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Table of Canadian Cases

Reported and Noted in this Volume.

PAGE

Abbott v. Medcalf, *Re* 30
Abell v. Morrison 220
Abraham v. Abraham 505
Accident Insurance Co. v. McLachlan 185
Acme Silver Co. v. Stacey Hardware, etc., Co 477
Aldous v. Hicks 284
Alger & Sarnia Oil Co., *Re* 616
Allenby & Weir, *Re* Solicitor 216
Archibald v. Hubley 188
Archibald v. The Queen 566
Armstrong v. Auger 371
Attorney-General *ex rel* Hobbs v. Niagara Falls Wesley Park, etc., Co 409

Bain v. Ætna Life Ins. Co. 477
Baird v. Walker 227
Banks v. Township of Anderdon 30
Bank of Montreal v. Poyner 119
Barber v. Clark 118, 505
Barry v. Anderson 217
Batchford v. McBean 185
Beatty v. Davis 87
Beatty v. Rumble 475
Bennett, *Re* 599
Bertrand v. The Queen 83
Bickerton v. Dakin 191, 599
Blackley v. Kenney 85
Blair, *Re* 220
Bowey *Re*, Bowey v. Ardill 568
Boyd v. Robinson 117
Brady v. The Queen 83
Brantford, etc., Ry. Co. v. Huffman 536
Brooke v. Toronto Belt Line Ry. Co 567
Bunnell v. Gordon 29
Burk's case, *Re* Central Bank 54
Butterfield, *Re* 118

Campbell v. Kingston & Bath Road Co 217
Campbell v. Scott 192
Cann v. Knott 59
Cape Breton, Municipality of, v. McKay 504
Carter v. Stone 86
Case Machine Co. v. Laird 478
Catton v. Gleason 220
Central Bank, *Re*, Burk's case 54
Central Bank, *Re*, Home Savings & Loan Co's. case 410
Central Bank, *Re*, Nasmith's case 216
Central Bank v. Garland 410
Chapman v. Newell 191
Clarke v. Creighton 60
Coe v. Coe, *Re* 616
Coffin v. North American Land Co 282
Connolly v. Murrell 154, 373
Cornell v. Smith 284
Cossette v. Dunn 184
Cribbin & City of Toronto, *Re* 506
Croil v. Russell 154
Cumming v. Landed Banking Co 151

Dame v. Slater 601
Dancey v. Grand Trunk Ry. Co 245
Davidson v. Taylor 31
Davis & City of Toronto, *Re* 505
Davies v. Gillard 599
Delaney v. Canadian Pacific Ry. Co 246
Donovan v. Haldane 61
Doran v. Toronto Suspender Co 59
Dougall v. Leggo 93
Dubé v. The Queen 567
Duffy v. Donovan 88
Duggan v. London & Canadian L. & A. Co 315
Duncan v. Canadian Pacific Ry. Co 537
Dwyer & Town of Port Arthur, *Re* 474

Edmonds v. Hamilton Provident & Loan Society 316
Elliott v. McCuaig, *Re* 26
Ellis v. Clemens 474
Essex Land & Timber Co., *Re*, Trout's case 601
Exchange Bank v. Fletcher 502

Field v. Rice, *Re* 86
Flett v. Way 88, 192, 508
Fonseca v. Schultz 249
Freehold Loan & S. Co. v. Bryson & Galt .... [illegible]
Frothingham v. Isbister 60
Fuller v. Anderson 153

G., *Re* 372
Gage v. Douglas 119
Garbutt, *Re* 443
Gattie v. Overend 192
Genge v. Freeman 568
Gibbons v. McDonald 85
Gillespie v. Lloyd 247
Gilmour v. Magee 88
Godson v. City of Toronto 58
Gould v. Erskine 30
Graeme v. Globe Printing Co .... [illegible]
Grant v. Hunter 59
Greenwood v. Croome 411
Griffith v. Crocker 316

Hagar v. O'Neill 317
Halifax Street Ry. Co. v. Joyce 56
Hall v. Hall 218
Hamilton v. Groesbeck 409
Heaslip v. Heaslip 89
Henderson v. Blain 478
Heward v. O'Donohoe 536
Hibbard, *Re* 154
Hickey v. Hickey 153
Hobbs v. Ontario Loan & Debenture Co 186
Hope v. Traders Bank 61
Huntingdon v. Attrill 85
Hyatt v. Mills 151

Israel v. Leith 151

James v. Bell 91
Jones v. Kelland, *Re* Parsons 118
Jones v. Macdonald 60
Jones v. Paxton 596
Judson v. City of Toronto 602

Kearney v. Oakes 57
Keen v. Codd 154
Kelly v. Wade 31
Kent v. Kent 189
Knell v. Bowman, Waterloo Election Petition 476

Ladies' Tailoring Association v. Clarkson 501
Laird v. Trerice 120
Lake Winnipeg Transportation Co., *Re* 91
Lamb v. Cleveland 504
Langevin v. School Commissioners of St. Mark 186

PAGE

Langman v. Hudson ... 191
Lasby v. Crewson ... 316, 506
Leeds & Grenville, United Counties of, v. Town of Brockville ... 410
Lilley v. Allin, *Re* ... 616
Local Option Act, *Re* ... 537
Logan, Township of, v. Kirk ... 153
London & Canadian L. & A. Co. v. Municipality of Morris ... 121
Loney v. Oliver ... 343
Long Point Co. v. Anderson *Re* ... 315
Long Point Co. v. Duncan, *Re* 315
Luke v. Kerr and Municipality of E. Whitby ... 181
Lynn v. Toronto General Trusts Co., *Re* Lynn ... 210

McArthur v. Deans ... 476
McCaffrey v. McCaffrey ... 536
McCormick v. Township of Pelee ... 30
McCraney v. McCool ... 216
McGugan v. McGugan ... 442
McIlroy v. McIlroy ... 373
McIntosh v. Moynihan ... 216
McKay v. Bruce ... 283
McKay v. Martin ... 372
McKay v. Nanton ... 92
McLean v. Allen ... 31, 373
McLean v. Bruce ... 191
McMichael v. Wilkie ... 409
McNair v. Boyd ... 87
McNamara v. Kirkland ... 2.7
McPherson v. McPhee ... 444, 601
McRae v. Marshall ... 501
MacDougall v. Law Society of Upper Canada ... 57
Mackenzie v. Ross ... 144
Mahoney v. Horkins ... 89
Marsh v. Webb ... 443
Marthinson v. Patterson ... 245
Martin v. Hutchinson ... 477
Martin v. Magee ... 316
Martin v. McMullen ... 537
Martin v. Moore ... 189
Martin v The Queen ... 371
Mason v. Van Camp ... 444
Massey Co. v. Hanna ... 479
Mathers, *Re* ... 249
Mayes v. The Queen ... 615
Meaford, Town of, v. Lang ... 191
Merchants Bank v. Galbraith ... 122
Merchants Bank of Halifax v. Whidden ... 503
Meyer Rubber Co. v. Rich ... 219
Mingeaud v. Packer ... 442
Mitchell v. Lister ... 218, 476
Mitchell v. McCauley ... 600
Molsons Bank v. Halter ... 187
Molson v. Barnard ... 185
Moody v. Canadian Bank of Commerce ... 345
Moore v. Jackson ... 218
Moot v. Gibson ... 475
Morin v. The Queen ... 188, 615
Muir v. McNeill, *Re* North Bruce Election Petition ... 538
Murray v. Black ... 601

Nasmith's Case, *Re* Central Bank ... 216
Nordheimer v. Alexander ... 502
North Bruce Election Petition, *Re*, Muir v. McNeil ... 538

Odell v. Mulholland ... 154
O'Donohoe, *Re* ... 538
Ontario Investment Association v. Sippi ... 152
Orford, Township of, v. Township of Howard, *Re* ... 409
Owen Sound Dry Dock, Ship building, etc., Co., *Re* ... 507

Paisley v. Wills ... 217
Parsons, *Re*, Jones v. Kelland 118
People's Loan Co. v. Grant ... 187
Peuchen v. City Mutual Insurance Co. ... 410
Peuchen v. Imperial Bank ... 59
Phœnix Ins. Co. v. McGhee ... 57
Plaxton, *Re* ... 26
Pratt v. Bunnell ... 282, 449
Price v. Wade ... 617

Quebec, City of, v. The Queen 84

Radford v. Macdonald ... 85
Raphael v. McFarlane ... 184
Redmond v. Canadian Mutual Aid Association ... 315
Regina v. Barry ... 566
Regina v. Fisher ... 567
Regina v. Malcolm ... 566
Regina v. Milford ... 58
Regina v. McCurdy ... 371
Regina v. McGreevy ... 183
Regina *ex rel* McGuire v. Birkett ... 343
Regina v. Petrie ... 59
Regina v. Popplewell ... 58
Regina v. Sloan ... 410
Regina v. Starkey ... 119
Regina v. Thomas ... 83
Reilly v. City of London ... 153
Ritchie v. Grundy ... 248
Robinson v. Harris ... 246
Rogers v. Knowles ... 344
Rogers v. Ontario Bank ... 507
Romney, Township of, and Township of Tilbury, *Re* ... 411
Ross v. Stobil, *Re* ... 220
Ross v. Hannan ... 502
Royal Institution for Advancement of Learning v. Scottish Union, etc., Insurance Co. 186

Sarnia Oil Co., *Re* ... 568
Sawyer v. Baskerville ... 91
Sawyer v. Pringle ... 216
Sawyer v. Thomas ... 84
Schwersenski v. Vineberg ... 503
Scott v. Scott ... 87
Scripture v. Reilly ... 219
Shaw, *Re* ... 247
Sherbrooke, City of, v. McManamy ... 185
Shore v. Shore ... 152
Sibbald v. Grand Trunk Ry. Co. 85
Simpson v. Chase ... 373
Simpson v. Hall ... 477
Sims v. Kelly, *Re* ... 20
Smith v. Benton ... 86
Smith v. Lawrence ... 116
Smith v. The Queen ... 615
Sombra, Township of, v. Township of Chatham ... 217
Standard Bank v. Frind ... 618
Stark & Stephenson, *Re* ... 90
Stephen, Township of, v. Township of McGillivray ... 411
Stewart v. Whitney ... 119
Stott v. Lancashire Fire Ins. Co. ... 475
Sullivan v. Francis ... 29
Sweetland v. Neville ... 602

Taillifer v. Taillifer ... 507
Taylor v. Massey ... 190
Thompson v. Clarkson ... 601
Tipling v. Cole, *Re* ... 411
Toothe v. Frederick ... 344
Toronto Dental Mfg. Co. v. McLaren ... 31
Tremayne v. Grand Trunk Ry. Co. ... 85
Trout's Case, Essex Land, etc., Co., *Re* ... 601
Trustees R.C. Separate School v. Township of Arthur ... 153
Turner v. Crozier ... 373

Unger v. Brennan ... 444
Union Bank v. Neville ... 284
Union Fire Ins. Co., *Re*, McCord's case ... 537

Vaughan Road Co. v. Fisher ... 602
Vernon v. Corporation of Smith's Falls ... 476

Wagner v. O'Donnell ... 284
Wait v. Sager ... 617
Walker v. Dickson ... 617
Wansley & Brown, *Re* ... 316
Ward v. Braun ... 90
Waterloo Election Petition, Knell v. Bowman ... 476
Waterous Engine Co. v. Palmerston ... 117
Watson v. Kennedy ... 597
Watson v. Ontario Supply Co. 32
Western Assurance Co. v. Ontario Coal Co. ... 59
Whidden v. Jackson ... 410
White v. Municipality of Louise 90
Williams & McKinnon, *Re* ... 602
Williams v. Township of Raleigh ... 411
Wilson and Toronto Incandescent Light Co., *Re* ... 189
Wilson and Houston, *Re* ... 218
Wilson, *Re* ... 344
Winnipeg, City of, *Re* By-laws of, *Ex parte* Barrett ... 120

Young, *Re* ... 444

Zilliax v. Deans ... 247

Table of English Cases

Noted in this Volume in "Current English Decisions."

