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DIARY FOR APRIL.

3. Fri.....*Good Friday.* Prince Leopold born, 1853.
4. Sat.....Canada discovered, 1499.
5. Sun.....*Easter.*
6. Mon.....Easter Monday. Non-jury sittings of County Court (except York). County Court and Surrogate Court Terms commence.
11. Sat.....County Court and Surrogate Court Terms end.
12. Sun.....*1st Sunday after Easter.*
13. Mon.....Princess Beatrice born, 1857.

TORONTO, APRIL 1, 1885.

THE subject of prisoners giving evidence on their own behalf has again come to the front. It has been a favourite subject for theorists to discuss. But the discussion has not brought out any necessity for the change. There are, of course, plausible arguments in its favour, but most cogent and practical ones against it. At all events, it is eminently one of those matters which should not be decided without much more serious and lengthened attention than it has yet received in this country. It might be different if there were any evident or persistent demand for the change; but there is no such demand. If a prisoner were to refuse to testify it would be accepted as an evidence of guilt, although there might often be circumstances which would induce an innocent man to refrain from explanations. The timid, nervous, but innocent, prisoner often would equally ensure his condemnation by refraining to give evidence, or by giving it in such a way, as, by his hesitation or nervous self-contradiction, to induce a belief in his guilt, whilst the hardened and guilty scoundrel, who could cleverly invent and boldly stick to a lie, would often escape. "Guilty," or "not guilty" would become a question of temperament or experience in crime. But more than all, the crime of perjury would flourish as it has never flourished before. It has largely increased since litigants have given evidence on their own behalf. How much more when a man's liberty or even his life would depend upon it. Let us hasten slowly in this matter, even if it is desirable to go in that direction at all.

WE find in a recent letter to *The Times* a suggestion which seems a most admirable one. The writer, who dates his letter at Perth, Western Australia, says:—

> Now that the subject of Imperial Federation is occupying the attention of the powers that be will you kindly allow me space for a suggestion?
>
> The want of a system of reciprocal legal procedure between the mother country and the colonies, as well as between the colonies themselves, has been a long-felt evil, and I venture to think that with the increasing commercial relations the time has now arrived, and the opportunity too, when some steps should be taken to remedy the evil. A debtor, who now betakes himself to another colony with a letter of credit on a bank there, has only to withdraw his balance from his local bank and remain where he is, and his creditors find themselves foiled. The evil is, however, not confined to cases of contract, but abounds in cases of tort, where the wrongdoer finds an easy escape from the consequences of his acts, provided they are not criminal, by taking a ticket for 'the other side.'
>
> There is, of course, the remedy of a *ne exeat*, and the alternative of beginning an action in the courts of the country where the defendant is to be found; but they are sadly deficient remedies, and often prove worse than the disease.
>
> A short clause in the Federation Enabling Bill, authorizing an execution in the mother country, or in any colony, of any legal process issued out of any of the Superior Courts of any other colony, and *vice versâ*, would, I have no doubt, prove beneficial to all concerned.

It seems a pity that such a suggestion as this should be forgotten. Why should

not Her Majesty's writs run into all parts of Her Majesty's dominions? They all alike issue out of the Queen's Courts, and there seems no reason why they should not be executed and acted upon by her officials in all parts of the Empire. Why, for example, should not writs of execution issued upon a judgment of the Queen's Bench Division here or any other of our Courts be enforcible against property of the judgment debtor in England or Australia as well as here. With proper safeguards we believe such a system would be highly conducive to the ends of law and justice. Besides which it would be a step towards making the Empire one in fact and deed, instead of chiefly in sentiment as at present, and would illustrate the many benefits which we believe will result to each of the parts when the whole of the British nationality is drawn more closely together.

It is a matter of surprise that more public attention has not been called in this country to the recent English Bills of Exchange Act, 1882. It is in reality a most admirable code of law relating to bills of exchange, promissory notes and cheques; and being for the most part, if not altogether, merely declaratory of the law, its propositions may be said to be as binding here as in England. It would be useless for us to reprint any portion of its provisions; all we desire to do is to call the attention of our readers to its existence. The progress of codification in England is slow but sure, and the slower it is no doubt the better, for the task of satisfactorily transmitting case law into a code is one requiring the most profound learning and immense labour, and involves a great responsibility. The Bills of Exchange Act is now statute law. Then there is Stephen's Digest of Criminal Law, and Law of Evidence, one or other of which will probably ultimately receive parliamentary sanction. Every reader of Pollock on Contracts knows that in India contract law is already codified. Lastly, we have before us a very interesting specimen code of English Equity Case Law, by Charles F. Trower, M.A., of the Inner Temple, Barrister-at-law. The learned author prefaces his code by the remark: "Why should not the case law of England be codified like other branches of the law? America has been before us in this, as she was in her fusion of law and equity; and even our own law publishers are pressing on the public a scheme of revised and abridged case law, and looking to those who are qualified to do so to pronounce upon it." His plan is to omit all cases of no authority by reason of being over-ruled, reversed, or discharged, all cases of weakened authority, all superfluous cases, all special cases, all *sembles*, queries and *obiter dicta*, and his code consists of the residuum left after the above deductions, and is a series of categorical condensed substantive propositions, placed table-wise, and arranged alphabetically under generic and specific heads (with cross references) of the subject matter to which it refers. Anyone who likes to refer back to the English *Law Magazine and Review* of August 1883-84, will find Mr. Trower's specimen code there. It seems to us Mr. Trower has hit upon not only a great scheme, but one which must ultimately be adopted and acted upon. The ever increasing multiplication of reported decisions seems to us to be degrading the profession of the law and the administration of it. It is rendering it more and more difficult either to argue a case upon principle, or to get it decided upon principle. The one thing to do seems to be to hunt out as many decided cases as work in your favour as possible, without much regard to the reasoning on which the judgments are based, and hurl them at the judges. The only remedy

seems to us to be the formation of a code of case law by a state commission composed of the ablest jurists attainable. Probably no country but England could at present find the men to do the work. No doubt it would be a gigantic undertaking but it could be done, and such a code once adopted could be revised at stated intervals. Then the touchstone in all cases would be the propositions of the code as modified by the decided cases since the last revision. A large measure of certainty would take the place of uncertainty; an immense number of unsound decisions by incompetent judges would be consigned to oblivion, and the evil tendency of the present state of things would cease.

SIR GEORGE CARTIER AND THE CIVIL CODE.

We have been reminded pleasantly, but a little reproachfully, that our columns have never contained a tribute to the memory of the late Sir George Cartier, an eminent statesman and lawyer under whose auspices, as Attorney-General for Lower Canada, the Civil Code of that Province—the first work of the kind ever attempted in Canda—was projected, drafted, and brought into force as law in 1866. A lawyer who loved his profession and its professors, and its supporters too, for his favourite toast at a Bar dinner was "The Client," adding a few words in praise of that always welcome personage. We are going to try to remedy this omission in our present number by the insertion of two articles, the first by a hand which will not be suspected of flattery, and the other by an old and valued contributor of ours, a lover of our deceased brother in the law, the most English of French-Canadians, an Englishman speaking French.

The first extract, taken from a recent issue of *The Week*, is as follows:—

Sir George Cartier, whose statue was unveiled the other day by his old friend and colleague Sir John Macdonald, may be classed among the best representative French Canadians. More perhaps than any other of our public men he combined in his own person the theoretical and the practical Reformer. In his career were seen strong marks of the rude transition from the oligarchical to the constitutional system. Against the former at an age when the blood is hot and wisdom young he fought at St. Dennis, where discipline prevailed over ill-armed enthusiasm, and he found refuge in exile with a price upon his head. The belief was for some time general that in his attempts to escape he had perished miserably in the woods. Exile did not sour his temper, and when, the storm having blown over, he returned, no one was jealous of the undistinguished young advocate, who was only known for the hair-brained adventure in which he had taken part, and in which nothing but defeat had ever been possible; and no one in his wildest dreams saw in the returned exile the future Premier, no one had any interest in curbing his ambition and holding him back. Cartier did not, like Papineau, in 1848 look to France for a model; he accepted in good faith the new Constitution, and determined to make the best of it. The redeeming point in the Conquest of 1760 was in his estimation that it saved Canada from the misery and the infamies of the French Revolution. Though he bore his part in carrying the leading measures of his time, Cartier's best monument is to be found in the Code of Civil Law and the Code of Procedure: a code common to the whole country was an achievement impossible to our public men. In the first he saw the individuality and the nationality of his race and his province. He used to say, half in jest and half in earnest, though he could not seriously have believed the prediction, that Ontario would one day borrow the civil code from her French neighbour. A French-speaking Englishman, as he would on occasion call himself, he settled in favour of his race the long-contested question of which law should prevail in the Eastern Townships, French or English, with the result that the French population which was before gaining ground, bids fair entirely to swamp the English in a region where Lord John Russell thought it desirable to build up a rampart of English colonists between the French settlements and the American frontier: a project founded on a state of things which has entirely passed away. Judicial decentralization in Quebec was one of Cartier's most difficult achievements; the local opposition aroused by dividing the Province into nineteen new judicial districts being of the most formidable nature.

