonable and probable cause, and malice, and that it lay on him to show that the defendants had not taken reasonable care to inform themselves of the true facts of the case, and he asked the jury to say whether they were satisfied the defendants did take reasonable care to inform themselves of the true facts, and that they honestly believed in the case which they laid before the magistrates. The jury having answered these questions in the affirmative, the judge gave judgment for the defendants. On appeal to the Divisional Court (Grove and Lopes, JJ.,) a new trial was ordered on the ground of misdirection (11 Q. B. D. 79). The Court of Appeal reversed this decision, and ordered the judgment of Cave, J., to stand (11 Q. B. D. 440). From this latter decision an appeal was had to the House of Lords, who now affirm it. The case is noteworthy for an *obiter dictum* of Lord Bramwell, who was of opinion that in no case could an action of the kind be brought against a corporation aggregate, because it is incapable of malice or motive, which he considered necessary ingredients in such a cause of action.

PARTNERSHIP—CONTINUATION OF BUSINESS WITHOUT FRESH ARTICLES.

Neilson v. *Mossend Iron Co.*, 11 App. Cas. 298, is an important decision on the law of partnership. After the expiration of the time limited by articles of partnership, the partners without fresh articles continued to carry on the business. The articles contained express stipulations as to the terms on which the partnership should be dissolved, or partners should be permitted to retire, and those continuing the business should be permitted to buy it as a going concern. The question was whether this clause continued operative. The House of Lords held, reversing the decision of the court below, that it did not; and that although it is true that upon the partners continuing to carry on the business after the expiration of the period limited by the articles, the original contract is deemed to be prolonged by tacit consent, yet only such conditions remain in force as are not inconsistent with any implied term of the renewed contract, and that one implied term of such a new contract is that

each partner has the right, when acting *bona fide*, and not for the purpose of obtaining an undue advantage, instantly to determine the partnership, and that this right could not be controlled by any express stipulations in the articles to the contrary.

LANDLORD AND TENANT—ASSENT OF LANDLORD TO ASSIGNMENT OF LEASE—PENALTIES, PENAL AND LIQUIDATED—WINDING UP—CONTINGENT DAMAGE.

The only other case in the Appeal Cases to which which we think it necessary to refer is *Elphinstone* v. *Monkland Iron and Coal Co.*, 11 App. Cas. 332, in which several points of interest are decided by the House of Lords. In the first place, it was held that when a lease is not assignable without the consent of the lessor, the fact that the lessor did not object to the assignees taking possession cannot, irrespective of all other circumstances, be held sufficient to imply his assent to the assignment. Secondly, it was held by their lordships, reversing the decision of the court below, that where lessees were granted the privilege of placing slag from blast furnaces on land let to them, and they covenanted to pay the lessor £100 per acre for all land not restored at a particular date, the sum so agreed to be paid, though described in one part of the agreement as "the penalty there... stipulated," was not a penalty, but liquidated damages. Thirdly, their lordships further decided that when a limited company is being voluntarily wound up, a lessor of the company who has a claim against the company for damages for assigning the lease without his consent may obtain an interdict against the liquidator's dividing the surplus among the shareholders, until some provision is made to meet his future contingent claims against the company.

SELECTIONS.

UNITED STATES CASES.

Corporations — Mortgage of corporate property—All stock owned by one person.

When all the stock of a private corporation is owned by one persor, a mortgage executed by him creates a valid equitable lien on the property of the corporation, enforceable against him and his representatives, and it is not necessary for the corporation as such to unite with him in the mortgage. We think the mortgage to Swift was good and operative to charge the property conveyed by it, irrespective of the attempted execution by the company. At the time of its execution, Cruikshank had become the owner of all the stock of the company, and of all its property. From that moment he might have renounced his rights under the act of incorporation, and might have conducted the business as a private individual, without corporate formalities. Being then absolute proprietor in equity of all that belonged to a purely private enterprise, in which the public had no interest whatever, we know of no principle, on the ground of public policy or otherwise, requiring his act, in charging the property for the agreed indebtedness of the corporation to Swift, for loans to and claims against it, and for his stock in it sold to Cruikshank, to be denied efficacy because he had not then reorganized the company, and brought in other persons to help him to do that in a corporate way which we think, from the very nature of the business, he had a right to abandon entirely, and even the business if he chose. A man can certainly do what he pleases with his own property, if he does not thereby prejudice any of the rights of subsisting creditors. It does not appear that any existing creditors were injuriously affected thereby. The appellees became such afterward. It is true that the corporation, as such, united (whether effectually or not it is immaterial to discuss) with Cruikshank in the mortgage. Why it was thought necessary for it to do so we do not know. Its doing so has certainly complicated the matter, and as we think diverted the mind of the court below from