PAGE

Aas v. Benham 428
Abrahams v. Deakin 236
Accomac, The 11
Adams v. Adams 40
Akerman v. Akerman 582
Alden v. Beckley 10
Allcock v. Hall 233
Amos, *Re*, Carrier v. Price ... 580
Anderton & Milner, *Re* 43
Andrew v. Cooper, *Re* Bowden 41
Angus v. Clifford 487
Apollinaris Co., *Re* 71
Arbib & Class, *Re* 330
Armour v. Bate 461
Ashling v. Boon 266
Ashworth v. Roberts 46
Askew v. Askew 238
Attorney-General v. Logan ... 424
Avery v. Wood 578
Avon, The, & Thomas Jolliffe, *Re* 71
Aylward v. Lewis 392

Bank of England v. Vagliano. 457
Barker, In the goods of 301
Barker v. Farlong 395
Barlow v. Terret 424
Barney v. Stubbs, *Re* Stubbs, 137, 263
Barrow v. Isaacs 167
Bartlett v. Charles, *Re* Eyton. 42
Batten v. Dartmouth Harbor Commissioners 46
Baumvoll v. Gilchrest 486
Beasley v. Roney 236
Beckett v. Tower Assets Co.. 66
Belcher v. Williams 44
Bell v. Antwerp 70
Bellamy v. Debenham 43, 262
Bellencontre, *Re* 425
Bellyse v. McGinn 461
Bentley v. Manchester, etc., Ry. Co 582
Bignold v. Bignold 43
Bilke v. Roper, *Re* Smith 47
Bills v. Totham, *Re* Patrick.. 134
Blyth v. Fladgate 203
Bodman v. Bodman 579
Boehm, In the goods of 300
Bolton v. Buckenham 104
Bolton v. Salmon 391
Bonnard v. Perryman 428
Bostock v. D'Eyncourt, *Re* Yates 551
Bowden, *Re*, Andrew v. Cooper 41
Brace, *Re*, Welch v. Colt 528
Bridgewater Navigation Co., *Re* 136, 455
Briggs & Spicer, *Re* 394
Britannia Fire Association, *Re*, Coventry's Case 199
Budgett v. Binnington 67
Burt v. Arnold, *Re* Jeffrey 332

Caron Park, The 11
Carrier v. Price, *Re* Amos 580
Castioni, *Re* 101
Chappell v. North 484
Chatenay v. Brazilian Submarine Telegraph Co 69
Cheesman, *Re* 454
Child v. Bulmer, *Re* Wilks 552
Clarke v. Ramuz 525
Clinck v. Radford 298
Comfort v. Betts 358
Connor v. Kent 575
Coombs v. Wilkes 552
Cordovan Union Gold Co., *Re* 490
Coupé Company v. Maddick 524
Cox v. Bennett 331
Cox v. Hakes 47, 103
Cox & Neve, *Re* 393
Coxon v. Gorst 392
Crawford v. Forshaw 428
Crawshay, *Re*, Dennis v. Crawshay 13
Crawshay, *Re*, Walker v. Crawshay 581
Cressington, The 168
Crumbie v. Wallsend Local Board 235
Cunningham & Frayling, *Re*. 490
Curfew, The 167
Curran v. Treleaven 576
Cusack v. London & N.W. Ry. Co 165

Daniel v. Ferguson 361
Davis, *Re*, Evans v. Moore ... 578
Dean v. Dean 579
De Francesco v. Barnum 40
De Mestre v. West 460
De Pass v. Capital and Industries Corporation 103
De Souza v. Cobden 356
Dennis, In the goods of. 549
Dennis v. Crawshay, *Re* Crawshay 13
Dick, *Re*, Lopes v. Hume-Dick 263
Dickinson, In the goods of 427
Dobson v. Festi 423
Dodsworth, *Re*, Spence v. Dodsworth 331
Dowse v. Gorton 458
Drummond & Davie, *Re* 264

Elve v. Boyton 264
Evans, In the goods of 12
Evans v. Moore, *Re* Davis ... 578
Eyton, *Re*, Bartlett v. Charles. 42

Fecitt v. Walsh 485
Fillingham v. Wood 72
Fisher v. Jackson 392
Fletcher v. Fields 360
Foster, *Re*, Lloyd v. Carr 47
Foster v. North Hendrie Mining Co 68
Frames v. Bullfontein Co 135
France v. Dutton 427
Freme, *Re*, Freme v. Logan .. 580

Gedye v. Commissioners of H. M. Works, etc 527
General Service Co-operative Stores, *Re* 203
Gibbs v. Messer 459
Gibson v. Lawson 575
Grenwood v. Turner 394
Griffith v. Pound 44

Halifax Banking Co. v. Gledhill 72
Hamlyn v. Wood 526
Hammond v. Schofield 234
Hardinge v. Cobden, *Re* Lucan 42
Hargreave v. Freeman 551
Harrison, *Re*, Smith v. Allen 456
Harrison v. Southwark & Vauxhall Water Co 457
Hayward v. Mutual Reserve Association 462
Head & Macdonald, *Re* 13
Heinemann v. Hale 423
Hemingway, *Re*, James v. Dawson 41
Henderson v. Bank of Australasia 15
Henderson v. Underwriting and Agency Association 296
Hewett v. Barr 69
Hoare v. Niblett 360
Hogarth v. Miller 205
Humber v. Richards, *Re* Richards 45
Hunt v. Great Northern Ry. Co 426

Indigo Co. v. Ogilvy 361

James v. Dawson, *Re* Hemingway 41
James v. Smith 204
Jeffray v. Tredwell, *Re* Tredwell 527
Jeffrey, *Re*, Burt v. Arnold 332
Jenkins v. Bushby 263
Jeuoure v. Delmege 205
Johannesberg Hotel Co., *Re* .. 135
Jones v. Foley 357
Jones v. Macaulay 104
Jones v. Merionethshire Building Society 491
Joyner v. Weeks 422

Kennedy v. Cowie 359
King v. Frost 49

	PAGE
Knowles v. Scott	333
Kong Magnus, The	299
Lacon v. Lacon	333, 488
Lane v. Esdaile	459
Lashmar, *R* Moody v. Penfold	200
Learoyd v. Brook	232
Levasseur v. Mason	423
Llewellin, *Re*	579
Lloyd v. Carr, *Re* Foster	47
Louis, *Re*	298
Low v. Bouverie	577
Lucan, *Re*, Hardinge v. Cobden	42
Lysaght v. Clark	296
McMahon v. North Kent Iron Works	395
McNair v. Audenshaw Paint Co.	526
Mabett, *Re*, Pitman v. Holborrow	332
Makins v. Ibotson	135
Mallinson v. Carr	68
Manchester, Mayor, etc., of, v. Williams	16, 69
Mander v. Falcke	489
Mangan v. Metropolitan Electric Supply Co.	489
Mann, In the goods of	427
Medawar v. Grand Hotel Co.	421
Mervin v. Crossman	581
Metcalfe v. Metcalfe	550
Metropolitan Coal Asso'n, *Re*	46
Miller v. Dell	234
Mills v. Dunham	330
Mirams, *Re*	296
Monk v. Bartram	164
Montgomerie v. United, etc., Steamship Association	165
Montgomery v. Thompson	459
Moody v. Penfold, *Re* Lashmar	200
Moore, *Re*	487
Moore v. Knight	265
Moore v. North-Western Bank	491
Musgrove v. Chun Teeong Toy	460
National Bank v. Silke	233
National Debenture Corporation, *Re*	489
Nevin, *Re*	455
New Chile Gold Co., *Re*	45
Opera, *Re*	395
Oppenheim v. Schweder, *Re* Schweder	551
O'Shea v. Wood	300, 427
Parker, *Re*, Wignall v. Park	332
Parrott, *Re*	425
Patrick, *Re*, Bills v. Tatham	134
Pelton v. Harrison	525
Perry v. Eames	332
Phelps v. Hill	297
Pitman v. Holborrow, *Re* Mabett	332
Pittard v. Oliver	234, 336
Portuguese Consolidated Copper Mines, *Re*	550
Pride, *Re*, Shackell v. Cobnett	394
Pullman v. Hill	236
Pyle Works, *Re*	136
Queensland Mercantile & Agency Co., *Re*	264
Quickstep, The	10
Radcliffe v. Bewes, *Re* Radcliffe	528
Rawlins, *Re*	12
Reeve v. Gibson	298
Reeves v. Butcher	527
Regina v. Bank of England	360
Regina v. Barnardo, Jones's case	103
Regina v. Bowerman	70
Regina v. Goole	461
Regina v. Hall	359
Regina v. Jackson	356
Regina v. Marsden	425
Regina v. Vreanes	165
Rialto, The	238
Richards, *Re*, Humber v. Richards	45
Rickett v. Sharp, *Re* Sharp	12
Roberts v. Cooper	456
Roberts v. Jones	426
Robson v. Hamilton	489
Rogers v. Lambert	164
Salamon v. Warner	358
Salford, Mayor of, v. Lever	102
Salomons v. Knight	454
Sandback & Edmonson, *Re*	134
Schofield, *Ex parte*	525
Schweder, *Re*, Oppenheim v. Schweder	551
Scott v. Hanbury	202
Seagrove v. Parks	295
Seaman, *Re*	301
Serraino v. Campbell	105
Shackell v. Cobnett, *Re* Pride	394
Sharp, *Re*, Rickett v. Sharp	12
Shepherd v. Berger	297
Simmons v. London Joint Stock Bank	201
Skinner's Co. v. Knight	549
Slevin v. Hepburn	204, 427
Smith, *Re*, Bilke v. Roper	47
Smith, *Re*, Williams v. Frere	203
Smith & Nelson, *Re*	10
Smith v. Allen, *Re* Harrison	456
Smith v. Bailey	524
Smith v. Gronow	523
Smith v. Pyman	68, 359
Solomon v. Knight	454
Soltykoff, *Re*	166
South Staffordshire Tramways Co. v. Sickness, etc., Ass'n	166
Speight v. Gosnay	337
Spence v. Dodsworth, *Re* Dodsworth	331
Stanley v. Powell	69
Steinman v. Angier Line	297
Stogdon v. Lee	299
Stone v. Lickorish	457
Streatley, In the goods of	237
Stuart v. Bell	486
Stubbs, *Re*, Barney v. Stubbs	137, 263
Surman v. Wharton	235, 295
Swain v. Bringeman	582
Tawes v. Knowles	577
Taylor *Re*	330
Taylor v. Russell	71
Tendring Guardians v. Dowton	44
Thorpe, *Re*, Vipont v. Radcliffe	457
Thynne v. Sarl	392
Thynne v. Shove	44
Towerson v. Jackson	526
Tredegar v. The Calliope	205
Tredwell, *Re*, Jeffray v. Tredwell	527
Turner v. Goldsmith	237
Tyler v. Merchant Taylors' Co	12
Unwin v. Hanson	424
Vernon v. Watson	166, 485
Vindomara, The, v. The Haswell	205
Vine v. Raleigh	360
Vipont v. Radcliffe, *Re* Thorpe	457
Walker v. Crawshay, *Re* Crawshay	581
Walker v. Everard	523
Wanzer, *Re*	202
Webster, *Re*	393
Welch v. Colt, *Re*, Brace	528
West Riding of Yorkshire Building Society, *Re*	42
Westacott v. Bevan	359
Western National Bank of New York v. Perez	105
Westmoreland Green & Blue Slate Co. v. Feilden	550
Weymouth & Channel Islands, etc., Co., *Re*	133
Whitely & Roberts, Arbitration *Re*	265
Whittaker v. Kershaw	14
Whitwood Chemical Co. v. Hardman	487
Wiedemann v. Walpole	548
Wignall v. Park, *Re* Parker	332
Wildhing v. Bean	70
Wilks, *Re*, Child v. Bulmer	552
Willey v. Great Northern Ry. Co.	426
Williams v. Frere, *Re* Smith	203
Williams & Stepney, *Re*	357, 484
Williamson v. Hine	204
Windhill Local Board v. Vint	15
Yates, *Re*, Bostock v. D'Eyncourt	551