When in 1857 he succeeded Dr. Taché as leader of the Conservatives of Lower Canada, Cartier, breaking through the narrow limits of party. took two Liberals, M. Sicotte and M. Belleau, into the Cabinet, and made overtures to M. Dorion which the Liberal Chief was not able to accept. On the Lysons Militia Bill his immediate followers, yielding to vague fears among their constituents of the conscription not less than the great increase of expense, deserted in numbers, leaving him with only a small minority at his back. A good Catholic, he had yet the courage to defend the rights of the State against the encroachments of Bishop Bourget, at a time when the Bishop's influence was omnipotent: an act of duty which cost him his seat in Montreal. He saw the beginning and the end of the Legislative union which he cordially accepted and assisted in working, and which when it had served its purpose he was among the first to assist in superseding by the Confederation. Whatever success he attained was due in a large measure to hard labour and perseverance; for the first fifteen years of his public life he was, when not disturbed, as he was often, chained to his desk fifteen hours a any; and for thirty years fancied that to get through his task he must labour seven days a week.

Whilst agreeing in the main with the sentiments above expressed we do not think there was any glory attaching to the efforts of this eminent man in favour of decentralisation as it has proved most injurious to the bench of his own Province, a fact of which some of our radical reformers (using these words in a literal and not in a political sense) in Ontario would do well to take note; nor is working seven days a week anything but utter folly, even from the lowest point of view, as the wreck of many brilliant intellects and busy hands scattered along life's legal pathway abundantly proves.

The other article appeared as a letter in an Ottawa paper some weeks since:—

Two Ministers, who had been his colleagues and knew him well, spoke at the unveiling of the statute of the late Sir George Cartier, and eloquently and lovingly eulogized his qualities as a statesman and the great services he rendered to our country; and he deserved their praise, for no man ever worked more earnestly and impartially for the welfare of Canada and of Canadians of every race and creed. Here in Ottawa he will be long remembered for his kindly geniality; and very many of our citizens and visitors will recollect the pleasant evenings spent at his house on Metcalfe street, when arranging his guests in make-believe canoes, with make-believe paddles in their hands, he would sing and make them join in his favourite boat song, with the *refrain* of which Sir John, in concluding his speech, so happily apostrophised his old friend and colleague. I feel sure that they, and all who knew Sir George, will join Sir John in saying from their hearts as I do—

"Il'y a longtemps que je t'aime,
Jamais je ne t'oublirai."

Not through the statue which his country's love
Hath to his honour raised, but through the deeds
And qualities which won that love, shall he,
The patriot whom we mourn, forever live
In true Canadian hearts of every race.
And chiefly through his strong and steadfast will
That difference of race, or creed, or tongue,
Should not divide Canadians, but that all
Should be one people striving for one end,
The common good of all. His country stretched
From Louisbourg to far Vancouver's Isle
And claimed and had his patriot love and care.
And thus he won a high and honoured place
Among the worthiest of his name and race.

RECENT ENGLISH DECISIONS.

The only remaining case in the February number of the Law Reports for the Queen's Bench Division to which we think it necessary to refer is an important one on the subject of privileged communication to legal advisers, viz., that of *The Queen* v. *Cox and Railton* (14 Q. B. D. 153), in which the Court ruled that when a client applies to a legal adviser for advice intended to facilitate, or to guide the client in the commission of a crime or fraud (the legal adviser being ignorant of the purposes for which his advice is wanted), the communication is not protected on the score of privilege, but on the contrary is admissible in evidence in a criminal proceeding against the client, arising out of the fraud contemplated by him, at the time of making the communication, although the solicitor himself may have been no party to the fraud. In this case the defendants applied to a solicitor for information to enable them to dispose

of certain property so as to defeat a creditor who was about to obtain execution; and in a subsequent indictment against them for conspiracy to defraud the creditor, the evidence of the solicitor, as to their communication made to him under these circumstances, was held to be admissible.

The Court adopted the following rule laid down by Lord Brougham on the subject of privileged communications in *Greenhough* v. *Gaskell*, 1 My. & K. 98: "If, touching matters that come within the ordinary scope of professional employment, they (the legal advisers) received a communication in their professional capacity, either from a client, or, on his account, and for his benefit, in the transaction of his business, or, which amounts to the same thing, if they commit to paper in the course of their employment on his behalf, matters which they know only through their professional relation to the client, they are not only justified in withholding such matters, but bound to withhold them, and will not be compelled to disclose the information, or produce the papers, in any Court of Law or Equity either as party or as witness;" but they proceed to point out that consultations with a solicitor for the purpose of enabling the client to see how best to commit a fraud, are not within "the ordinary scope of professional employment," and are therefore not within the terms of the rule. Of course communications made before the commission of a crime or fraud, for the purpose of being helped or guided in committing it, stand on a different footing, as the Court is careful to point out, from communications made subsequent to its commission, with the view to being defended. But, Mr. Justice Stephen adds: "we are far from saying, that the question whether the advice was taken before, or after, the offence, will always be decisive as to the admissibility of such evidence."

MUTUAL RESTRICTIVE COVENANTS — ACQUIESCENCE IN BREACH.

The first case to be noticed in the February number of the Law Reports in the Chancery Division is that of *Sayers* v. *Collyer* (28 Ch. D. 103) a decision of the Court of Appeal affirming a judgment of Pearson, J. on a different ground from those on which he had proceeded. A building estate had been laid out into lots which were sold to different purchasers, each of whom covenanted with the vendors, and the purchasers of the other lots, not to build a shop on his land, or use his house for carrying on any trade therein. One of the purchasers, who occupied his house as a private residence, brought the action against the owner of another lot, who was using his house as a beer shop, to restrain him from breaking his covenant, and for damages. It appeared, that for three years before the action was commenced, the plaintiff knew that the defendant was using his house as a beer shop, and had himself bought beer at it. There was evidence, that some of the houses built on other lots had been for some time used as shops, and that some of the houses near the plaintiff's were occupied by more than one family at weekly rents. It was held by the Court (differing on this point from Pearson, J.) that the change in the character of the neighbourhood, not being caused by the plaintiff's conduct, was no ground for refusing him relief, yet, that he had lost his right thereto, either by way of injunction or damages, through his acquiescence in the proceedings of the defendant.

ELECTION AGAINST VOIDABLE COVENANT BY MARRIED WOMAN—COMPENSATION TO THOSE DISAPPOINTED.

The next case is *Re Vardon's Trusts* (28 Ch. D. 124), a decision on a branch of the law not often invoked in this Province. A married woman at the time of her marriage being an infant executed a marriage

settlement and thereby covenanted to settle after acquired property to the uses of the settlement. Under the settlement she was entitled to a life estate subject to a clause against anticipation. After she attained twenty-one a bequest was made to her of certain property to her separate use. This property she elected to retain, and not to settle pursuant to her covenant; and it was held by Kay, J., dissenting from *Smith* v. *Lucas*, 18 Ch. D. 531, and *In re Wheatley*, 27 Ch. D. 606, and following in preference the decision of Lord Hatherley in *Willoughby* v. *Middleton*, 2 J. & H. 344, that the life estate of the married woman under the settlement, notwithstanding the restraint against anticipation, was liable to be sequestered, to make compensation to those disappointed by her election to avoid her covenant to settle the after acquired property.