the true and only equitable aspect of the case. If there had been no attempt on the part of the corporation to unite in the mortgage, and it had only been executed by Cruikshank, who was the sole owner of all the property mortgaged, how could it have been denied operation? And would not the persons who took stock from Cruikshank afterward, and participated in perpetuating the operations of the corporation, have held subject to the mortgage put on the effects of the corporation before they bought the stock? And with such mortgage of record, would not persons dealing with and trusting the corporation afterward be affected with knowledge of such mortgage, and be subordinated to it? There would seem to be no escape from such conclusion. In the Bellona Co. case, 3 Bland. 446, the chancellor says the ownership by one person of all the stock of a private corporation aggregate virtually dissolves the corporation. For the time being it certainly does suspend corporate action, although according to the now generally received understanding of the law, such sole owner may dispose of some of his stock to others and continue the corporate existence by the election of necessary officers. *Russell* v. *McLellan*, 14 Pick. 70; *Newton Manufacturing Co.* v. *White*, 42 Ga. 148; Boone Corp., secs. 199, 200. While therefore the purchase by Cruikshank of all the stock in the corporation, and all its property, did not necessarily work a surrender of the company's franchise, it did virtually, for the time being, suspend its operations as a corporation until the election of new officers through new stockholders purchasing from Cruikshank. If from the moment of becoming sole owner, Cruikshank, as already suggested, had concluded to conduct the business as an individual, and without corporation formalities, can it be doubted that in such case this mortgage, executed by him, created a valid equitable lien on the property, enforceable against him and his representatives, and that in such case the execution, or attempted execution, thereof by the corporation could be wholly disregarded? The mortgage expressly provides for the payment to Cruikshank or his representatives (and not to the corporation) of any surplus proceeds after satisfying the mortgage in case of sale for default. It thus appears that the transaction was regarded by the participants in it (and all who were interested did participate) as giving Cruikshank the absolute control and ownership of all that pertained to the company. If so, his right to equitably charge it with the company's debts and his own ought not, it would seem, to be questioned. Md. Ct. App., June 23, 1886. *Swift* v. *Smith*. Opinion by Irving, J.

Exemplary damages—Tort—Husband's liability for wife's tort.

Exemplary damages are recoverable in an action against a husband and wife for the malicious trespass of the wife, even though the husband is free from blame. When two persons have so conducted themselves as to be jointly liable for a tort, each is responsible for the injury committed by their common act; but when motive may be taken into consideration, the improper motive of one cannot be made the ground of aggravating the damages against the other if he is free from such motive. In such case the plaintiff must elect against which party he will seek aggravated damages. *Clark* v. *Newsam*, 1 Exch. 131. So a master, sued for the trespass of his servant, is not liable for exemplary damages, however evil the motive of the servant, if he is himself without malice. The Amiable Nancy, 3 Wheat, 546; *Cleghorn* v. *N. Y. C. & H. R. R. Co.*, 56 N. Y. 44. In all these cases it is to be observed that the plaintiff has his election to proceed against all or any of the wrong-doers; and as in such case it would be unjust to make the malicious motive of one party the ground of enhancing damages against another who is free from such motive, if the plaintiff proceeds against all, he thereby deprives himself of the right he otherwise would have had to claim exemplary damages. But the case is different when suit is brought for a tort of the wife, for which the husband is liable solely by reason of her coverture, for then the plaintiff has no election, but must proceed against both. And herein lies the distinction between this case and the cases relied upon by the defendant; for the husband is liable, not as master, but as husband, and because of the oneness of the twain in the eye of the law. We have not referred to, nor have we found, much authority for this distinction, but we think

it must exist in principle. Vt. Sup. Ct., Aug. 21, 1886. *Lombard* v. *Batchelder*. Opinion by Rowell, J.