Rules of Practice

Referred to in this Volume.

RULE	PAGE
3	508
30	343
34	462
36	462
37	462
232	423
238	88
253	70
265	10, 105, 296, 423
266	423
271	361, 423
271 (*e*)	70
271 (*g*)	477
272	423
288	10, 191
309	41, 154
310	392
311	602
315	44
324	456
328	617
329	219
332	219, 456
375	192
442	88
508	296
536	88
551	89
566	192
580	203
605	331
654	372
673	461
718	89
727	104
739	296
753	89
755	233
756	618
850	284
854	89
876	10, 618
886	617
935	103, 191, 373
1005	154
1051	344
1170	87, 426
1170 (*a*)	444
1172	87
1204	13, 508
1205	60, 192, 508
1229	442
1233	373

FORMS	PAGE
92	88
124	88

Table of Statutes

Referred to in this Volume.

Imperial Statutes.

	PAGE
32 Henry VIII., c. 9	443
13 Elizabeth, c. 5, s. 5	72
21 Jac. I., c. 16	234, 265
9 Geo. II., c. 5	58
11 " " 19	477
39 Geo. III., c. 98	360
B.N.A. Act, s. 91, s-s. 21	284

Revised Statutes of Canada (1886).

	PAGE
cap. 5, ss. 19, 33	616
" 32, ss. 58, 59, 65	615
" 38, s. 53	57
" 39	371
" 48, s. 2, s-s. 4	83
" 106	86
" 107, ss. 15, 22, 23	485
" 120, ss. 20, 29	54
cap. 120, s. 48	601
" 129, ss. 16, 17	202
" 129, s. 39	601
" 129, s. 49	550
" 135, s. 24 (*d*)	56
" 135, s. 24 (*g*)	185, 186
" 135, s. 28	186
" 135, s. 29	184, 186
" 135, s. 29 (*a*) (*c*)	185
" 135, s. 30	185, 186
" 135, s. 61	186
" 142, s. 6, s-s. 2	443
" 142, s. 14 (*a*)	101
" 164, s. 50	475
" 164, s. 60	70
" 173, s. 3	58
" 173, s. 12, s-s. 1	575
" 174, s. 25	475
" 174, ss. 57, 58, 70	443
" 174, ss. 164, 256, 266	188

	PAGE
31 Vict., c. 13, ss. 16, 17, 18	183
37 " c. 15	183
44 " c. 25, s. 27	83
49 " c. 48, s. 2	410
51 " c. 2, s. 4	343
51 " c. 14, s. 15	615
52 " c. 13, s. 4	83
52 " c. 14, s. 6	615
53 " c. 26, s. 9	485
53 " c. 28, s. 2	537
53 " c. 33, s. 7, s-s. 3	457
53 " c. 33, s. 8	233
53 " c. 33, s. 22	166
53 " c. 33, ss. 72, 75	233

Revised Statutes of Ontario (1887).

PAGE

cap. 25, ss. 10, 11 476
" 44, s. 32 202
" 44, s. 43 47
" 44, s. 52, s-s. 5 29
" 44, s. 58, s-s. 8 428
" 44, s. 77 263
" 47, s. 19, s-s. 2 372
" 47, ss. 19, 38 442
" 51 129
" 51, s. 144 ....411, 444, 601
" 51, s. 149 373
" 51, s. 155 116
" 51, ss. 173, 182, 185, 188, 373
" 51, s. 197 ....31, 116
" 51, s. 208 116
" 53, s. 16 10
" 57, s. 9 30
" 60, s. 1 617
" 61, s. 8 ....154, 373
" 61, s. 10 ....85, 411
" 65, s. 4, s-s. 3 617
" 67, s. 1 344
" 67, s. 7 32
" 100, s. 29 580
" 102, s. 4 316
" 103, s. 3 264
" 107 217
" 109, s. 12 240
" 109, s. 29 528
" 110, ss. 3, 5 490
" 110, ss. 29, 30 263
" 111, s. 17 246

cap. 111, s. 23 578
" 111, ss. 35, 37 283
" 116, s. 23, s-s. 5 372
" 116, ss. 74, 127, 137 220
" 122, s. 7 358
" 124 ....410, 601
" 124, s. 2 ....85, 116, 187, 599
" 124, s. 6 444
" 124, s. 7 119
" 124, s. 9 ....86, 284
" 124, s. 23 345
" 125 ....66, 245
" 126, ss. 16, 19 191
" 126, s. 23 217
" 132, s. 3, s-s. 2 ..14, 299, 331, 525
" 132, s. 3, s-s. 3 ...235, 299, 525
" 132, s. 3, s-s. 4 ....299, 525
" 132, s. 4, s-s. 3 264
" 132, s. 7 218
" 132, s. 20 331
" 132, s. 22 235
" 133, ss. 5, 6 282
" 134, s. 3 ....218, 264
" 136 442
" 136, s. 5 ....87, 219
" 137, s. 3 154
" 141 409
" 143, s. 11 549
" 147, s. 34 118
" 147, s. 42 442
" 147, ss. 43, 46 452
" 154, s. 3 421
" 157 181
" 157, s. 45 152

cap. 159 217
" 172 442
" 175, s. 13 181
" 176 181
" 184, s. 389 411
" 184, s. 445 476
" 184, s. 477 58
" 184, s. 569 217
" 184, s. 576 411
" 184, s. 590 409
" 193, s. 6, s-s. 3 181
" 193, s. 52 474
" 193, s. 191 151
" 194, s. 130 410
" 205, s. 99 68
" 208 409
" 215, s. 3 192
" 225, s. 39 442
" 227, ss. 21-24 153
" 237 181
" 237, s. 14, s-ss. 1, 2, 3 316
51 Vict., c. 22 442
51 " c. 23, s. 2 29
51 " c. 23, s. 11 616
52 " c. 10, s. 2 360
53 " c. 10, s. 23, s-s. 11 68
53 " c. 37 191
53 " c. 37, s. 13 284
53 " c. 37, s. 25 597
53 " c. 37, s. 35 284
53 " c. 56, s. 18 537
54 " c. 14 372
54 " c. 19, s. 13 582
54 " c. 46, s. 1 537

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WE send with this number the sheet almanac, a welcome addition, as of old, to the literature of a lawyer's office. The volume for 1890 closed with the usual Index and Table of Cases, etc. There was added a new feature, to wit, a Table of the Statutes referred to in the volume, with the particular section on which some point was decided, or construction placed by the courts. There is also a Table of the Consolidated Rules of Practice, of a similar character. We feel that this addition to the index will be of practical value, enabling the practitioner to find the latest decision on any of the sections or rules given.

IN referring to the index we are reminded of a clipping from the *London Globe* a couple of years ago, which we reprint below, in the hope that its perusal may serve as an excuse for any shortcoming which our readers may find. The extract reads as follows:—"It would be difficult to discover an intellectual quality which the index-maker does not require. He must have a high degree of imagination in the truest sense—enough to put himself in the place of every possible student, for every possible purpose, so as to know, by a sort of instinct, what each would require. He must have the logical faculty that knows what to omit as well as what to insert; and he must know the work he deals with, not merely with mechanical precision, but with intelligent mastery. Indeed, the ordinary index-maker is in this unfortunate position—he requires qualities that would place him above his work, and yet he cannot do his work efficiently without them. The result is that there is scarcely such a thing as a really good index in the world; nor will there be until the truth is recognized of the fact that the production of more indexes to books, and not more books themselves, is the most practically useful work in which any trained scholar can engage. A good and comprehensive index should be worth, to its compiler, the number of its words in gold; and its achievement should imply fame." We wish it were possible for us to attain to this high standard.

CROSS-EXAMINATION.

There is hardly any subject connected with the administration of justice which, at times, demands more consideration than that of the cross-examination of witnesses.

To anyone who is a regular attendant at the trials of jury cases, it will be perfectly obvious that the time taken up with the cross-examination of a witness is very much out of proportion to that on his examination in chief, and, more-

over, that the length of the re-examination is very often in proportion to that of the cross-examination.

Now, if the cross-examination of a witness always resulted in some substantial benefit to the opposite party, it might fairly be said that no time was unnecessarily lost, and that counsel was not unreasonable in taking up the time of the court and jury.

It often happens, however, that in such cases much time is unnecessarily wasted—the time of the court, of the jurors, of the counsel, of the witnesses, of the suitors in that particular case, as well as of the suitors in other cases standing for trial, and their witnesses.

Where an old experienced counsel takes a witness in hand for cross-examination he generally devotes himself to one or two particular points, either to get the witness himself to unsay what he has said, or, what is much the same, to make him contradict himself—or to shew out of his own mouth, that, even should he adhere to what he said on his examination in chief, he is unworthy of credence.

In dealing with such a witness a counsel of experience will generally be able to tell, after a few questions, on what line he should continue his investigation. If he sees that the witness is honest in his adherence to what he has already said, he will take care about continuing a course which will make the evidence already given more impressive, and more confirmed in the minds of the jury.