WILL—CLERICAL ERROR—CORRECTION BY REFERENCE TO CONTEXT.

Passing over a couple of cases which have no special interest in this Province we come to *In re Northens' Estate*, *Salt* v. *Pym* (28 Ch. D. 153), which is a decision of Chitty, J., upon the construction of a will. The testator owned two estates, one *Lea Knowl*, the other *Croxton*. *Lea Knowl* he devised in trust for his daughter, W., her husband and children, with power to his trustees to sell the same at the request of W., and hold the proceeds to the same trusts as *Lea Knowl* was devised. The *Croxton* estate he devised in trust for his daughter C., her husband and children, and he also empowered his trustees to sell the *Croxton* estate at the request of C., and hold the proceeds "in trust for such person and persons, and for such estates, ends, interests and purposes, powers, provisoes and conditions as are hereinbefore limited, expressed and declared, of, and concerning the said *Lea Knowl* estate hereby devised, as to such, and so many of them as shall at the time of sale have been existing undetermined and capable of taking effect;" and it was held that the words "*Lea Knowl*" in the latter clause might be rejected and read as "*Croxton* estate," because to read the words "the said *Lea Knowl* estate" in this clause literally and grammatically, would be making the will lead to a manifest absurdity or incongruity, as it was apparent, that the testator intended, that the proceeds of each estate should be held for the benefit of the *cestuis que trustent* respectively entitled to the benefit of the estate, from which the proceeds should be derived.

The only other cases in the February number of the reports of the Chancery Division to which it is necessary to refer are *Hurst* v. *Hurst*, and *In re Klœbe*, notes of which will be found in our notes of English practice cases.

AN important Bill has, we understand, been prepared for introduction in the House of Commons to amend and consolidate the Acts in force in Canada respecting Bills of Exchange and Promissory Notes. It will be a consolidation of the various statutes now in force and introduce other provisions and propositions of law largely taken from the English Bills of Exchange Act referred to in another place.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

QUEEN'S BENCH DIVISION.

IN BANCO.

ROSS v. MACHAR.

Joint stock company—Shareholder.

Shares had been assigned in the books of the company by the managing director, in his own name, as to 20 shares, and by him, as attorney for another, as to 30 shares, to the defendant, who did not sign the usual formal acceptance for any of them; but a certificate under the corporate seal of the company and the signature of the President, Vice-President and Secretary of the Company was sent to him certifying him to be the registered owner of the 20 shares, and defendant had, in a bill filed against a third party for fraudulently inducing him to purchase the shares for which he had paid $500, admitted that he had purchased these 50 shares.

Held, that the defendant was a shareholder as to the 50 shares.

Semble, that if any further formal act were required to be done on the part of defendant to constitute him a shareholder, he could be directed to perform it.

Under the circumstances shown in the evidence stated below,

Held (O'CONNOR, J., dissenting), that secondary evidence of the contents of the minute book of the company's directors showing the making of certain calls, was improperly rejected.

By 41 Vict. ch. 58 (D), the three plaintiffs were appointed "joint assignees" of the Canada Agricultural Insurance Company for the purpose of winding up under 41 Vict. ch. 21 (D). Two of the plaintiffs, the third being unable to attend through illness, met on the 2nd January, 1879, and made the fourth and fifth calls of ten per cent. on the stock of the company.

Held, that the assignees must all join in making calls, and that the fourth and fifth calls were, therefore, invalid.

Held, also, that a meeting of the three joint assignees on 27th of January, after notice of the fourth and fifth calls had been mailed on the 13th January of purporting to confirm the action of the two assignees of 2nd January, had not that effect.

ROBERTS v. SHERMAN.

Assignment—R. S. O. c. 119, s.-s. 1, 2.

Assignment for creditors not being within Chattel Mortgage Act do not require registration.

MACKAY v. SHERMAN.

Caldwell v. *McLaren*, L. R. 9 App. Cas. 352, followed, and *held*, plaintiff could not recover tolls for slides and improvements in the bed of the stream; but could for any improvements outside the channel and on plaintiff's land.

MARIN v. GRAVER.

Landlord and tenant—Possession—Damages.

In action of tenant against landlord for not giving possession,

Held (WILSON, C. J., dissenting), the proper measure of damages is the difference between what tenant was to pay and what possession was really worth.

IN RE WOODHOUSE v. THE CORPORATION OF THE TOWN OF LINDSAY.

Drainage by-law—Use of sewer without leave—Validity of by-law.

A municipal corporation passed a by-law for the construction of a sewer, without limiting the purposes for which it was to be used, and subsequently passed another by-law regulating how it might be tapped for drainage purposes, and enacting that no one should drain into it without permission from the municipal council first obtained, and specifying a certain rate of payment for the use of it when so permitted. The applicant got no leave from the council or any committee thereof to use the sewer, but several members of the council gave him permission to connect some water closets with it on condition of his paying, whenever called upon, whatever was reasonable for the privilege.

Held, that the sewer was constructed for general drainage purposes, including that of water closets; but that the permission given to the applicant so to use it did not bind the council which could compel him to cut off the connection, as he had not obtained their consent to make the same, nor paid the rate provided by the by-law; and that the fact of his having enjoyed the privilege for several years did not place him in any better position than he was at the first.

Semble, that even if he had the legal right to use the sewer, either the corporation or the local Board of Health could, upon the facts stated below, under 47 Vict. ch. 32, sub.-sec. 13, and ch. 38, sec. 12, have passed a by-law compelling him to cut off his connection.

Quære, whether, after the formation of the local Board of Health, the by-laws provided for by 47 Vict. ch. 32, sec. 13, should be passed by the corporation or by the Board of Health under ch. 38, sec. 12. The motion to quash the by-law was therefore refused, but without costs, as the applicant had been led into his position by the indiscretion of certain members of the corporation.

Hudspeth, Q.C., for motion.

Aylesworth and *Martin*, contra.

MOLSON'S BANK v. TASKER.

Principal and surety—Change of liability—Discharge of surety.

Defendant endorsed C.'s note to secure advances to him on grain by Bank, the representation being that it was a mere formal matter; that but 75 per cent. of value of grain could be loaned, and warehouse receipts taken, and the bank agent would see that the grain continued in store and would hold it to secure the loan and credit any sales in C.'s note. Defendant afterwards was got to sign a sealed guarantee which varied defendant's position by permitting plaintiffs to abandon or release the grain.

Held, guarantee void, and plaintiffs could not recover on it.

THOMAS v. CAMERON.

Lease—Distress.

C. paid rent due by R. to H. T. and to secure same, and C. took assignment of rest of term from R., who then took lease from C. for three months, the rent being the advances of C. to R.

Held, that such a lease, though binding between parties, could not create the relation of landlord and tenant, so that C. could distrain goods of third parties.

REGINA v. BUNTING ET AL.

Criminal law—Conspiracy to bribe Members of Parliament—Pleading.

On demurrer to an indictment set out below for conspiracy to bring about a change in the Government of the Province of Ontario, by bribing members of the legislature to vote against the Government.

Held (O'CONNOR, J., dissenting), 1. That an indictable offence was disclosed; that a conspiracy to bribe members of parliament is a misdemeanour at common law, and as such indictable. 2. That the jurisdiction given to the legislature by R. S. O. ch. 12, secs., 45, 46, 47, 48, to punish as for a contempt, does not oust the jurisdiction of the Courts where the offence is of a criminal character, but that the same Act may be in one aspect a contempt of the legislature, and in another aspect a misdemeanour. 3. That the Legislative Assembly has no criminal jurisdiction, and hence no jurisdiction over the matter considered as a criminal offence. 4. That the indictment, considered as a pleading, sufficiently stated the offence intended to be charged.

Per O'CONNOR, J. 1. That the bribery of a member of parliament in a matter concerning parliament or parliamentary business is not an indictable offence at common law, and has not been made so by any statute. 2. That in all matters and offences done in contravention of the law and constitution of parliament, with the exception of treason, felony and breaches of the peace, parliament alone has jurisdiction, and the ordinary courts, civil and criminal, have no jurisdiction. 3. That the *lex et consuetudo parliamenti* reserves to the High Court of Parliament exclusive jurisdiction to deal with all matters relating to its own dignity, or concerning its powers, its members and its business, with the above three exceptions.