Telegraph—Reasonable regulations—Deposit to prepay answer.

A rule of a telegraph company requiring that a transient person sending a message calling for an answer shall deposit in advance an amount sufficient to pay for a reply of ten words is not unreasonable. The only case directly in point as to the reasonableness of these rules in their relation to the deposit of money to pay for the expected answer by transient persons, is that of *W. U. Tel. Co.* v. *McGuire*, 104 Ind. 130; S. C., 54 Am. Rep. 296, where it was held to be reasonable, and I am of the same opinion. I am not entirely satisfied with the grounds of that judgment; for it seems to me to place the ruling too entirely upon a mere question of etiquette between the parties to the correspondence. But there is great force in the argument of plaintiff's counsel that it is none of the telegraph company's business to enforce rules of social courtesy like that; and since it cannot know whether there will any reply, or whether if there be the circumstances may not be such that the sender of the answer should himself pay for it, and be anxious and willing to do so, the company should not refuse to send the original message, if it be paid for. He likened it to a regulation of a carrier of passengers refusing to transport a passenger at regular rates, unless he should buy a return ticket. And I take it that in an equal number of cases the relation of the parties may be such that the sender might reasonably expect and demand, notwithstanding the social rule of courtesy above referred to, that his correspondent should pay for the answer, and that in an equal number of cases he does do so. In many other cases, when the original message is solely about his own business, the sender may reasonably hope and expect the answer to be paid for by the other party. Again, often a transient person in distress, and with reduced funds, might wish to rely on the other party to pay for the answer; and since the company may protect itself by refusing to take the answer without prepayment by its sender, it would seem an unreasonable hardship, under those circumstances, to demand that he pay for both messages in advance. Or he might wish to go away to receive the answer, or to receive it over another line, or at another place, etc., and so under many imaginable circumstances, be reasonably exempt from the burden of depositing money in advance for a message he may never receive, and find it inconvenient and expensive to get back his deposit. Hence, take it altogether, I should not support the reasonableness of this regulation wholly on the ground of the sender's obligation to pay for the answer. He may very often be not so obliged, and that is an answer to it. But I think this regulation is a reasonable one, notwithstanding the force of the plaintiff's attack on this Indiana case. It should not be segregated from the other regulations of the company on the subject of collecting the tolls, and tested by itself alone, on the reasoning of plaintiff's argument, as above set forth. This is only one regulation of a carefully devised system for securing payment of tolls, consistently with enlarged accommodation of the public in allowing the customers of defendant to regulate among themselves this very matter of adjusting the burden of these toils. I have quoted in the statement of facts the entire regulations on the subject, as I find them printed, italics and all, and an analysis of them shows that the company is endeavouring to accommodate the public as much as possible in this matter. It might reasonably, as the railroads do as to passenger fares, demand prepayment by the sender of all messages, whether they be originals or answers. But it does not do this. It allows answers to be sent at the expense of the person whose message is answered, and this is a privilege and a benefit it seeks to confer on the original sender by undertaking to collect of him that toll instead of requiring his correspondent to pay it, thereby lessening the chances of his answering at all. It requires all original messages to be prepaid or guaranteed. If guaranteed the company will allow the sender, if he choose, to place the burden of the toll and the addressee, by itself undertaking to collect the toll of him in the first instance, but of the sender at last, if the other refuses to pay. It seeks as to answers to accommodate the public in the same way, by undertaking to collect of the person addressed; and as

I understand the regulations, the sender of the answer is not expected to pay at all, certainly not to prepay, unless it be an answer to a message which has been sent to be collected from himself, or is sent to parties away from home, or addressed to hotels: and in these last-mentioned cases he need not prepay if it be an answer to a message marked "answer prepaid." In order to give them their correspondents, and all persons who are interested in the use of the telegraph, the benefit of this system of collecting and adjusting tolls, the requirement is made that transient persons shall pay for the expected answers in advance, and it is not unreasonable, as a part of that system. It may be that a more liberal rule might be devised for transient persons, and that this one operates sometimes harshly and inconveniently; but that is not the question. In view of the whole system, a court cannot say that the power and discretion of the company to determine for itself what is best for all concerned has been unreasonably exercised. It has a choice of its own regulations, and the test of reasonableness is not whether some other would answer its purposes as well or better, but whether this is fairly and generally beneficial to the company, and all its customers. Cir. Ct., W. D. Tenn., July 1, 1886. *Hewlett* v. *Western Union Tel. Co.* Opinion by Hammond, J.