If he sees or suspects, that, though the witness is dishonest, there is no prospect of his being induced, either by the extreme pressure that can be sometimes brought to bear on such a witness, or by tripping him up, to "go back" on what he has said, then counsel will adopt another line—and it is then that great latitude should be, and generally is, given to the cross-examination, even though much time may appear to be thereby wasted.

It constantly happens, however, and it can be seen by attending the sittings of any court engaged with jury cases, that an immense amount of valuable time is wasted by the utterly aimless and unpointed way that a cross-examination is conducted, generally, of course, by young and inexperienced counsel—but, alas! not always. And this is carried to such an extent sometimes that sympathy for the witness is excited, not only in the breasts of the surrounding listeners, but also among the jury; that sympathy extending itself sometimes to that party to the suit, whose witness is being thus treated.

We are aware that in the case of young and inexperienced counsel, we must not look for that mode of conducting a cross-examination which can only be attained to after, perhaps, years of practice, and from a tyro, the proficiency of a master cannot be expected. And so, when we see a youthful counsel engaged in a contest of right and wrong, we must make every allowance for him, in his endeavor to establish and uphold the former.

But when it is evident to everyone that a witness trying to be honest, is subjected to a system of bullying and browbeating, and often of insult, then there should be some way of calling for interposition.

That interposition can only be looked for and can only take place from the court itself, and, we are free to admit, it is sometimes difficult to say when that right should be exercised.

It will be in the memory of many, that the late lamented Chief Justice Moss, after he ascended the bench, seeing the unwarrantable extent to which cross-examinations were carried—often by young counsel who wished to shew their smartness, and to establish a reputation as successful pleaders—interposed on several occasions in a most decided way, declaring that he desired that cross-examinations should be confined within proper bounds. No doubt the same desire exists in the minds of all *nisi prius* judges, but how to carry it out seems to be the difficulty.

Very often interference from the bench brings forth the insinuation from the offending counsel that the rights of his client are being interfered with—very often it results in actually rendering the examination more protracted. For it sometimes happens that counsel appear to forget that a judge is supposed to be impartial, and may be assumed to be so until he shows a bias, and that the effort to protect a witness, or to prevent time being unnecessarily wasted, is the duty, and sometimes the very unpleasant duty, of a judge.

The extreme latitude that was allowed in the Tichborne case seems to have established a precedent which is freely followed. But it would be wise for counsel to consider well, whether the exercise of the right thus conceded is at all times expedient.

The ordinary text-books lay down that even where questions wholly irrelevant to the issue are being asked in order to test the credibility of the witness, judges seldom interfere, trusting to the honor of counsel not to abuse their liberty. But surely when a judge sees plainly that this liberty is being abused, it is not only his right, but his duty, to interfere.

If counsel's brief contains questions to be put to an opponent's witness, it is of course his duty to put them, unless in the exercise of his judgment or his common sense, he see fit to omit them. And if instructed to put given questions with a view of bringing out certain facts and incidents in the witness's life, which will tend to discredit him, he will be justified in putting them. But will anyone say that a long series of random questions, put with a hope of bringing out something which the questioner has no real grounds for supposing exists, is justified?

An aimless and unwarranted cross-examination is a great evil; and "there is another like unto it"—and that is, the constant interruption by the opposite counsel, even when the cross-examination is being conducted in a fair and proper manner.

It is said that in England, the opposite counsel seldom interferes with the cross-examination of his witness—probably upon the ground that if the witness is honest a thorough sifting of his evidence can do no harm, and that any apparent contradictions can be set right on re-examination; while, if the witness is not honest, it will look as if an effort were being made to help him out, and betray, perhaps, an intimacy with "ways that are dark."

If counsel would ever bear in mind that an improper cross-examination—improper in any way—results only in assisting to bring the profession into disrepute or ridicule, in wasting the time of everyone who has any business at the court, and the patience as well as the time of the judge, and at the same time promotes the idea that the intelligence and judiciousness of the counsel himself are at fault—then, indeed, would some of the evils of this life be ameliorated.

GRAND JURIES.

Considerable discussion has taken place from time to time with regard to the question whether grand juries should be retained or abolished. At nearly all of our courts of Oyer and Terminer, the presiding judges have addressed the Grand Inquest upon this point, and in many cases have asked that body for an expression of opinion on the subject. Generally, the answer has been favorable to the retention of the system, and this fact is urged as an argument in furtherance of the views of those who do not desire to see any change made in the trial of criminal cases. A moment's reflection, however, will show that the opinion of grand juries on the question of their own continuance is not entitled to any great weight. As a rule, the jurors are not men accustomed to legal procedure. They have no special knowledge on the subject. Their training and modes of thought are not such as to enable them to give any very valuable suggestions with reference to the functions of a grand jury as part of our criminal procedure, and their information on this head must necessarily be very limited indeed. Add to this that, in most instances, their presentment is prepared by the foreman at the last moment, and we can readily judge of the importance of any opinion professedly given by the jurors, as a body, on a matter involving, for the purpose of a thorough knowledge of it, great experience, much research, and careful, serious reflection.

The views of many of our judges are, we are aware, in favor of the system, but one must not conclude that because the judges express themselves against the abolition of the grand jury therefore it ought not to be abolished. We have the greatest respect at all times and under all circumstances for the opinions of our judiciary, but this is a question which those who, as Crown prosecutors, are practically dealing with grand juries, and who know from actual experience how the system works and is worked, may be permitted with all deference to express a dissenting opinion, and to take issue with abler men, whose position removes them from the level from which the system can be best seen and judged. We are therefore inclined, from the information which we have gathered from various reliable sources, to take a position adverse to that generally taken by the Bench on this point; and whilst we approach the subject with much diffidence, we hope to satisfy our readers that the grand jury is not all that it is claimed to be, and that the administration of criminal justice would not suffer if the venerable institution were abolished.

So far as the origin of the grand jury is concerned, the causes which led to its inception no longer exist, and consequently cannot be urged as a reason for its continuance, nor does a historical review of this venerable system supply us with any arguments in its favor. With regard to the information which can be gained from the writers on this subject, there appears to be considerable obscurity concerning the early history of juries. The grand jury was originally a creature of necessity. There does not appear to have been any regularly constituted tribunal for the trial of criminals, nor was there any provision for the attendance of witnesses, their examination on oath, or any other of the ordinary means now used

for the discovery of facts at the trial. These matters were dealt with, and the present functions of a court and petit jury were performed by the grand jury, composed of men selected from the neighborhood of the occurrence, and supposed to have a personal knowledge of the circumstances. The original function of the grand jury was, therefore, that of a trial jury and witnesses. As one writer puts it, "If a thief were taken in the act, the case was quite clear and no trial was needed." If not so taken, he was tried by "oaths and ordeals at the hundred court." If the grand jurors knew enough of the case personally, they at once decided the issue of guilt or innocence. If they did not know enough to enable them to judge, and the compurgation or oaths failed to satisfy them, then there was recourse to the ordeal, which was of different kinds and was used only as a last resort. The jurors actually tried the cases and were themselves the witnesses, for the simple reason that no other tribunal with similar functions existed. The accusation by a grand jury became practically a conviction. The jurors were, in contemplation of law, the witnesses. Sir James Stephen says: "It was by their oath, and not by the oath of their informants, that the fact to be proved was considered to be established, and the only form of perjury known to the law of England as a crime till comparatively modern times was that form of perjury which was committed by giving a false verdict, and which was punished by the process known as an attaint." The indictment was the accusation presented by the grand jurors on their own knowledge. After several changes in the law had been made, witnesses were introduced before the courts to testify as to the facts of the case under consideration, and the jurisdiction of grand juries became very much curtailed in consequence. The principal reason for the convening of grand juries, namely—the trial of the accused by the peculiar modes then sanctioned as proper and sufficient—ceased to exist, as the final adjudication in criminal matters was gradually assumed by what is now known as the petit jury; but nothing appears to have been done towards abolishing the prior tribunal, although the changes we have indicated materially affected its power and procedure. It continued to exist, just as many other ancient forms and ceremonies, useless in themselves and cumbrous elements in the administration of justice, continue to the present day to exist, because our administrators are, in too many cases, imbued with a feeling of veneration for matters that have nothing but age to recommend them.

The Assize of Clarendon, 1164, and of Northampton, 1176, are amongst the earliest authentic records of the introduction of what was in some respects similar to our present procedure, with the exception of the ordeal of water. The provisions of the Assize of Clarendon are that, in case any one is accused before the justices of our Lord the King of murder, theft, robbery, or of harboring persons committing those crimes, or of forgery or arson, "by the oath of twelve knights of the hundred, or if there are no knights, by the oath of twelve free and lawful men, and by the oath of four men from each township of the hundred, let him go to the ordeal of water, and if he fails, let him lose one foot." The Assize of Northampton added to this the loss of the right hand of the accused, and to abjure the realm and exile himself from the realm within forty days.

These twelve men were originally the accusers instead of the private person wronged, and there is no less an authority than Mr. Justice Stephen, in his admirable History of the Criminal Law, for the assertion that "the system of indictment by a grand jury, which merely reported on oath the rumors of the neighborhood, might, and no doubt often did, work cruel injustice." After a time, the practice of convening what he calls "something like a county parliament," fell into disuse, and the sheriffs gradually adopted the plan of "summoning only a sufficient number of *probi et legales homines* to form a grand jury, and as many petty juries as might be needed." The theory was to summon the county magistrates until twenty-three appeared, but practically the summoning of "good and lawful men," not necessarily magistrates, was held to be a sufficient compliance with the law. This is now the practice of our system of criminal procedure, and it is based entirely on the theories and customs in vogue amongst the early law-givers and dispensers of justice during the Saxon and immediately succeeding periods of English history. All that has been left to the grand jury is the function of preliminary investigation.

Bearing in mind that the original grand jury system was a sort of county council and a local executive body, having an eye to the whole details of local government and the administration of justice or injustice, as the case might be, that the accusation of supposed criminals was only one of its numerous duties, and that to all intents and purposes it has been stripped of its once great power, we may fairly ask whether the shred that still remains might not go with the rest. Other functionaries and other bodies perform the greater part of the work originally assumed by grand juries in a better manner than it was done by them, and parliament of late years, still further encroaching on the functions of the grand jury in giving summary trials and a direct appeal to the court for its judgment of guilt or innocence, has shown itself to be guided by good sense and practical ideas. At any rate, it will be seen from the brief sketch we have given that there can be no argument in favor of the system grounded on its inception or early history; and like all other matters in this utilitarian age, if it has nothing to recommend it save the veneration which comes from the accident of old age, it must, we predict, soon become a fact for historians only.

We come now to the present state of grand juries, and the first questions which suggest themselves are: Is the system in accord with our modern ideas of fair trials? Is the bill found or ignored an independent judgment by a competent tribunal? Is it right that a man should be put in peril by an irresponsible body in his absence? Is not the theory of a secret tribunal entirely opposed to our whole system of legal procedure? Is it a safe tribunal to deal with the reputation or the liberty of a subject? We must not forget that the finding of a bill is of serious moment to the accused. In grave offences he is seldom allowed bail after a bill is found, although six months must elapse in many instances before he can be tried. The mere finding of a bill is also of the greatest consequence to the reputation and future of a person charged with an offence, even if the presiding judge directs an acquittal. It is therefore highly proper to enquire whether, in an important matter like this, we have retained and nourished out of the legal wrecks and deformities of the past, a useful or injurious article.