CONWAY v. C. P. R. Co.

Railway—Fencing.

Held, that under the Railway Act of 1879 as amended, the railway company are not bound to fence, except as against a proprietor or tenant, and that the company are not therefore liable to a mere squatter for the killing of his horses without other negligence than their omission to fence as against him.

Osler, Q.C., and *Gorman*, for plaintiff.

H. Cameron, Q.C., and *White*, contra.

LONGWAY v. AVISON.

Action against J. P.—Immediate return of conviction.

In an action against two justices of the peace to recover a penalty for not making an immediate return of a conviction had before them to the clerk of the peace.

Held, that it is a question for the jury whether under the circumstances of any particular case the return made is immediate.

Held, also, that in a *qui tam* action the finding of the jury upon such a question is conclusive.

Rose, J.]

TAYLOR v. MCCULLOUGH.

Assault—Prosecution—Civil action—Pleading.

Held, on demurrer to plea, that a civil action for assault cannot proceed pending criminal prosecution for same.

Rose, J.]

BRICE v. MUNRO.

Action for unpaid shares in foreign Co.—40 Vict. ch. 43, sec. 47 (D)—Non issue of execution in Ontario—Pleading.

In an action by a creditor of the Morton Dairy Co., Limited, against defendants, to recover the amount of unpaid shares in that company under 40 Vict. ch. 43, sec. 47 (D), the head office of the company being in Quebec, where the plaintiff's judgment against the company had been obtained and execution returned thereon unsatisfied, a demurrer to the statement of claim was allowed because it did not appear that an execution in Ontario against the company had been returned unsatisfied.

Shepley, for demurrer.

Lash, Q.C., contra.

Rose, J.]

REGINA v. SMITH.

Patent of invention—35 Vict. ch. 26 (D)—Delivery of model.

Held, that 35 Vict. ch. 26 (D), does not require delivery of a model prior to the issue of a patent of invention.

In this case, after the granting of the patent, the commissioner wrote to the applicant that the patent had been granted, and that it would be forwarded on receipt of the model, which was sent, and the patent was then forwarded.

Semble, that delivery of the model prior to the grant of the patent was dispensed with, merely requiring it to be sent before the patent could be forwarded.

Gormully, for demurrer.

Foster, contra.

Rose, J.]

REGINA v. LACKIE.

Fraudulent removal of goods—11 Geo. II. ch. 19, sec. 4—Compelled to testify.

The fraudulent removal of goods under 11 Geo. II. ch. 19, sec. 4 is a crime, and a conviction was therefore quashed with costs against the landlord, because the defendant had been compelled to give evidence in the prosecution.

Shepley, for motion.

Watson, contra.

RE WARIN.

Water lots—Navigation—Easement—Prescription.

A., lessee for years of west half (being practically vacant) of water lot 17 in Toronto Harbour, B., proprietor of east half of same lot on which exists a wharf and storehouse erected more than twenty years before suit, and so near the line dividing the half lots that vessels could not call at the west side of the wharf, where all the business had been done, without passing over the half lot of A., and partially occupying the same while lying at the wharf. B. and his successors had also laid up vessels at their wharf in winter, two or three abreast, occupying part of A's half lot nearly every year since the erection of the wharf, and about eighteen years before suit built on the wharf an elevator for receiving and shipping grain at the west side of the wharf.

In 1882 A. put up a notice warning persons

against trespassing on his half water lot, which vessels passing to B.'s wharf knocked down. Subsequently in the same year A. drove certain piles into the soil of his own half lot, ostensibly as a foundation for certain buildings for boat houses, and was proceeding to drive others which would have had the effect of obstructing the passage to B.'s wharf. B. met this by moving vessels to and from his wharf, and finally by mooring vessels to his wharf and extending into the waters on A.'s half lot thus preventing A. from driving more piles.

In trespass by plaintiff, B. claimed, first, an easement by prescription and non-existing grant to the owners of the fee, whose lessee, Taylor, who erected said wharf, was over A.'s half lot to the extent necessary to allow vessels to pass to and from his wharf and to lie up there; secondiy, that the waters covering said water lot were navigable waters, part of Lake Ontario and Toronto Harbour, and that the wharf was a construction within the law for the purpose of enabling the use of the harbour and the safe and useful navigation of said water, and that the act of A. was a wrongful interference and an obstruction of the use of the said navigable waters which B. was entitled to and did abate.

Held, 1. The waters covering said lot 17 were part of the navigable waters of Lake Ontario, and the same law was applicable thereto as in the case of tidal waters in the absence of a valid grant, the soil being vested in the Crown, subject to the *jus publicum* of navigation. 2. That the Act 23 Vict. c. 2, sec. 35, R. S. O. c. 23, sec. 47 gives authority to the Crown to grant water lots, and the grant of water lot 17 by the description of "land covered with water" was valid under these enactments, and sufficient to pass to the grantee and his representatives the soil and the *jus publicum* for navigation and the like in the water which could be built upon, filled up or otherwise dealt with as might be thought proper. 3. That so long as A.'s water was unenclosed or unoccupied any one might pass over or across it without being liable to be treated as a trespasser, and an easement such as that claimed could not therefore be acquired. 4. That the claim to an easement was not founded upon an enjoyment *nec clam, nec vi, nec precario*, and could not be sustained. 5. That the evidence showed that the user of the plaintiff's water lot was not "as of right," and the finding of the jury was warranted by the evidence. 6. That neither the erection of the wharf nor its long use nor the erection of the elevator showed such a claim of enjoyment as of right as to satisfy the statute. 7. That in any event the claim was of an easement in gross and therefore invalid. 8. That the verdict should have been against the defendants, in any event, because they were not making use of the waters for the purpose of trade and commerce where they anchored the vessels upon the lot. 9. The patent to the City of Toronto of the water lots confirmed by the Esplanade legislation gave to the owners of water lots the right to fill in the lots and turn them into land.

COMMON PLEAS DIVISION.

Rose, J.] [Jan. 15.

REGINA v. YOUNG.

Brewers—Sale of liquors manufactured.

Held, that brewers licensed to manufacture under a Dominion license are licensed to sell by wholesale the liquor manufactured by them in places other than that named in the license.

Cattanach, for the motion.

Delamere, contra.

Divisional Court.] [Jan. 3, Feb. 3.

STUART v. MCKIM.

Garnishment—Money in hands of Speaker—Form of issue.

The defendant, a member of the Legislative Assembly, received a sum of money from a person as an inducement or bribe to influence him in his course in the Assembly, which he handed to the Hon. Charles Clarke, the Speaker of the Assembly, to await the action of the Assembly with regard to the alleged bribery. The plaintiff, a judgment creditor of the defendant, issued an attaching order attaching all debts due from, or accruing due from the said Clarke to the defendant, claiming that the money so handed to him became a debt payable to the defendant.

[January 3.

The Court (GALT, J. dissenting), without expressing any opinion on its merits, directed an

issue to be tried under Rule 370 O. J. A. as to the garnishee's indebtedness.

Walker (of Hamilton), for the plaintiff.

J. G. Scott, Q.C., for the garnishee.

The form of the issue was subsequently settled by the Registrar, namely, whether at the date of the service upon the garnishee of the attaching order there was any debt due, or accruing due, from the garnishee to the defendant.

[February 3.

An appeal to the Divisional Court by the garnishee to change form of issue was dismissed, the Court holding that the issue, as settled by the Registrar, was sufficient.

J. G. Scott, Q.C., for the appeal.

Clement, contra.

Rose, J.] [Feb. 12.

REGINA V. HOLLISTER.

Market by-law—Conviction under—Costs.

A by-law required "all hay, straw, grain, coal, farm produce and animals sold at the market or elsewhere in the town of Cornwall which is required to be weighed by the vendor or purchaser to be weighed by public weigh scales." A conviction under this by-law was that the defendant "brought into the town of Cornwall" certain hay, etc., "and had the same weighed on scales other than the public scales of said town, the same being a contravention of the market by-law and amendments thereto of said town."

Held, that the conviction was bad in not stating that the hay was "sold at the market or elsewhere," and must therefore be quashed.