In *McCaffrey* v. *Smith*, 41 Hun. 117, it was held that neither the legislature nor a village can confer authority on a person to occupy part of the public street as a hack stand as against the adjacent lot owners. The court said: "The plaintiff is the lessee of the hotel and premises, and as such was in the actual possession and occupation thereof at the time the acts complained of were committed, and he was entitled to have the highway adjoining and in front of such premises kept free from all obstructions and nuisances. *White's Bank of Buffalo* v. *Nichols*, 64 N.Y. 73. The public interest in the highway is nothing but an easement which gives to individuals the right to pass or repass on foot, or with animals and conveyances, and as an incident, they may do all acts necessary to keep the highway in proper repair for travelling purposes. *Kelsey* v. *King*, 33 How. Pr. 39. Any use of a highway except for the purposes of travelling, and the making of necessary repairs under the direction of proper authorities, constitutes a trespass against the adjoining owner. *Jackson* v. *Hathaway*, 15 Johns. 447; *Adams* v. *Rivers*, 11 Barb. 390. And actions of trespass or ejectment may be maintained therefor. *Bloomfield Gas-light Co.* v. *Calkins*, 62 N.Y. 386. The legislature undoubtedly had the power to authorize the village authorities to pass ordinances and by-laws (which they might enforce) limiting and restricting the use which the public might make of the streets beyond their rights of travel—ordinances which could be enforced as against the adjoining owners themselves, for the purpose of keeping the streets open to free and uninterrupted travel. But the Legislature had not the power, neither had the municipal authorities, as against the adjoining owner, to confer upon any person the right to make use of the highway for any other purpose than to pass and repass without the consent of the owner of the fee. *Williams* v. *N. Y. C. R. Co.*, 16 N.Y. 97; *Henderson* v. *Same*, 78 id. 423; *Knox* v. *Mayor*, 55 Barb. 404; *People* v. *Mayor*, 59 How. Pr. 277. As the by-laws in question afforded no protection to the defendants for the acts of trespass, committed as against this plaintiff, the evidence was properly excluded." To the same effect is *Branahan* v. *Hotel Co.*, 39 Ohio St. 333; S. C., 48 Am. Rep. 457.—*Albany L. J.*

DIVISION COURTS.

DIVISION COURT CLERKS' ASSOCIATION.

EARLY in this year an association was formed by a number of the Division Court clerks in Ontario, having for its object the protection of their body, and the furtherance of the interests of the Division Courts; and having in view, amongst other matters, the desirability of securing uniformity in practice, and settling difficulties arising in the interpretation of the tariff. Questions arising under this tariff have often proved sources of irritation and vexation, and the desirability of a uniform practice in all the Courts goes without saying. It was also thought that the result of the clerks getting together for consultation from time to time might be some suggestions to the Legislature in reference to changes in the law which would facilitate the administration of justice in these Courts.

We have received from the secretary of the association, and are happy to make space in our columns for the minutes of the last meeting of the association as follows:—

Minutes of Special Meeting of Division Court Clerks' Association of Ontario, held at Court House, in the City of Toronto, on Tuesday, the 14th September, 1886.

Present—R. W. Errett, Esq., President; J. McIntosh, Esq., 1st Vice-President; W. G. Fraser, Esq., 2nd Vice-President; and Hy. Jennings, Secretary-Treasurer, with about fifty members.

The President took the Chair, and called the meeting to order, at 2.15 p.m.

The minutes of the last meeting were read and confirmed.

The Secretary then read a number of letters from members of the association giving reasons for their non-attendance.