What is the practical experience in regard to the system? We have no hesitancy in alleging that there are very few grand juries that will not find a bill at the instance of the Crown prosecutor, and there are fewer still who will not ignore a bill on the intimation of the court in charging the Grand Inquest. This is natural. The jurors are principally farmers, with occasionally one or two business men on the panel. They implicitly obey those skilled in the law to guide them, when they think it proper to make enquiries on legal matters. They ask questions, the answers to which materially influence their judgment. But they are not bound to seek for any information, and a friend of the accused on the panel, with a little shrewdness, a little manipulation, may readily succeed in having a bill thrown out which ought to be presented. The evidence may be ingeniously extracted one way or the other, as the examiner is friendly or hostile to the prisoner. There is no limit set upon the mode of conducting a prosecution in the grand jury room. No evidence is allowed to be disclosed outside its sacred precincts. The *modus operandi* remains as if it were a confessional secret. The very oath taken by the jurors protects them, as they are in effect sworn to keep secret what transpires within their chamber. Only one witness is allowed to be present at one time. There is no record made of the evidence given. It is true that witnesses are sworn by the foreman; but if the witness swears to what is untrue, his perjury is practically protected and safely guarded by the veneration which the law has for the system which we are opposing. It is true that if a man swore to a fact in the grand jury room and directly opposite in the witness box an hour afterwards, there is a way of prosecuting him; but it would be so beset with legal points and hoary-headed objections, that a conviction would be almost impossible. Bills are presented to the grand jury on the last day of their session. The jurors are anxious to return to their homes. It is difficult to keep them together when their sitting is prolonged. They are, to a great extent, an independent body. What is the result? A hurried examination of a witness or two, not one-fourth of the facts elicited, a suggestion by an impatient "good and true man" that another day will be lost unless the business can be finished at once, a finding of a bill, and some unfortunate individual is subjected to the caprice of "the strong god, Circumstance," put upon his trial, mulcted in heavy counsel fees for his defence, and acquitted very often before the Crown has completed its case! Surely these are matters which ought to weigh heavily in considering the advisability of retaining this adjunct to our criminal procedure.

A grave objection to the system is undoubtedly that the jury is a secret tribunal. The proceedings are, as is well known, not only conducted in private, but the privacy is sanctioned and bound by an oath which each juror takes after the foreman has been sworn. No question can be raised as to the sufficiency of evidence, or whether there is any evidence at all against the accused. All other findings of every court or functionary can be reversed if there is no evidence to support them. The Grand Inquest alone stands in this respect unique and beyond the reach of the law, and occupies the high position of being answerable to no power, no court and no parliament of the state. Its mistakes cannot

be rectified. The affidavits or statements of grand jurors are not, as a rule, allowable to correct the simplest error or remedy the gravest miscarriage of justice, and the court that tries the case cannot assist by way of amendment, except in matters of mere form. The *prima facie* evidence of a man's guilt is weighed by laymen in secret conclave, the examinations are conducted no one knows how, and the finding is arrived at almost necessarily on facts which are perhaps only a small part of the truth, and all this without the assistance of the court or counsel, because the general directions given by the court, useful as they always must be, manifestly fall far short of any practical service in hearing and considering the evidence in detail. There is no public sitting in judgment on their actions. That guardian of private rights and public interests—the press—is helpless. There is no fierce "white light" to terrify and hold in check any juror concerned in wrong-doing. All the restrictions and safeguards which the law has thrown around criminal prosecutions are wanting. And worse perhaps than all, a man may be put in peril of his life upon *hearsay* testimony, the mere rumors of the neighborhood, the idle gossip of his friends, or the vindictive insinuations of his enemies, for no wise judicial hand is raised to prevent the admission of this evidence, which the law says shall not be evidence at all.

The accused is not allowed to be represented. That a person charged with an offence shall have the benefit of counsel, is one of the fundamental principles of our modern practice. A preliminary examination before a magistrate may be, it is true, a secret enquiry, and is such in theory. But what magistrate would dare to exclude prisoner's counsel? And even if he did, the accused is himself present and may ask such questions as he thinks proper, questions which often tend to throw a very different light on the evidence already given. The result is that the finding of a magistrate is really a far greater protection to the public and the accused than are the proceedings before a grand jury. The magistrate is generally a man having more or less experience in dealing with criminal cases, and in this respect he has a great advantage over the jurors. His committals often end in acquittals, but at least there is something apparent on which they are based. We have only to look at the cases which are presented to the Court at the Toronto sittings of Oyer and Terminer to see how little ground there could have been in many instances for finding a bill. Case after case has been thrown out by the trial Judge before it reached the petit jury, and men have been put upon their trial, and have undergone the humiliation of being placed in the dock as felons, without the slightest particle of legal evidence against them. In fact, we doubt if a single case can be named where a grand jury has protected either the interests of the Crown or the legal rights of a prisoner by its finding; and further, we do not believe that there is any instance where a better result has been accomplished by reason of the intervention of a grand jury than would have been gained by the magisterial enquiry alone.

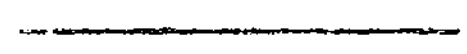
Perhaps the strongest evidence that the system of grand juries has outlived its usefulness, if it ever had any, is shown by the fact that the great majority of cases are now tried before the county judges or police magistrates, and no injus-

tice has thereby been complained of. A vast amount of expense has been saved, and the delay in the trials of accused persons has been largely obviated. And another great feature is that instead of perhaps an innocent man being put in the dock and held up to the reproach of a crowded court-room, these trials have been uniformly conducted quietly, fairly, and without any injustice, and the morbid curiosity which abounds at every trial of importance before grand and petit juries has been properly held in a great measure in abeyance. We ask, then, for an example, one solitary instance, in which grand juries in the past ten or twenty years have, by reason of their intervention, protected the innocent or in any way furthered the punishment of the guilty? If no evidence of this can be given, in what does their usefulness consist?

It is urged that their visits to the gaols and other places of restraint are and must be productive of good. This contention would, under certain circumstances, have weight; but in view of the fact that responsible and trusted officers of the Government have all such places under their direct supervision, and that boards of visitors in special cases have been constituted, we do not think any one would seriously urge such an argument in favor of the grand jury system.

In these days of an irreproachable and painstaking judiciary, composed of men of the highest moral character, men who are removed from political, personal, and local feelings, and whose sense of duty outweighs any other influence—the grand jury is a useless and very often a dangerous incumbrance to our system of administering criminal justice. And in speaking as we do, we have no intention of reflecting in any way upon the individual reputation of grand jurors. We attack the system, not the men, for it would be difficult indeed to see how the system could work to any advantage to the public interests, no matter who composed the Grand Inquest.

Everything connected with a criminal trial ought to be carried out in the full light of public criticism, and no man, be he innocent or guilty, should be put upon his trial as a result of a secret and wholly irresponsible inquisition. It may be said that if the grand jury system were abolished, men might be put upon trial who would not be placed in that position if grand juries were continued. We propose to deal in a future number with the question of appointing permanent Crown Counsel, who, along with the local Crown officer, would be competent to determine in what cases the accused should go before a petit jury. We venture to say that a responsible officer, being a lawyer of good standing in his profession, and of necessity entirely removed from local influences and prejudices, would be a much safer authority to determine the only question which a grand jury has to consider than a body of local men, amongst whom, in too many instances, there are either warm friends or personal enemies of the accused.



COMMENTS ON CURRENT ENGLISH DECISIONS.

The law reports for December comprise 25 Q.B.D., pp. 521-568; 15 P.D., pp. 189-219; 45 Chy. D., pp. 285-639; 15 App. Cas., pp. 449-568.

PRACTICE—FIRM SUED—SERVICE OF WRIT ON FIRM—SUBSEQUENT SERVICE ON PARTNER—JUDGMENT AGAINST FIRM FOR DEFAULT OF APPEARANCE—SUBSEQUENT APPEARANCE BY PARTNER—ORD. IX. R. 6; ORD. XII., R. 15; ORD. XLII., R. 10 (ONT. RULES 265, 288, 876).

In *Alden* v. *Beckley*, 25 Q.B.D., 543, a partnership was sued in the firm name. The firm was first served by serving the writ on the person having the management of the business, and five days afterwards a person claimed to be one of the partners was also served. Judgment was signed against the firm for non-appearance; and subsequently and within eight days after service on him, the person served as a partner entered an appearance and then moved to set aside the judgment against the firm as having been entered prematurely; and the Divisional Court (Pollock, B., and Grantham, J.), affirming Day, J., held that the judgment must be set aside. From this case, therefore, it appears, that where a firm is sued and service is effected on the firm by serving the manager, and individuals claimed to be partners are also served, judgment cannot properly be signed against the firm until the time has expired for the individuals who have been served to appear, and that this time runs, not from the service on the firm, but from the service on themselves individually.

SUBMISSION TO ARBITRATION—REFUSAL OF PARTY TO APPOINT ARBITRATOR—COURT HAS NO POWER TO COMPEL PARTY TO APPOINT ARBITRATOR—9 & 10 W. 3, C. 15, S. 1; 3 & 4 W. 4, C. 42, S. 39 (R.S.O., C. 53, S. 16).

In re Smith & Nelson, 25 Q.B.D., 545, an attempt was made to induce the court to compel a party who had entered into an agreement to refer a dispute to arbitration, to appoint an arbitrator. The application was successful so far as the Divisional Court (Lord Coleridge, C.J., and Wills, J.) was concerned; but on appeal the order was reversed, the Court of Appeal (Lord Esher, M.R., and Lindley and Bowen, L.JJ.) being clearly of opinion that the Court had no statutory jurisdiction to make any such order, and that although where arbitrators have been appointed by the parties they can not afterwards revoke their authority (R.S.O., c. 53, s. 16), yet that there was no means of compelling a specific performance of an agreement to appoint an arbitrator either at law or in equity, and the provision of the Arbitration Act of 1889 (52 & 53 Vict., c. 49, s. 1), that a submission, unless a contrary intention is expressed therein, shall be irrevocable except by leave of the court or a judge, had not in any way enlarged the powers of the court in that direction.

DAMAGE—TUG, AND VESSEL IN TOW—COLLISION WITH THIRD VESSEL THROUGH NEGLIGENCE OF TUG—LIABILITY OF VESSEL IN TOW.

In *The Quickstep*, 15 P.D., 196, the Divisional Court of the Probate Division came to the conclusion that no general rule can be laid down as to the liability of a vessel in tow, for a collision between it and another vessel, occasioned by the

negligence of those on board the tug; but that the question turns upon whether or not the relation of master and servant exists between the owners of the vessel in tow and the crew of the tug, and this depends upon the circumstances of each case. Where the crew of the tug stand in the relation of servants to the owner of the vessel in tow, the latter are liable. When that relation does not exist, then they are not liable. In the present case, the court was of opinion that the relationship did not exist.