As the complainant was the weighmaster, and had instituted the prosecution for his own benefit after warning, instead of bringing an action in the Division Court he was ordered to pay the costs.

Aylesworth, for the applicant.

Cattanach, contra.

Rose, J.] [Feb. 17.

MACFIE V. PEARSON.

Attachment under Absconding Debtors' Act—Creditors' Relief Act.

On 27th September, 1884, the sheriff seized certain goods of the defendant under two writs of execution. On the 30th a writ of attachment against defendant as an absconding debtor was issued and placed in his hands under which he seized all the defendant's property, credits and effects. On 1st and 2nd October two more writs of attachment were placed in his hands. On 13th October the sheriff sold under the two executions and realized enough to satisfy them, which moneys remain in his hands pending these proceedings. On 20th October the sheriff received a certificate issued under and pursuant to the Creditors' Relief Act, 1880, and on the 24th of same month received a further certificate under the said Act. On 26th he sold the balance of defendant's property, etc., so seized by him, and realized the sum of $2,908.37 for, as he said, distribution amongst the creditors. After this, various executions and certificates were received by him. On the 14th October the sheriff, pursuant to the Creditor's Relief Act, made the entry in his book. The attaching creditors had not placed executions in the sheriff's hands.

Held, that the proceedings under the Absconding Debtors' Act were entitled to prevail as against those under the Creditors' Relief Act; and that the creditors who had certificates under the Creditors' Relief Act should obtain judgment and execution in the ordinary way so as to come within the provisions of the Absconding Debtors' Act.

Street, Q.C., *H. J. Scott*, Q.C., *Gibbons*, *Clements*, *Shepley* and *Henderson*, represented the various parties.

Divisional Court.] [Feb. 28.

CLARKE V. RAMA TIMBER AND TRANSPORT COMPANY.

Canal — Dam — Damages by water overflowing plaintiff's land—Findings—New trial.

The defendants built a canal from a point on the St. John River to Lake St. John, and from thence to Lake Couchiching, under power conferred therefor by their act of incorporation, 31 Vict. ch. 66. The plaintiffs owning land near Lake St. John brought an action against defendants, claiming: (1) That by the erection or continuance of a dam by defendants in the bed of the St. John River, which was the natural outlet of the said Lake St. John, the waters of said lake were prevented

from flowing by and away from his land, and also in not keeping the said dam in repair, whereby the plaintiff suffered damage; (2) That by the erection of the canal so built by them waters, that would not otherwise have done so, flowed into Lake St. John and damaged the plaintiff's land. At the trial a verdict was given for the plaintiff.

On motion to the Divisional Court, the Court, after discussing the evidence and liability of the defendants, were of opinion that in order to arrive at a conclusion as to the liability, if any, of the defendants, there should have been a finding as to whether the damage claimed was caused by the dam or the canal; and, if by the latter, whether by any negligence of defendants or by a *vis major*. A new trial was therefore directed.

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

McCarthy, Q.C., and *F. Arnoldi*, for the defendants.

Divisional Court.] [Feb. 28.

COPELAND v. CORPORATION OF BLENHEIM.

Municipal corporations — Ways — Negligence — Contributory negligence.

A building was being erected on a street in the Village of Blenheim. It had a basement several feet deep; the joists of the first floor being about level with the sidewalk. For the purpose of excavating the basement, planks to the distance of twenty feet had been removed from the sidewalk and the earth taken away so as to form a grade into the basement. There were three openings in the basement wall, one in the centre for a door, and one on each side for windows. Where the doorway was there was a hole made by the grade into the cellar. Planks were laid across the open space in the sidewalk. During the day time a plank was laid from the board across the sidewalk to the first floor which it was customary to remove at night, and there was no direct evidence that it was not removed the night in question. The plaintiff, who knew of the dangerous character of the place, was, on the night in question, about 7 o'clock, going along the sidewalk, and while in front of the building met two persons and in endeavouring to get out of their way he struck against something and fell into the hole and was injured.

Held, that the defendants were guilty of negligence in leaving the hole unguarded; and that there was no evidence of contributory negligence on plaintiff's part.

Pegley, for the plaintiff.

Meredith, Q.C., for the defendants.

Divisional Court.] [Feb. 28.

LEADLEY v. MCLAREN.

Sale of goods — Statute of Frauds — Acceptance.

Action to recover the purchase money of a large quantity of wool, namely, 39,538 lbs. of white wool at 24 cents per pound, and 11,652 of black wool at 21½ cents per pound under an alleged contract.

Held, CAMERON, C. J., dissenting, on the evidence disclosed in the case, there was no contract within the Statute of Frauds so as to bind the defendant; nor any acceptance to take the case out of the statute: that as to the black wool the contract was only for some ten sacks, and that although plaintiff spoke of being able to procure for defendants the larger quantity no contract was ever entered into for it; and as to the white wool, that though defendant had on different occasions received some ten and twenty sacks respectively of it, it was only for the purpose of testing the quality of the wool and not as an acceptance under the contract.

Held, therefore, the plaintiff could not recover.

McMichael, Q.C., for the plaintiff.

McLaren, for the defendant.

Divisional Court.] [Feb. 28.

GALBRAITH v. IRVING.

Solicitor and client—Security for costs incurred—Misdirection—Adding parties—Assignment of reversion or future rent—Chose in action.

The defendant was lessee of certain premises from D. An instrument was signed by D. but not executed under seal, stating that in consideration of certain costs owing by him to plaintiff in certain cases named and other matters and cases, "I hereby assign and transfer unto the said G. H. Galbraith" (the plaintiff) "a certain lease dated," etc., "and made between John Irving" (the defendant) "to me,

conveying the premises known," etc., "together with all rent now due, or to accrue due, from the said John Irving or his assigns in respect of said lease and the term thereby created." The plaintiff brought an action on this instrument to recover rent which accrued due after the making thereof. At the trial the learned judge charged the jury that while the plaintiff remained solicitor for D. he could not take any security for his benefit; and that he should have first dissevered the connection between them, and let D. have independent legal advice.

Held, misdirection.

Held, also, that D. was not a necessary party, for if such a state of facts existed as would constitute fraud it might be raised without D. being a party; nor even if defendant desired to obtain relief over against D., for plaintiff had nothing to do with this, for she would only be so added to protect both parties.

A new trial was granted, unless the plaintiff desired the Court to consider matters not raised on the argument, namely, whether the assignment was of the reversion or of future rent issuing out of the land, and therefore void as not being under seal; or whether it could be supported as an assignment of a chose in action, namely, of the moneys payable under and by virtue of the covenants of the lease.

The plaintiff in person.

E. Meyers, of Orangeville, contra.

Divisional Court.] [Feb. 28.

McCRAE v. BACKER.

Sale of land—Title of land—Condition precedent to payment of purchase money—Costs—Damages.

On 2nd May, 1882, the plaintiff agreed to sell and the defendant to buy certain land for $856, namely, $156 on the execution of the agreement, and the balance, $700, without interest, on 1st January, 1883; and defendant covenanted to pay said sums as aforesaid. In consideration whereof the plaintiff covenanted to convey, or cause to be conveyed, the land to defendant free from incumbrances, and to permit defendant to occupy same until default. The agreement also provided that defendant might assume possession of the land and collect the rent then due from M., the tenant, and make arrangements with him for giving up possession. The defendant took possession when he was turned out by M., who claimed the land and had registered a *lis pendens* against it. Ejectment was then brought and judgment recovered against M., when his solicitors undertook to remove and did remove the *lis pendens*, the defendant having been kept out of possession for a year. In an action by plaintiff against defendant for the purchase money the defendant set up as a defence that on 1st January, 1883, plaintiff could not give an unincumbered title to land by reason of the *lis pendens;* and also counterclaimed, contending for the costs of the ejectment suit, and for damages for being kept out of possession.

Held, by CAMERON, C. J., following *McDonald* v. *Murray*, that the shewing a good title by plaintiff was not a condition precedent to his right to recover the purchase money, and by ROSE, J., apart from this the plaintiff was entitled to recover; that defendant could have no claim for the costs unless there was an unqualified agreement to pay them; but, as it appeared, plaintiff, on his own statement, intended to pay some portion he was charged with half; and plaintiff was disallowed interest for the time defendant was kept out of possession.