His Honor Judge Sinclair was then introduced by the President, and gave a most interesting address, in which he complimented the association on its success so far, and predicted a happy future for it. He said that he considered it a move in the right direction, as he considered that the Division Court Clerks were, in his opinion, one of the principal factors in the administration of the laws of the country. He also stated that he had been somewhat taken by surprise by the asking of his opinions on several points which had been submitted to this meeting, and that he would be very happy to give his opinions as far as he could; but would not undertake to reply to them finally here, as some of them required looking into, but that at the same time he would make this offer that, if these or any questions were submitted to him through the medium of the association by the hands of the President or Secretary, he would be happy to reply to them in writing, but would not undertake to answer any individual correspondence. He also suggested the great advisability of the association having a good Executive Committee to bring before the Government and Board of County Judges any suggestions that might be deemed of importance to the Clerks as a whole, at the same time pointing out that the whole body of Clerks must be in unity togetherso as to have weight.

At the conclusion of his speech, a hearty vote of thanks was tendered to his Honor by the meeting, to which he replied in suitable terms. Several questions which had been forwarded to the Secretary were then given out and discussed.

Jas. Dickey, Esq., Inspector of Division Courts, then addressed the meeting, expressing his pleasure at being present, and corroborating the opinions expressed by his Honor Judge Sinclair, and giving it as his opinion that this and similar meetings would conduce most favourably towards a uniform understanding of the tariff and also procedure.

A hearty vote of thanks was tendered to Mr. Dickey for his present kindness, as well as for the great courtesy and kindness he had shown to all Clerks since his appointment.

Mr. O'Brien, editor of the *Canada Law Journal*, was then introduced to the meeting, and made a happy and entertaining speech, expressing the most kindly feelings towards the association, and at the same time stating that he was prepared to make some arrangements whereby a space could be afforded the Clerks in the *Law Journal* for discussion and enquiries.

A vote of thanks was also tendered to Mr. O'Brien for his kind offer.

Several questions were then propounded and discussed upon relative to fees, procedure and other matters.

Some accounts were presented and ordered to be paid.

The Executive Committee then presented draft of constitution and by-laws, which were discussed clause by clause, and, after some alterations had been made, were adopted. On motion, it was decided that the present officers should hold office until the next annual meeting in September, 1887. The Secretary was instructed to have copies of the by-laws and constitution printed and distributed, also copies of the minutes of this meeting.

HY. JENNINGS,
Secretary-Treasurer.

In accordance with the above suggestion, arrangments have been made to give space in each number of this journal or as often as occasion may require, for the publication of matters of interest to Division Court officers and those practising in these now important courts. Correspondents will kindly be as brief and pointed as possible as our space is limited.

Law Society of Upper Canada.

OSGOODE HALL.

TRINITY TERM, 1886.

During this Term the following gentlemen were called to the Bar, namely:—*Sept. 6th*—John Murray Clarke (Honours and Gold Medal); William Smith Ormiston, Edward Cornelius Stanbury Huycke, William Murray Douglas, William Chambers, William Nassau Irwin, George Henry Kilimer, Francis Cockburn Powell, Lawrence Heyden Baldwin, Lyman Lee, Robert Charles Donald, George Hutchison Esten, Thomas Urquhart, Joseph Coulson Judd, Walter Samuel Morphy, John Wesley White, Thomas Johnson, William H Wardrope, Francis Edmund O'Flynn. *Sept. 7th*.—Thomas Joseph Blain (who passed his examination in Trinity Term, 1885), William Lees, Charles True Glass, Alexander David Hardy, John Campbell, Richard John Dowdall, John Carson, Richard Vanstone, George Edward Evans, Charles Bagot Jackes. William Hope Dean; and *Sept. 17th*, William Robert Smythe (who passed his examination in Hilary Term, 1886). The following gentlemen received Certificates of Fitness to practise as Solicitors, namely:—John Murray Clarke, George Hutchison Esten, Wm. Smith Ormiston, Wm. Chambers, Alex. McLean, Robt. George Code, Henry Smith Osler, Edward C. S. Huycke, Wm. John McWhinney, Wm. Murray Douglas, Chas. True Glass, Robt. Charles Donald, Herbert Mcdonald Mowat, Francis Edmund O'Flynn, Lawrence Heyden Baldwin, John Bell Dalzell, Lyman Lee, Augus McCrimmon, Ranald D. Gunn, Joseph Coulson Judd, Heber Hartley Dewart, John Wesley White, Alex. David Hardy, Wm. Mansfield Sinclair, Hubert Hamilton Macrae, John Geale (who passed his examination in Hilary Term, 1886, also received his Certificate of Fitness). The following were admitted into the Society as Students and Articled Clerks, namely:—

Graduates.—George Ross, John Simpson, George Wm. Bruce, John Almon Ritchie, James Armour, John Miller, Frederick McBain Young, Malcolm Roblin Allison, Robert Baldwin, Charles Eddington Burkholder, Alexander David Crooks, Andrew Elliott, Robert Griffin Macdonald, Thomas Joseph Mulvey, James Milton Palmer, James Ross, John Wesley Roswell, Richard Shiell, Alfred Edmund Lussier, Charles Murphy, George Newton Beaumont, Charles Elliott.