SHIP—CHARTER PARTY—EXCEPTION TO LIABILITY—NEGLIGENCE OF CREW—VOYAGE—GENERAL AVERAGE, CONTRIBUTION.

The Carron Park, 15 P.D., 203, was an action for damage to cargo, but by the charter party it was provided that the defendants were not to be responsible "for any neglect, or default whatsoever of their servants *during the said voyage*." The damage in question occurred during the loading of the vessel, and was occasioned by the negligence of the defendants' servants. The question was, whether the damage could be said to have occurred "during the voyage." The president, Sir J. Hannen, held that the time of loading was part of the voyage, dissenting from *Crow* v. *Falk*,, 8 Q.B., 467, and following in preference *Barker* v. *McAndrew*, 24 L.J., C.P., 191, and *Bruce* v. *Nicolopulo*, 11 Ex., 129. The defendants counter-claimed for a general average contribution. It is not clear from the report how this claim arose, but it would seem from the reasoning of the court that it must have arisen out of the negligence complained of by the plaintiff; and inasmuch as the defendants were not responsible for that negligence, the court held that they were entitled to succeed on the counter-claim.

SHIP—CHARTER PARTY—EXCEPTION OF LIABILITY FOR NEGLIGENCE OF CREW—VOYAGE.

The Accomac, 15 P.D., 208, is a somewhat similar case to the preceding one. In this case the charter party excepted the defendants (the ship-owners) from liability "for any act, negligence, or default of master or crew in the navigation of the ship in the ordinary course of the voyage." After the vessel arrived in port to discharge her cargo, it was discovered that one of the bilge pumps was out of order, and a firm of marine engineers was employed to repair it; their workmen removed it, but in order to do so they removed a cock from a water-pipe, which was not replaced. The chief engineer opened the sea-cock to admit water into the ballast tank, and went away forgetting it was open, and in consequence of the repairers of the bilge pump not having replaced the cock they had removed, the water reached and damaged the cargo. The Court of Appeal (Lord Esher, M.R., Lindley and Bowen, L.JJ.) affirmed Butt, J., holding that the damage was occasioned by two combined acts of negligence of the chief engineer, and of the workmen from the store; that the negligence had not taken place "in the navigation of the ship in the ordinary course of the voyage," and the workmen from the shore could not in any case come under the category of "master or crew," and therefore the negligence did not come within the exception, and the defendants were liable.

TESTAMENTARY SUIT—APPLICATION OF CREDITOR TO APPOINT ADMINISTRATOR PENDENTE LITE.

In the Goods of Evans, 15 P.D., 215, a will was disputed and a suit was pending to determine its validity, which the parties had neglected to bring to trial; a creditor, who was no party to that suit, now applied for the appointment of an administrator *pendente lite*, and the application was granted.

PROBATE—WILL AND CODICIL—INTERLINEATIONS AND ALTERATIONS IN WILL BEFORE CODICIL.

In *Tyler* v. *Merchant Taylors' Co.*, 15 P.D., 216, it being proved that interlineations and alterations, including a pencil-writing across the foot of the will, had been made in a will before the execution of a codicil to the will, they were admitted to probate.

WILL—TRUST FOR INVESTMENT—CONSTRUCTION—EJUSDEM GENERIS.

In re Sharp, Rickett v. *Sharp*, 45 Chy. D., 286, a testator had by his will directed his trustees to invest the residue of his estate (*inter alia*) "upon the debentures or securities of any railway or other public company carrying on business in any part of the United Kingdom." The question for the Court was, whether under this power the trustees could invest in the shares of companies incorporated under the Companies' Act, or whether the reference to railway companies restricted the power of investment to companies *ejusdem generis* as railway companies. The Court of Appeal (Cotton, Bowen, and Fry, L.JJ.), affirming the opinion of Stirling, J., decided that a company incorporated under the Companies' Act was a public company within the meaning of the power, and that the power was not restricted by reason of the specific reference to railway companies. The Court, however, was careful to say that though other companies came within the power, an investment in them would not be warranted without due inquiry into their prospects and all other things which trustees ought to consider as prudent men.

WILL—CONSTRUCTION—GIFT FOR LIFE, COUPLED WITH GIFT OVER, ON DONEE FOR LIFE DYING WITHOUT HAVING CHILDREN—IMPLIED GIFT TO CHILDREN.

In re Rawlins, 45 Chy.D., 299, shews the danger of a judge deciding a case on a view of the law not advanced by any of the litigants. Kay, J., adopted that course in the present case, but the Court of Appeal (Cotton, Bowen, and Fry, L.JJ.) were agreed that he was wrong. The point was a somewhat curious one, arising on the construction of a will, whereby the testator made a gift of certain property to his niece, Harriet Rawlins, for life, with a gift over "on the death of Harriet without leaving children." There was also a gift of the residue. Harriet left two children, and she also made a will whereby she bequeathed all her property to one of them; there was a contest between the two children on the one hand, who claimed that Harriet was entitled for life only, and that on her death leaving children the latter became entitled by virtue of an implied gift; and those claiming under the residuary devise, on the other hand, who contended that there was no implied gift. On the hearing, Kay, J., introduced a third element of

discord, for he decided contrary to the contention of any of the parties, that the effect of the will was to vest an absolute estate in Harriet, and, therefore, he held her devisee took the whole estate. On the appeal, however, the court disagreed with his view, and held that Harriet only took a life estate, and that on her death the residuary devise took effect. In arriving at this conclusion, the court approved of, and adopted, the rule laid down by the Irish Master of the Rolls in *Kinsella* v. *Caffrey*, 11 Ir. Ch. 154. It may also be useful to notice that although only one of the residuary devisees appealed, yet the court nevertheless made a declaration generally, that in the events which had happened the property in question had fallen into the residue.

VENDOR AND PURCHASER—SUBSTITUTION BY VENDORS OF NEW TITLE—RESCISSION BY PURCHASER.

In re Head & Macdonald, 45 Chy.D., 310, may be read in conjunction with the recent case in our own court of *Paisley* v. *Wills*, 19 Ont., 303. The case was an application under the Vendor and Purchaser Act, 1874. The vendors were trustees under a will which contained a power to sell after the death of the testator's widow, and they entered into a contract for the sale of the trust property on 17th December, 1889; 24th January, 1890, being fixed for the completion of the contract. On the 22nd December, 1889, the abstract was delivered. The purchaser then inquired if the testator's widow was living, and was informed that she was and would join in the conveyance; to which the purchaser's solicitor rejoined that as she was living the power to sell had not arisen. On the 6th January, 1890, the vendor's solicitor wrote, contending that the power could be accelerated by the widow surrendering her life estate. On the 7th January the purchaser's solicitor repudiated the contract and claimed a return of the deposit. This the Court of Appeal (Cotton, Fry, and Lopes, L.JJ.), affirming the opinion of Chitty, J., decided the purchaser was entitled to, and in doing so they determined that a mere authority to trustees to pay debts did not create an implied power to sell the trust property in order to pay them, and in this respect a mere authority to pay differs from a positive direction. In *Paisley* v. *Wills* the title was in the vendor's wife, and not in the vendor himself, but she offered to convey to the purchaser; the latter resisted the performance on the ground of fraud, and it was not until the trial that by amendment then made he claimed rescission on account of the infirmity of the title, although he knew of the defect sometime previously; and the court was of opinion that the neglect promptly to repudiate the contract on that ground deprived him of the right to insist on the objection. It may be noted that *Re Bryant & Birmingham*, 44 Chy.D., 218, does not appear to have been before the court in that case.

COSTS—SET OFF—ORD. LXV., R. 27 (21) (ONT. RULE 1204).

In re Crawshay, Dennis v. *Crawshay*, 45 Chy.D., 318, on the dismissal of an appeal, the respondent asked that the costs might be directed to be set off against costs which had been previously ordered to be paid to the appellants out of the estate. But the court declined to make any order, but stayed the payment out

of the costs to the appellants for two weeks, to enable the respondents to carry in their bill before the taxing-officer, who, under the Ord. lxv., r. 27 (21) (Ont. Rule 1204), had power to make the set-off.

EXECUTOR—PAYMENT TO LEGATEE WITH NOTICE OF LIABILITY—LEGATEE, WHEN LIABLE TO REFUND—MARRIED WOMAN, LIABILITY OF, TO BE SUED—MARRIED WOMAN'S PROPERTY ACT, 1882 (45 & 46 VICT., c. 75), s. 1, s-s. 2—R.S.O., c. 132, s. 3 (2).

Whittaker v. *Kershaw*, 45 Chy.D., 320, deals with two interesting points. First, the liability of a legatee to refund to the personal representative; and second, the liability of a married woman to be sued in respect of claims not strictly arising out of contract. The facts of the case were as follows: The defendant, a married woman, was a residuary legatee. The executors handed over to her, as the residuary estate, the certificates of some shares not fully paid up, and also a sum in cash. No transfer of the shares was made. Subsequently a call was made on the shares, the defendant refused to pay; an action was then brought against the executors in whose name the shares stood, and they were compelled to pay the call, with costs of the action. They then applied to the defendant to recoup them and she refused, and they thereupon applied to the court and obtained an order directing the sale of the shares, which failed to realise sufficient to pay the calls, and left a balance due the executors, to recover which the present action was brought. It was contended by the defendant that she was not liable to refund, because the executors had paid over the residue with notice of the debt; and, also, because the action would lie against a married woman, because it was not founded on any contract made by her. As to the first point, the Court of Appeal (Cotton, Fry, and Bowen, L.JJ.) determined that, though where an executor makes a payment to a legatee with notice of a debt due by his testator he cannot call upon the legatee to refund on being subsequently compelled to pay the debt; the same rule does not apply where the executor has merely notice of a liability; and that notice of a liability for calls is not notice of a debt, because no debt arises in respect of calls until the call has been duly made; and, therefore, in the present case the executors having notice of the liability was no bar to their right to recover As to the other point, the court determine that the liability of a married w[illegible]nan to be sued is not restricted to cases founded on contract or tort, but that the words "a married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, *or otherwise*, in all respects as if she were a *feme sole*," 45 & 46 Vict., c. 75, s. 1, s.s. 2 (R.S.O., c. 132, s. 3 (2)), render a married woman liable to be sued for any cause of action for which a man could be sued under similar circumstances; and, furthermore, that her liability to suit is not barred because her separate property is subject to a restraint against anticipation, although that fact may be an obstacle in the way of the plaintiff recovering on a judgment, should he obtain one. The Court of Appeal, though expressing some doubt on the point, held that the right to indemnity extended to the costs of the action against

the executors to recover the calls; at the same time they intimated that as that point was not discussed before them, they might not see fit to consider themselves bound by their present decision on that particular point. It may be well to note that the words of R.S.O., c. 132, s. 3 (2), are not identical with the English Act, but probably bear the same construction.

COMPANY—GENERAL MEETING—CHAIRMAN REFUSING TO PUT AMENDMENT—WAIVER.