Divisional Court.] [Feb. 28.

BOULTBEE v. BURK.

Statute of Limitations—Part payment.

The mere fact of part payment is not sufficient to take a debt out of the Statute of Limitations. It must be such that a jury may fairly infer a promise to pay the remainder.

In this case where payments were made there was evidence upon which such inference could be made, and the learned judge who tried the case having found that there was a promise to pay the remainder, the Court refused to interfere.

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

Tilt, Q.C., for the defendant.

Divisional Court.] [Feb. 28.

ADAIR v. WADE.

Seduction—Assessment of damages by judge without jury, Validity of—Service of writ of summons—Evidence of—New trial.

In an action for seduction no appearance was entered. The plaintiff then filed a state-

ment of claim to which no statement of defence was entered, and interlocutory judgment was signed and notice of assessment of damages given. When the case came on at the trial the defendant did not appear, and a jury was called, but on their disagreeing the learned judge discharged them and tried the case himself without a jury upon a fresh taking of evidence, and assessed the damages and gave judgment for the plaintiff.

Quære, whether under O. J. Act and former practice the learned judge had power to try the action and give judgment therein; but that it was not necessary to decide this point because it was not satisfactorily established that the writ of summons had been served on the defendant. The defendant was therefore allowed to file a statement of defence and a new trial directed; the judgment and execution to stand in the meantime as security.

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

Aylesworth, contra.

Divisional Court.] [Feb. 28.

BURNETT v. HOPE ET AL.

Partnership—Death of partner—Contract of hiring.

When a contract of hiring is entered into between a person and a firm, and afterwards one of the partners dies, the death of such partner puts an end to the contract.

Meyer, of Orangeville, for the plaintiff.

Moss, Q.C., and *Crerar*, for the defendant.

Divisional Court.] [Feb. 28.

THE ROYAL INSURANCE CO. v. BYERS.

Insurance—Fraud and misrepresentation—Right to recover back money paid.

Action to recover money paid by the plaintiffs to the defendant in settlement of a claim under a policy of insurance, the plaintiffs alleging that they had been induced to make the payment by the fraud and misrepresentation of the defendant.

Held, that the evidence failed to shew any fraud or misrepresentation; and if there were any it was immaterial; and further, the plaintiffs never offered to, and possibly could not, place defendant in his original position; and that no amendment of the form of action could be made which could avail the plaintiffs.

Held, therefore, there could be no recovery.

Moss, Q.C., and *Clute*, for the plaintiffs.

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

Divisional Court.] [Feb. 28.

RE DE SOUZA.

English Barrister—Right to practice in Ontario—Admission through Law Society.

Held, that to entitle an English barrister to practise at the Bar of Her Majesty's Courts in this Province he must be admitted to do so through the Law Society of the Province.

The applicant in person.

C. Robinson, Q.C. and *Walter Read*, contra.

Divisional Court.] Feb. 28.

WEBSTER v. HAGGART.

Arbitration—Consent reference—Right to appeal.

At the trial of an action it was referred, the order of reference being "upon the consent of the parties, I do order and direct that the matters in dispute between the plaintiff and defendant, upon the issues joined in this action be referred," etc. It was urged that as the action involved the investigation of long accounts, and was, therefore, such an action as would be referred compulsorily, the consent must be taken to be to the arbitrator named and not generally to the reference, and that there was, therefore, a right to appeal from the award on the merits,

Held, that the reference was a consent reference, and there was no appeal.

Osler, Q.C. and *Justin*, for the motion.

Milligan (of Brampton), contra.

Divisional Court.] [March 7.

DONOVAN v. HERBERT.

Ejectment—Insolvent Act 1870, *sec.* 68—*Proceedings under—Validity—Possession—Damages.*

In ejectment plaintiff claimed title under a deed from the assignee in insolvency of one D. It appeared that prior to the issue of the writ of attachment in insolvency D. had conveyed

the property to his brother. Two of the creditors claimed that this deed was fraudulent, and made a demand, under sec. 68 of the Insolvent Act of 1875, on the assignee to take proceedings to have the deed set aside which the assignee, on instructions from the other creditors, refused to do, and thereupon these two creditors obtained an order from the County Judge authorizing them to take proceedings, on their own behalf in the name of the assignee; such proceedings under the said section to be for their own benefit. Proceedings were thereupon taken by these creditors and the deed set aside and the land recovered back and was sold, and upon an order obtained from the County Judge a conveyance was made by the assignee to the purchaser, under whom the plaintiff claims. The defendant contended that this deed was void under sec. 75 because it was not authorized by the creditors at their first meeting or any subsequent meeting specially called for the purpose or by the inspector.

Held, ROSE, J. dissenting, that the deed was valid; that it depended entirely on the provisions of sec. 69, and was in no way affected by sec. 75; and, therefore, the sanction of the creditors was not essential to its validity; but at any rate the defendant, a mere stranger to the insolvency proceedings, could not avail himself of the objection.

The defendant set up a possessory title, but the Court *held* that the evidence failed to establish it; and also that damages awarded the plaintiff for mesne profits were not excessive.

McMichael, Q.C., for the plaintiff.

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

BROWN v. HOWLAND.

Promissory note—Made by secretary of Company—Individual liability—Completed instrument—Election to look to company for payment.

The Toronto Wheel and Waggon Company being indebted to plaintiff he got a note therefor signed by the defendant, who was secretary of the company, with, as defendant alleged, "per" before his signature, the intention being to fill in the company's name above defendant's, which had not been done. After the note became due, the plaintiff proved on the note against the company who had gone into insolvency and obtained a dividend. The plaintiff subsequently sued defendant.

Held, that defendant was not liable.

Per CAMERON, C.J., that defendant must be treated as maker of the note, and would have been liable thereon, and, if material, it could not be said that the word "per" was before his name for what was alleged to be such might equally well be a flourish of the first initial letter of his name, but for his election to look to the company for payment by proving against them and accepting a dividend.

Per OSLER, J.A. The instrument never became perfected as a note, it being intended that the name of the company should have been filled in.

Held, also that the requirement of sec. 79 of the Canada Joint Stock Act, 1877, requiring the name of the company to be mentioned in legible letters with the word limited, did not apply here as this did not purport to be signed by or on behalf of the company.

McLean, for the plaintiff.

Arnoldi, for the defendant.

CLENDENNING v. TURNER.

Wharf—Tolls—Damages—Navigable waters.

The defendant built a wharf on the waters of Toronto Bay adjacent to the Island near Hanlan's Point under permission from the Commissioner of Crown Lands for the Province of Ontario. It was claimed, however, that the water lots in front of the Island, or at all events, the free access to and from the shore over the waters of the Bay was vested in the City of Toronto by grant from the Crown prior to Confederation. The defendant claimed to exact tolls from plaintiff for using the wharf, and also for damage done to the wharf by the negligence and want of care in management of his boat.

Held, that it was not necessary to decide as to the ownership of the soil under the water in question; that the relationship and dealings of the parties as disclosed by the evidence showed that no tolls were to be charged; that the wharf was constructed on the navigable waters of the Bay, and assuming that the Commissioner of Crown Lands had power to grant the license it did not give power to

charge tolls for vessels landing passengers at it, for the public had the right to reach the shore of the Island over the waters of the Bay; and the plaintiff having been invited by the proprietor of Hanlan's Point, the lessee of the corporation, to land passengers there, he had the right to land upon the wharf which prevented his reaching the shore at that place.

Held, however, that the defendant was entitled to recover the damages claimed for plaintiff's negligence as plaintiff was not at liberty either negligently or wilfully to use or exercise his rights so as to injure the defendant's wharf.

Allan Cassels, for the plaintiff.

W. Laidlaw, contra.

PRACTICE.

Boyd, C.] [January 19.

THOMSON v. FAIRBAIRN.

Administration suit—Reference—Change of place of—Conduct of.

An appeal from the order of the Master in Chambers changing the place of reference in an administration suit from Brantford to Walkerton, and giving the conduct of reference to the defendants, the executors, instead of the plaintiffs, was dismissed with costs.

Held, that the reference in administration actions should *prima facie* be to the place where the person whose estate is to be administered resided. G. O. Chy. 638, governs the case, and the practice laid down in *Macara* v. *Gwyn*, 3 Gr. 310, is superseded.