Matriculants of Universities.—William Johnston, Samuel Edmund Lindsay, Nelson D Mills.

Junior Class.—Richard Clay Gillett, Alexander James Anderson, George Prior Deacon, Louis A. Smith, Andrew Robert Tufts, William Wright, Kenneth Hillyard Cameron, Harry Bivar Travers, John Alfred Webster, Thomas James McFarlen, William Elijah Coryell, John Henry Glass, Albert Henry Northey, Archibald Alexander Roberts, Charles B. Rae, George S. Kerr, William Egerton Lincolm Hunter, Francis Augustus Buttrey, Frederick Thomas Dixon, Hector Robert Argue Hunt, Daniel O'Brien, Franklin Crawford Cousins, Thomas Alexander Duff, William G. Bee, Stephen Thomas Evans, William Mott, Thomas Arthur Beament, and John Alexander Mather was allowed his examination as an Articled Clerk.

SUBJECTS FOR EXAMINATIONS.

Articled Clerks.

1884 and 1885.
- Arithmetic.
- Euclid, Bb. I., II., and III.
- English Grammar and Composition.
- English History—Queen Anne to George III.
- Modern Geography—North America and Europe.
- Elements of Book-Keeping.

In 1884 and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil, at their option, which are appointed for Students-at-Law in the same years.

Students-at-Law.

1884.
- Cicero, Cato Major.
- Virgil, Æneid, B. V., vv. 1-361.
- Ovid, Fasti, B. I., vv. 1-300.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. IV.

1885.
- Xenophon, Anabasis, B. V.
- Homer, Iliad, B. IV.
- Cicero, Cato Major.
- Virgil, Æneid, B. I., vv. 1-304.
- Ovid, Fasti, B. I., vv. 1-300.

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

Translation from English into Latin Prose.

MATHEMATICS.

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

ENGLISH.

A Paper on English Grammar.

Composition.

Critical Analysis of a Selected Poem:—

1884—Elegy in a Country Churchyard. The Traveller.

1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

HISTORY AND GEOGRAPHY

English History from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography, Greece, Italy and Asia Minor. Modern Geography North America and Europe.

Optional subjects instead of Greek:

FRENCH.

A paper on Grammar,
Translation from English into French prose.
1884—Souvestre, Un Philosophe sous le toits.
1885—Emile de Bonnechose, Lazare Hoche.

OF NATURAL PHILOSOPHY.

Books—Arnott's elements of Physics, and Somerville's Physical Geography.

First Intermediate.

Williams on Real Property, Leith's Edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and cap. 117, Revised Statutes of Ontario and amending Acts.

Three scholarships can be competed for in connection with this intermediate.

Second Intermediate.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 1 .136.

Three scholarships can be competed for in connection with this intermediate.

For Certificate of Fitness.

Taylor on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

For Call.

Blackstone, vol. 1, containing the introduction and rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris' Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law and Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of Intermediate Examinations All other requisites for obtaining Certificates of Fitness and for Call are continued.

1. A graduate in the Faculty of Arts, in any university in Her Majesty's dominions empowered to grant such degrees, shall be entitled to admission on the books of the society as a Student-at-Law, upon conforming with clause four of this curriculum, and presenting (in person) to Convocation his diploma or proper certificate of his having received his degree, without further examination by the Society.

2. A student of any university in the Province of Ontario, who shall present (in person) a certificate of having passed, within four years of his application, an examination in the subjects prescribed in this curriculum for the Student-at-Law Examination, shall be entitled to admission on the books of the Socity as a Student-at-Law, or passed as an Articled Clerk (as the case may be) on conforming with clause four of this curriculum, without any further examination by the Society.