Henderson v. *Bank of Australasia*, 45 Chy.D., 330, was an action brought to test the validity of a certain resolution passed at a general meeting of the shareholders of a company. The ground of objection was that the chairman had improperly refused to put an amendment, proposed by the plaintiff, to the meeting. The proposed amendment was not written out nor expressed very explicitly, but the Court of Appeal found as a fact that the chairman understood what was intended, and inquired if any one seconded it, and upon it being seconded stated that he was advised by the solicitor of the company that no amendment could be put, and accordingly refused to put it to the meeting. The original resolution was passed, the plaintiff moving its rejection and voting against it. The resolution was confirmed at a subsequent meeting, at which the plaintiff attended and protested on the ground that the resolution was not within the notice calling the meeting, and that the chairman had refused to put his amendment. The Court of Appeal (Cotton, Fry, and Lopes, L.JJ.) (overruling Chitty, J., who thought the plaintiff had waived his right to object by acquiescing in the chairman's ruling) held that the resolution must be set aside, and that there had been no waiver by the plaintiff of his right to object.

ILLEGAL CONTRACT—STIFLING PROSECUTION—INDICTMENT FOR OBSTRUCTING—SPECIFIC PERFORMANCE.

Windhill Local Board v. *Vint*, 45 Chy.D., 351, was an action for specific performance of a covenant to restore a highway, in which the doctrine of the illegality of stifling a prosecution appears to be carried to the verge of absurdity. The defendants were stone merchants and were indicted by the plaintiffs (a municipal body) for nuisance for interfering with a highway by excavating a stone quarry and for obstructing a footpath. The indictment came on for trial and the defendants pleaded "not guilty." On the same day an agreement was drawn up by the counsel and solicitors of the parties, whereby the defendants agreed within a limited time to abate the alleged nuisance, to the satisfaction of the defendants' surveyor; and that the indictment should lie in the office as security for the performance of the agreement; and that when the terms were fulfilled a verdict of "not guilty" should be entered. The judge approved of the terms of this agreement and ordered the indictment to lie in the office. A deed was subsequently executed by the parties embodying the terms agreed to. The defendants having failed to carry out the agreement, this action was brought to compel them to specifically perform it, and was dismissed by Stirling, J., on the ground that the agreement was founded on an illegal consideration; because, as the indictment was for a public injury, the agreement to consent to a verdict of "not guilty" was

against public policy and illegal, which decision was affirmed by the Court of Appeal (Cotton, Fry, and Lopes, L.JJ.). We may observe that precisely the same conclusion was arrived at by our own Court of Appeal, upon an almost identical state of facts: *Hungerford* v. *Latimer*, 13 Ont. App. 315. At the same time, although there can be little room to doubt that the courts have correctly expounded the law as it is, we think it open to question whether the law might not properly be amended in this particular. Rules of this kind rest on considerations of public policy, and on a supposed regard for what is in the best interests of the public, and we cannot help thinking that in cases of this nature it would better conserve public interests if, under such circumstances, there were power, with the sanction of the judge at the trial, legally to make and enforce such an agreement as that in question.

Notes on Exchanges and Legal Scrap Book.

AN EXPENSIVE PLEADING.—Perhaps the most expensive pleading that was ever framed in any suit was the answer in the celebrated case of *Small* v. *Atwood*, a copy of which it was sworn would cost £19,000 sterling: *Bennett's Biographical Sketches from the Note-Book of a Reporter*, p. 114.

LIBELLING A MUNICIPAL CORPORATION.—A municipal corporation cannot sue for libel. So it was held by Mr. Justice Day and Mr. Justice Lawrance in *Mayor, etc., of Manchester* v. *Williams*, in which case the defendant charged that "bribery and corruption had existed and done their nefarious work in the case of two, if not three, departments of the Manchester city council, and that the plaintiffs were either parties thereto, or culpably ignorant thereof," etc. It is of importance to inquire how far this decision is reconcilable with that in *Metropolitan Saloon Omnibus Company* v. *Hawkins*, 4 H. L. 87, the only modern authority on the subject. In that case the defendant imputed to the company insolvency, mismanagement, and an improper and dishonest carrying on of its affairs. It was expressly held that the company could maintain an action, but the court no doubt put its judgment on the ground that the natural result of the defendant's imputation was that the plaintiff's business might be damaged, and Chief Baron Pollock went so far as to say that a corporation could not sue in respect of a charge of corruption, "for a corporation cannot be guilty of corruption, though the individuals composing it may." There is therefore a great distinction between that case and the recent Manchester case, but the dictum of Chief Baron Pollock is a strong authority in favor of the Manchester case. We are not so sure, however, that the decision in the Manchester case is correct. Supposing, for instance, that a municipal corporation were issuing a loan, would not an imputation of general corruption existing in the town council discourage the public from coming forward as subscribers? We should be glad to see the question argued before a court of appeal.—*The Law Times.*

INSURANCE POLICY AND PREMIUM NOTES.—An insurance policy provided that a note taken for the premium should be accepted as payment only until maturity, that if not paid at maturity the policy should be void while it remained unpaid, and that, on payment of the note after maturity, the policy should be in force from such payment. The property was burned after maturity of the note, and while it remained unpaid. *Held*, that a tender of payment after the fire would not revive the company's liability. The time of credit was so short that it can scarcely be contended that the date of payment had escaped the memory of the appellee. The appellee was required to know the time the note matured, and the duty rested upon him to pay his note without notice or demand from the appellant. In the case of *Insurance Co.* v. *Leonard*, 80 Ind. 273, it is held that a policy of insurance is governed by the same principles applicable to other agreements involving pecuniary obligations. It is also held in the same case that where a policy provides that if premium notes are given and are not paid the policy shall become void. It is a good defence to an action on the policy that the premium notes were unpaid at the time of the loss, and this is in accordance with the holdings of this and other courts. *Insurance Co.* v. *Henley*, 60 Ind. 515; *Willcuts* v. *Insurance Co.*, 81 id. 300. The case of *Thompson* v. *Insurance Co.*, 104 U.S. 252, is directly in point in this case. In that case the court says that "it appears from the special pleas that the policy contained the usual condition that it should become void if the annual premiums should not be paid on the day when they severally became due, or if any notes given in payment of premiums should not be paid at maturity." And distinguishing between that case, and the case of *Insurance Co.* v. *French*, 30 Ohio St. 240, the court further says: "But in this case the policy does contain an express condition to be void, if any note given in payment of premium should not be paid at maturity. We are of the opinion therefore that while the primary condition of forfeiture for non-payment of the annual premium was waived by the acceptance of the notes, yet, that the secondary condition thereupon came into operation, by which the policy was void if the notes were not paid at maturity." It is further said by the court in that case: "The third replication sets up a usage on the part of the insurance company of giving notice of the day of payment, and the reliance of the assured upon having such notice. This is no excuse for non-payment. The assured knew, or was bound to know, when his premiums became due." Further on the court says: "The reason why the insurance company gives notice to its members of the time of payment of its premiums is to aid their memory, and to stimulate them to prompt payment. The company is under no obligation to give such notice, and assumes no responsibilities by giving it. The duty of the assured to pay at the day is the same whether notice be given or not. Banks often give notice to their customers of, the approaching maturity of their promissory notes or bills of exchange, but they are not obliged to give such notice, and their neglect to do it would furnish no excuse for non-payment at the day." What we have quoted applies with full force in this case. Ind. Sup. Ct., Sept. 24, 1890. *Continental Ins. Co.* v. *Dorman*. Opinion by Olds, J.—*Albany Law Journal.*

"MEMORANDUM" UNDER STATUTE OF FRAUDS.—In *Mentz* v. *Newwitter*, New York Court of Appeals, Second Division, December, 1890 (reversing 14 Daly, 524), it was held that an auctioneer's memorandum, made and signed by him at the time of the sale of real estate, which gives the name of the vendee, but fails to state the name of the vendor, or to give any description by which he or she may be identified, is void under the statute of frauds. The court, Brown, J., said: "Many English cases in regard to sales of goods and chattels are collected in Benjamin on Sales (Bennett's edition), sections 234 to 238, and that learned author states the general rule deduced from them to be as follows: 'It is indispensable that the written memorandum should show not only who is the person to be charged, but also who is the party in whose favor he is charged. The name of the party to be charged is required by the statute to be signed, so that there can be no question of the necessity of his name in the writing. But the authorities have equally established that the name or a sufficient description of the other party is indispensable, because without it no contract is shown, inasmuch as a stipulation or promise by A. does not bind him save to the person to whom the promise is made, and until that person's name is shown, it is impossible to say the writing contains a memorandum of the bargain.' The leading English case on the subject is *Champion* v. *Plummer*, 1 Bos. & P. 252, where Champion, by his agent, wrote down in a memorandum book the terms of a verbal sale to him by the defendant, and the defendant signed the writing. The words were 'Bought of Plummer,' etc., etc., with no name of the person who bought. Sir James Mansfield, C. J., said: 'How can that be said to be a contract or memorandum of a contract which does not state who are the contracting parties? By the note it does not appear to whom the goods were sold. It would prove a sale to any other person as well as to the plaintiff.' Among other cases may be cited *Williams* v. *Lake*, 2 E. & E. 349; *Williams* v. *Byrnes*, 9 Jun. (N. S.) 363; *Potter* v. *Duffield*, 9 Eng. 664. *Potter* v. *Duffield* was a case of a sale of real estate at auction. The name of the vendor was not disclosed. The plaintiff's agent signed a memorandum of the contract, and the auctioneer signed for the vendor as follows: 'Confirmed on behalf of the vendor, Beadles, per N. J., Aug. 20, 1869.' This was held by the master of the rolls, Sir George Jessel, not a sufficient memorandum under the statute, for the reason that the vendor was neither named nor described. The question was fully examined by the Supreme Court of the United States in *Grafton* v. *Cummings*, 99 U.S. 100. That case arose in the State of New Hampshire, where the statute provides that no action can be maintained on a contract for the sale of land unless the agreement is signed by the party to be charged, or by some person by him authorized. The contract was signed by Grafton, the purchaser, and it was assumed by the court that it was also signed by the auctioneer, and the precise question presented was stated to be whether the contract was void because the vendor was not named in it. It was held that it was void. The same doctrine is stated in Brown Stat. Fr., §§ 371-375; Smith Cont., pp. 134, 135; 3 Pars. Cont. 13 note v. In this State Chancellor Kent, in *Bailey* v. *Ogden*, 3 Johns. 399, stated the general rule to be that 'the form of the memo-

randum cannot be material, but it must state the contract with reasonable certainty, so that the substance of it can be made to appear, and be understood from the writing itself, without having recourse to parol proof.' Again the same learned judge, in *Classon* v. *Bailey*, 14 Johns. 484, said: 'Forms are not regarded, and the statute is satisfied if the terms of the contract are in writing and the names of the contracting parties appear.' *First Baptist Church* v. *Bigelow*, 16 Wend. 28, was a case of a sale of a church pew. The same rule was again stated, and the memorandum was held insufficient because it stated no parties or terms of payment. *Calkins* v. *Falk*, 39 Barb. 620, was a case of a sale of hops. The written memorandum was held defective, and the rule stated that the terms of the contract and the names of the contracting parties must appear in the instrument. This case was affirmed in this court. 41 N. Y. 619; 1 Abb. Dec. 291. The opinion of the court appears in the latter volume, where it is held that the names of the contracting parties must appear in the memorandum required by the statute. In nearly all the cases in this State *Champion* v. *Plummer*, *supra*, was cited with approval, and the whole current of authority in this State is that the memorandum must contain substantially the whole agreement and all its material terms and conditions, so that one reading it can understand from it what the agreement is. *Wright* v. *Weeks*, 25 N. Y. 159; *Drake* v. *Seaman*, 97 id. 230. No case holding a different rule is cited by the General Term and none by the counsel for the respondent, except *Salmon Falls Manf'g Co.* v. *Goddard*, 14 How. (U. S.) 276. There was a strong dissent in that case, and it was said in *Grafton* v. *Cummings* that it was to be doubted whether the opinion of the majority was sound law. It is clearly in conflict with the general current of authority, and may well be disregarded in view of the later decision of the same court. Tested by the rule established by the adjudged cases, the memorandum in this case was insufficient to answer the requirements of the statute."—*Albany Law Journal.*

Reviews and Notices of Books

The History of Canada. By William Kingsford, LL.D., F.R.S. (Canada), Vol IV. (1756—1763). Toronto: Rowsell & Hutchison. London: Trübner & Co., Ludgate Hill, 1890.