During the argument before the Master, and on the appeal the solicitor for certain of the defendants other than the executors asked for the conduct of the reference in the event of its being taken from the plaintiffs.

Held, that the solicitor could not obtain the conduct of the reference unless by a substantive application.

The appeal was dismissed without prejudice to a substantive application.

W. H. C. Kerr, for the plaintiffs.

Hoyles, for the defendants, the executors and the churches.

Holman, for the defendants, the village of Teeswater.

George Kerr, for the other defendants.

Rose, J.] [January 27.

CLENDENNAN v. GRANT.

Judgment—Rule 324 O. J. A.—Covenants—Unascertained amount.

Leave was given to plaintiff to sign judgment under Rule 324 O. J. A., where the claim was on a covenant by defendant with plaintiff to pay certain mortgages made by plaintiff on lands sold by him to defendant and for indemnity, and where the plaintiff was being sued for payment of four of the mortgages, but had not actually paid them in whole or in part; the judgment to be for the amount of the four mortgages with interest, to be ascertained by the Registrar, and costs; the defendant to be at liberty to apply to be relieved from this judgment on his satisfying the holder of the mortgages, so that the action against the plaintiff is withdrawn and his costs paid.

J. B. O'Brian, for the plaintiff.

A. H. Meyers, for the defendant.

Mr. Dalton, Q.C.] [Feb. 4.

ROBERTSON v. COWAN.

Security for costs.

A defendant is entitled to security for costs from a plaintiff whose permanent residence is foreign, if at the time the application is made the plaintiff is actually out of the jurisdiction. The only answer to the application in such a case is the plaintiff's return within the jurisdiction.

Clement, for the defendant.

Masters, for the plaintiff.

Rose, J.] [March 3.

ONTARIO BANK v. BURK ET AL.

Judgment—Rule 80 O. J. A.—Notice of protest—Address.

An action on a promissory note for $15,000, dated at Prince Arthur's Landing, 15th Sept., 1884, payable one month after date at the Ontario Bank there, made by defendant M. Burk, payable to the order of the defendant C. C. Burk, and endorsed by C. C. Burk and the defendant D. F. Burk. The defendant C. C. Burk resided at Bowmanville and the other defendants at Prince Arthur's Landing.

Since the making of the note the place called Prince Arthur's Landing was incorpor-

ated under the name of Port Arthur, the limits of the two places not exactly corresponding. Prince Arthur's Landing was not an incorporated place, and the post office prior to the incorporation was called Thunder Bay.

A motion was made by the plaintiffs before the Master in Chambers for judgment under Rule 80 O. J. A. against the defendants C. C. Burk and D. F. Burk, as endorsers of the promissory note.

The sole defence suggested in answer to the application was want of notice of protest, the defendants C. C. and D. F. Burk being, as it was said, accommodation endorsers. These defendants filed affidavits denying receipt of any notice of dishonour.

In the material filed by the plaintiffs on the application there was no allegation of notice of protest save that the plaintiffs claimed notarial charges. The protest was, however, subsequently produced in Chambers.

The Master in Chambers expressing an opinion against the defendants on their affidavits, the defendants C. C. Burk obtained an enlargement to examine the notary and his clerk.

On the return of the enlarged motion, the depositions taken on the examination were produced, and it was shown by them that notice had been sent to the defendant C. C. Burk at Port Arthur, and on this a further point was raised, viz.: that the Stat. 37 Vict. (C.) c. 47, sec. 1, had not been complied with, the notice of protest not having been addressed either to the defendant's place of residence or to the place where the note was dated.

The Master in Chambers made the order asked, directing judgment under Rule 80, and the defendants C. C. Burk and D. F. Burk appealed to a Judge in Chambers.

Held, that as the protest was not originally part of the plaintiffs' material, therefore apart from the examination of the notary and his clerk there was no evidence of the defendants having received notice, and as there was a distinct denial by the defendants of having received notice, the motion should have been refused before the enlargement took place.

Held, also, that the fact of notice was one which the plaintiff should have proved, and the production of the protest, being only presumptive evidence of the posting of the notices, was not sufficient in the face of the denial of receipt of the notices.

Held, also, that the point raised on the deposition of the notary and his clerk as to the sufficiency of a notice addressed to Port Arthur when the endorser resided at Bowmanville and the note was dated at Prince Arthur's Landing, was one open to argument upon which the defendant was entitled to have a trial, and on this ground judgment should not have been ordered.

Walter Barwick, for the plaintiffs.

Holman, for the defendant, C. C. Burk.

Mr. Macrae (R. S. Smellie), for the defendant, D. F. Burk.

The Master in Chambers.] [March 4.

BRADLEY v. BRADLEY.

Alimony suit—Disbursements to be paid by defendant before trial—Counsel fee—Solicitor as Counsel.

On an application by the plaintiff in an alimony suit, for an order against the defendant for payment before the trial of *interim* disbursements, witness fees and counsel fee, *Shepley*, for the defendant, cited *Haffey* v. *Haffey* 7 P. R. 137.

Millar, for the plaintiff, cited the unreported case of *Ingram* v. *Ingram* and *Magurn* v. *Magurn*, 20 C. L. J. 261 and 4 C. L. T.

In *Ingram* v. *Ingram*, FERGUSON, J., affirmed an order of the Master in Chambers for payment to the plaintiff before the trial "on account of her disbursements for witness fees $22.35, and on account of her disbursements for Counsel, $40," but he thought the order might be varied by providing that the counsel fee should not be paid if the plaintiff's solicitor acted as Counsel.

In *Magurn* v. *Magurn*, OSLER, J. A., sitting as a Judge of the Court of Appeal in Chambers made an order for the defendant to pay to the plaintiff before the hearing of the appeal a sum of $40 for the purpose of paying the wife's counsel fee, notwithstanding that it appeared that the counsel would be the solicitor for the plaintiff.

THE MASTER IN CHAMBERS followed *Ingram* v. *Ingram* and *Magurn* v. *Magurn* as to payment before the trial, and *Magurn* v. *Magurn* as to the payment of counsel fee when the solicitor was to act as Counsel, and ordered the defendant to pay plaintiff's witness fees, counsel fee and disbursements forthwith, the solicitor for the plaintiff to see to the proper expenditure of counsel and witness fees.

Rose, J.] [March 4.

BUDWORTH v. BELL.

Security for costs—Penal action—Time for application for—What costs to be secured—C. L. P. Act sec. 71—Rule 429 O. J. A.

In a penal action brought by a common informer, the Master in Chambers made an order in general terms for security for costs under the 71st section of the C. L. P. Act.

The order was made after the statement of defence had been delivered, and after the parties had been examined.

Held, on appeal, following *Sydney* v. *Bird*, 23 Ch. D. 358, that the order was properly made at that late stage of the cause, and was authorized by Rule 429 O. J. A., but that the order should be amended so as to direct that security should be given "for the costs *to be* incurred in such suit or action," following the words of the 71st sec. of the C. L. P. A.

H. T. Beck, for the plaintiff.

McMichael, *Hoskin* and *Ogden*, for the defendant.

Rose, J.] [February 24. [March 13.

RYAN v. CANADA SOUTHERN RY. CO.

Local Judge of High Court—Jurisdiction—Rescinding orders.

The plaintiff's solicitors lived at Sandwich and the defendant's solicitors at Toronto.

The local judge at Sandwich in November, 1884, made an *ex parte* order for leave to the plaintiff to amend the writ of summons before service, and subsequently set aside his own order on the defendant's application on notice to the plaintiff, and after argument by Counsel on behalf of both parties.

The plaintiff appealed from the second order to a Judge in Chambers at Toronto.

Held, that the local judge had no power to make the rescinding order under Rule 422 O. J. A.

Subsequently the defendants made a substantive motion before the same Judge in Chambers at Toronto to set aside the original order of the local judge.

Held, that save as excepted, a local judge of the High Court in proceedings in the High Court, having the same power in Chambers as a judge of the High Court in Chambers as to the matters referred to in the Judicature Rules, he is a judge of co-ordinate jurisdiction with a judge of the High Court in Chambers. A judge of the High Court has, therefore, no power to review the decision of a local judge save by way of appeal in the manner provided by the Judicature Rules. This motion cannot be treated as an appeal as it is too late under Rule 427 O. J. A.