3. Every other candidate for admission to the Society as a Student-at-Law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this curriculum.

4. Every candidate for admission as a Student-at-Law, or Articled Clerk, shall file with the secretary, six weeks before the term in which he intends to come up, a notice (on prescribed form), signed by a Bencher, and pay $1 fee; and, on or before the day of presentation or examination, file with the secretary a petition and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:
Hilary Term, first Monday in February, lasting two weeks.
Easter Term, third Monday in May, lasting three weeks.
Trinity Term, first Monday in September, lasting two weeks.
Michaelmas Term, third Monday in November, lasting three weeks.

6. The primary examinations for Students-at-Law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity and Michaelmas Terms.

7. Graduates and matriculants of universities will present their diplomas and certificates on the third Thursday before each term at 11 a.m.

8 The First Intermediate examination will begin on the second Tuesday before each term at 9 a.m. Oral on the Wednesday at 2 p.m.

9. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

10. The Solicitors' examination will begin on the Tuesday next before each term at 9 a.m. Oral on the Thursday at 2:30 p.m.

11. The Barristers' examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2:30 p.m.

12. Articles and assignments must be filed with either the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

13. Full term of five years, or, in the case of graduates of three years, under articles must be served before certificates of fitness can be granted.

14. Service under articles is effectual only after the Primary examination has been passed.

15. A Student-at-Law is required to pass the First Intermediate examination in his third year, and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second year, and his Second in the first six

months of his third year. One year must elapse between First and Second Intermediates. See further, R.S.O., ch. 140, sec. 6, sub-secs. 2 and 3.

16. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive certificates of fitness, examinations passed before or during Term shall be construed as passed at the actual date of the examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

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

18. Candidates for call or certificate of fitness are required to file with the secretary their papers and pay their fees on or before the third Saturday before Term. Any candidate failing to do so will be required to put in a special petition, and pay an additional fee of $2.

FEES.

Notice Fees	$1 00
Students' Admission Fee	50 00
Articled Clerk's Fees	40 00
Solicitor's Examination Fee	60 00
Barrister's " "	100 00
Intermediate Fee	1 00
Fee in special cases additional to the above.	200 00
Fee for Petitions	2 00
Fee for Diplomas	2 00
Fee for Certificate of Admission	1 00
Fee for other Certificates	1 00

PRIMARY EXAMINATION CURRICULUM

FOR 1886, 1887, 1888, 1889 AND 1890.

Students-at-law.

CLASSICS.

1886.
- Cicero, Cato Major.
- Virgil, Æneid, B. I., vv. 1-304.
- Cæsar, Bellum Britannicum.
- Xenophon, Anabasis, B. V.
- Homer, Iliad, B. VI.

1887.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. VI.
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. I.
- Cæsar, Bellum Britannicum.

1888.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. IV.
- Cæsar, B. G. I. (vv. 133.)
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. I.

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

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

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

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

MATHEMATICS.

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

ENGLISH.

A Paper on English Grammar.

Composition.

Critical reading of a Selected Poem:—

1886—Coleridge, Ancient Mariner and Christabel.

1887—Thomson, The Seasons, Autumn and Winter.

1888—Cowper, the Task, Bb. III. and IV.

1889—Scott, Lay of the Last Minstrel.

1890—Byron, the Prisoner of Chillon; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography — Greece, Italy and Asia Minor. Modern Geography—North America and Europe.

Optional Subjects instead of Greek:—

FRENCH.

A paper on Grammar.

Translation from English into French Prose.

1886, 1888, 1890 } Souvestre, Un Philosophe sous le toits.

1887, 1889 } Lamartine, Christophe Colomb.

or, NATURAL PHILOSOPHY.

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

ARTICLED CLERKS.

Cicero, Cato Major; *or*, Virgil, Æneid, B. I., vv. 1-304, in the year 1886: and in the years 1887, 1888, 1889, 1890, the same portions of Cicero, *or* Virgil, at the option of the candidates, as noted above for Students-at-Law.

Arithmetic.

Euclid, Bb. I., II., and III.

English Grammar and Composition.

English History—Queen Anne to George III.

Modern Geography—North America and Europe.

Elements of Book-Keeping.

Copies of Rules can be obtained from Messrs. Rowsell & Hutcheson.