Aylesworth, for the plaintiff.

H. Symons, for defendants.

Rose, J.] [March 13.

GORING v. THE LONDON MUTUAL FIRE INSURANCE COMPANY.

Examination—Discovery—Officers of Corporation.

In an action upon a fire insurance policy against a company,

Held, that the local territoral agent of the company who received the application and the premium and issued the *interim* receipt, and his successor who had charge of the agency when the fire occurred were properly examinable for discovery, before the trial, as officers of the company under the C. L. P. Act.

Quære, whether the examination should not be limited to the purposes of discovery, and whether or not it should be used as evidence against the company.

Clement, for the plaintiff.

Aylesworth, for the defendants.

Rose, J.] [March 13.

HUGHSON & Co. v. GORDON.

Judgment—Rule 80 O. J. A.

In an action on a promissory note made by defendant in favour of one McKenzie, and by him endorsed to the plaintiff, the Master in Chambers made an order for judgment under Rule 80 O. J. A.

The usual affidavit was made by the plaintiffs' manager. The defendant filed an affidavit in answer showing that he was an accommodation maker and stating his information and belief that the plaintiffs were perfectly aware of the fact. He also stated on information and belief that the plaintiffs held the note as collateral security, and that they never gave any value for it, and further that since the making of the note McKenzie had become insolvent and had made an assignment for the benefit of his creditors, and that there was

litigation pending between the plaintiffs and his assignee in respect to certain securities alleged to be held by the plaintiff on account of McKenzie's indebtedness. An affidavit of the plaintiffs' manager in reply was filed denying knowledge of the note being an accommodation one, and stating that it was discounted by the plaintiffs and the proceeds placed to McKenzie's credit.

On appeal from the order of the Master in Chambers,

Held, that it is not the duty of the Judge in Chambers hearing an application under Rule 80, to determine how the facts are. This is not a case in which judgment can be ordered.

Aylesworth, for the appeal.

J. H. Mayne Campbell, contra.

Rose, J.] [March 16.

CULVERWELL v. BIRNEY.

Examination of defendant—Excluding co-defendant.

An appeal from the order of the Master in Chambers directing the defendant J. L. Birney to attend and be examined at his own expense after an abortive examination, and directing the defendants to pay the costs, was dismissed.

Held, that the special examiner was right in ruling that the defendant Joseph Birney should be excluded during the examination before him in the cause, of the other defendant J. L. Birney.

Fullerton, for the appeal.

Holman, contra.

Rose, J.] [March 16.

FLETCHER ET AL. v. FIELD.

Costs—Taxation—Special circumstances.

An appeal from the order of the Master in Chambers directing taxation of the plaintiff's bill of costs sued on in this action nearly two years after delivery was allowed.

The bill was for professional services rendered the defendant in an investigation of his conduct as a public official before a commissioner appointed by the Ontario Government, the plaintiffs acting as defendant's solicitors and also assisting as Counsel in the investigation, a senior counsel being also in attendance. The amount of the bill was $593.42, the chief items being counsel fees. The solicitors who were acting against the defendant, in the investigation, charged their clients $740. The investigation lasted nine days. The bill was rendered in 1883.

The special circumstance relied upon to enable the defendant to obtain the order for taxation after the lapse of more than a year from the delivery of the bill was, in the words of the defendant, that "there was a distinct understanding between me and the above named plaintiffs that the payment of the said bill of costs was to lie over to await the decision of the Ontario Government, who were by both me and the said plaintiffs, as they stated, expected to pay said bill of costs, I being one of their officers and the charges against me having fallen through."

Held, that the existence of the above understanding, if proved, was not a special circumstance within R. S. O. c. 140, sec. 35, to justify an order for the taxation of the bill after the lapse of a year.

Aylesworth, for the appeal.

Watson, contra.

Rose, J.] [March 16.

SLATER v. PURVIS.

Changing place of trial.

A motion to change the place of trial in a County Conrt action from London to Toronto was refused under the following circumstances:

The action was on a promissory note made at Toronto, payable at Toronto. The plaintiff resided in Montreal, and his solicitor in London. The sole defence was that the defendant was discharged from liability by a discharge under the Insolvent Act. The defendant resided in Toronto, and swore that he intended to call two witnesses, the clerk of the County Court ot Toronto, and the assignee of the defendant, who also lived in Toronto. The plaintiff filed no affidavit on the motion.

Morson, for the motion.

Aylesworth, contra.

Rose J.] [March 16.

COCHRANE v. MORRISON.

Trial of issue by county judge—Powers of judge—Rule 373, O. J. A.

Upon a garnishing application made after judgment in this action, which was brought in the H. C. J., C. P. D., the Master in Chambers made an order under Rule 373, O. J. A., direct-

ing an issue raised by one of the garnishees to be tried before the judge of the County Court of Wellington and a jury at the next sittings of the Court.

After this order was made the county judge assumed to make an order directing the defendant to produce, and the defendant failing to produce, a further order striking out his defence or denial of the issue, and declaring the plaintiff entitled to the moneys in question and to judgment. These orders were entitled "In the County Court of the County of Wellington."

Held, that the county judge had no power to make the order to produce or the subsequent order. The action was not by the order of the Master transferred to the County Court, but was still in the High Court of Justice.

H. J. Scott, Q.C., for defendants.

Black, for the plaintiff.

Boyd, C.] [February 9.
Div. Ct., Chan. Div.] [March 21.

RATTÉ v. BOOTH.

Parties—Joinder of.

The plaintiff, the owner of a water-lot abutting on the Ottawa River who carried on the business of letting boats for hire, brought an action against four saw-mill owners alleging that they, being each the owner of a saw-mill situated higher up on the river than the plaintiff's lot, had each been in the habit of throwing sawdust, slabs, etc., into the river, and that this waste matter floating down the river had lodged upon and in front of the plaintiff's water-lot, and had there formed into a solid mass.

Held, that the four saw-mill owners were properly joined as defendants in one action.

McCarthy, Q.C., *Gormully* and *Clement*, for the defendants.

Maclennan, Q.C., for the plaintiff.

Proudfoot, J.] [January 2.
Div. Court.] [March 21.

LAUDER v. CANIER.

Dower—Pleading—Rule 128, O. J. A.

The statement of claim in an action of dower stated that the plaintiff was the widow of L., who died seized of such an estate (in certain lands) as to entitle and give the plaintiff an estate of dower therein.

Held, that the pleadings in action of dower are to be governed by the provisions of the Judicature Act. The right of dower is a legal conclusion from certain facts, and these facts ought to be shortly stated in the pleading.

The statement of claim was held insufficient and was struck out, leave being given to amend.

S. H. Blake, Q.C., and *Grote*, for the plaintiff.

Langton and *Haverson*, for the defendants.

Ferguson J.] [March 21.

KINCAID v. REED.

Receiver—Plaintiff—Estate under administration.

Watson, for the plaintiff, moved for an order appointing the plaintiff receiver of the share of the defendant (against whom judgment had been recovered in this action) of the estate of defendant's deceased father, in the hands of his administrator, to which defendant is entitled under the Statute of Distributions. He cited *Fuggle* v. *Bland*, 11 Q. B. D. 711; *Webb* v. *Stenton*, 11 Q. B. D. 518; *Westhead* v. *Riley*, 25 Chy. D. 413.

FERGUSON, J., made the order asked for, appointing the plaintiff receiver of the defendant's share to the extent of the judgment and costs, including the costs of this application. The plaintiff not to be required to give security and not to receive any remuneration. The plaintiff to pass his accounts as receiver, and to hold the money subject to further orders.

Rose, J.] [March 23.

LOCOMOTIVE ENGINE CO. v. COPELAND.

Substitutional service—Local judge—Rule 422, O. J. A.

The action was begun in the High Court of Justice by writ issued out of the local office at Kingston.

Two of the defendants lived in Chicago, Illinois.

The local judge at Kingston made an order for substitutional service on these defendants by serving another person resident in this Province.

Held, that the local judge had no jurisdiction to make the order under the provisions of Rule 422, O. J. A.

Pattison, for the defendant.

D. Saunders, for the plaintiffs.