We have been favored with a copy of the fourth and last volume of this valuable work, and feel bound, for the reasons we assigned for noticing the three former volumes, to call the attention of our readers to that now before us. The close of Vol. III. left the aspect of affairs favorable to French ascendency, after the destruction of Oswego, the extension of French power on Lakes Champlain and Ontario, and down the Ohio and Mississippi to New Orleans. The present volume records the principal events which, commencing with the advent of Pitt to power, and his energetic policy and action, ended in the conquest and cession of Canada to England; and relates the expedition under

Forbes against Fort Duquesne, his defeat and heroic perseverance until, on the repetition of his advance, he found the Fort abandoned; the siege and taking of Fort Niagara; the abandonment of Fort Rouillé; the operations on Lakes George and Champlain; the siege and capture of Quebec, the military and naval manœuvres connected therewith, and the persistent and gallant efforts made by the French after its fall, in divers places and with alternating success and defeat, until the final siege, capitulation, and surrender of Montreal—in short, the battles, sieges, and fortunes on either side, the tragic close of the ancient feud between two of the foremost nations of the world, and their fierce contest for the possession of North America. And in his account of the period between the conquest and the final cession of the country and the establishment of British rule, which is sometimes spoken of as *le regne militaire*, and regarded as a period of harsh dealing with the French-Canadians, Dr. Kingsford has shown that the implied reproach is unfounded and unjust.

The narrative is accompanied and illustrated by the fullest details of every circumstance connected with the events recorded, tables of the forces engaged and maps of the localities in which they occurred, and the names and characters of the personages who conducted or took leading parts in them. The book is clearly printed and well got up in every way. The table of contents gives an intelligible summary of each of the eleven chapters into which the work is divided, and the index is very full and skilfully made, so that the portion of the text relating any event, place, or person, can be readily found. The articles of capitulation at Quebec in 1759, and at Montreal in 1760, and those of the Treaty of Paris in 1763, bearing upon the cession of Canada to the Crown of Great Britain, and the rights granted as to Newfoundland, are given at length. The maps, seven in number, are well constructed and engraved, and placed near the portions of the text in which they are referred to, and the plan adopted in the preceding volumes, of placing at the head of each page the A.D. of the events referred to in it, is continued, so that every facility for the use of the work is afforded; and a succinct but intelligible account of the synchronous events in Europe which affected Canada is given, as being necessary to the clear understanding of those in Canada itself. Dr. Kingsford has again shown his power of appreciating and describing the characters of the actors in the great drama he presents to us, and among others that of Lord Bute, whom he dislikes and holds up to scorn and contempt as both knave and fool, and of whom he says that "If there was no word but Newfoundland in the Treaty of Paris, it would be enough to establish the blight which Bute's presence cast upon the Empire; there is a charge brought against Bute which it is impossible to pass over unnoticed, that he was the recipient of money from France to influence him in the settlement of the peace." His tribute to the memory of another Scotchman, Brigadier-General Forbes, who took Fort Duquesne, and whom he calls "one of the forgotten heroes who died for us," is written in the same whole-hearted affectionate strain in which he writes of Champlain in his first volume, and he closes, as he did in the case of his favorite hero, with the expression of his deep regret that "no monument is erected to Forbes, either in his native place or in

Pennsylvania or Virginia, where he had lived, or Pittsburg, which he founded, though notwithstanding this neglect his name will be emblazoned in its own nobility in the page of history as that of one whose genius and patriotism secured for the British race the Valley of the Ohio, the southern shore of Lake Erie, and the territory extending to the Mississippi." This is wrong, no doubt; but how much greater is the wrong done by Canada to the memory of the man to whom she owes her existence, for there is still no monument to the memory of Champlain, though a county, a lovely lake, "once ours, now lost," and a not very lovely street in Quebec, bear his name. This should not be; and although we understand that a patriot member of our profession, Mr. Lighthall, of Montreal, and some others zealous for Canada's honor, propose to put up tablets with suitable inscriptions at places in that city where events of an historical character have occurred, and one of which will record Champlain's selection and approval of the site on which Montreal was subsequently founded by M. de Maisonneuve, this will discharge a very small portion of Canada's debt of gratitude. Wolfe and Montcalm share one monument at Quebec, with a brief but admirable inscription recording their equal valor and fame and the gratitude of posterity. Why should not Montreal have a like memorial of Champlain, which might be read and understood by our own citizens and by strangers of every nation? It is some time since we left school, and law Latin is not generally of the purely classical type, yet in moving the resolution we must suggest a form suitable for adoption or for amendment by our younger and more scholarly brethren, fresher from the teachings of our excellent universities:

SAMUEL CHAMPLAIN
VIR BONUS FORTIS CHRISTIANUS
GENTIS CANADENSIS CONDITOR VERUS
GENERISQUE HUMANI
DECUS INSIGNE.

We have, in our former notices, stated our appreciation of Dr. Kingsford's qualifications for the great work he has performed so well; his extensive knowledge, indefatigable industry, and deep patriotic interest in his subject; and his honorable impartiality and fairness in the statement of facts, and in the inferences he draws from them; and we hold the same opinion still, and believe that he has faithfully performed his duty as an historian, without fear, favor, or affection, so far as human frailty permits. He is English, and takes an English view on points which admit of honest difference of opinion; but we again repeat the conviction expressed in our notice of his first volume, that "No French-Canadian can be dissatisfied with the account the book gives of his ancestors, that no English Canadian can refuse to acknowledge the merits of his French precursors, and that no student of Canadian history can afford to be without it."

Before we received our copy of the fourth volume, we saw with great pleasure that Dr. G. M. Grant, Principal of Queen's University, Kingston, had written for *The Week* of the 28th November last an elaborate and excellent critique on the work now before us, in which he fully confirms the opinions we have expressed respecting it, and from which we quote the following passage: "It is satisfac-

tory that we have in Dr. Kingsford a historian who has, at the cost of enormous labor, sought and consulted original authorities, and who, after sifting evidence and coming to his conclusions, does not allow himself to be biased, on one side or the other, by any considerations of so-called courtesy or self-interest. No volumes in English known to me are a nobler tribute to the French-Canadians than those now completed. Whether describing Champlain, the hero 'with no moral leaven to weaken the regard or esteem with which his character may be considered,' or more complex and very different personalities like La Salle or Frontenac, or that Jesuit of the Jesuits—Rasle—whom he forces us to respect and almost to love; or in detailing the sacrifices that the *habitant* was always ready to endure for his country and his faith, and the piety and unity of feeling that made a handful of people able to hold their own against the greatest odds, he is always fair, and therefore, without intending it, building up the noblest monument to our French-Canadian ancestors." He then cites a passage from pages 217-18, and says, "It is impossible to read this volume without being convinced that, had it not been for the generous and abundant aid of the Mother Country, French domination would have been established over the greater part of North America," and adds, "Dr. Kingsford also speaks some pregnant words in the last pages of his work, and with them I shall bring this notice to a close. May I also be permitted to thank him for the great work he has given us, and to express the hope that, if no official recognition is given him, the public will do so in the best way by ordering his history to be placed in every Mechanics' Institute, school, and city library, and by purchasing it freely and giving it to their sons and daughters to read." He then cites verbatim, and with unqualified approval, the last four paragraphs of pages 503 and 504, in which the the author claims that he has fully performed the promise he made to be impartial, and to spare no pains to ascertain and state the truth. He states forcibly and clearly the benefits which all Canadians, and French-Canadians especially, have derived from representative and responsible government, and the necessity of that harmony and unity without which all hope of becoming a nation is baseless and futile.

In all this, and in all that Dr. Grant says about our author and his work, we most cordially agree, as we do also in his wish for its public recognition in the manner he suggests, and that our public schools may become such that even a minority of one in any parish may send his children to be educated with the assurance that their faith will be respected by their teacher. We rejoice to have so high an anthority for believing that this wish can be realized; and though we are not quite without fears, arising from the great and peculiar difficulties of our case, we say heartily—Amen; so may it be. W.

The Elements of Jurisprudence. By Thomas Erskine Holland, D.C.L., etc. Fifth edition. Oxford, 1890.

Mr. Holland's book is too well known to require any further review at our hands; we can add nothing to what has already been said about it. This edition has been carefully revised throughout.

Introduction to the Study of Federal Government. By Albert Bushnell Hart, Ph.D. Boston: Ginn & Co., 1891.

This second of the series of Harvard Historical Monographs outlines the development of federal government, and compares the constitutions of the United States, Switzerland, Germany, and Canada.

The Blackstone Text-Book Series—Index. The Blackstone Publishing Co., Philadelphia, Penn.

The promised consolidated index of all the subjects treated upon in this useful series has been issued. Such an index cannot fail to be of the greatest use to those possessing the series, since all the subjects therein contained can be immediately found by referring to this volume alone, without having recourse to the thirty-six different indices. It is greatly to be hoped that the publishers will re-consider their decision not to republish any more English-text books in this series, which has been so useful to the profession of Canada.

Proceedings of Law Societies.

HAMILTON LAW ASSOCIATION.

The annual meeting of the Hamilton Law Association was held there on the 6th inst., at the library in the Court House, and was very fairly attended by the members of the legal profession of the city and county. Mr. Edward Martin, Q.C., the president of the association, was in the chair, and after the usual routine business, presented the annual report of the association, which exhibited a very satisfactory state of the library, there being upwards of 2,000 volumes upon the shelves. Mr. W. F. Burton, the treasurer of the association, presented the annual statement of receipts and expenditures. The receipts for the past year amounted to $1,038.38, which revenue is derived from annual subscriptions from the members of the profession in the city and county, from an annual grant from Osgoode Hall based upon the number of members of the association, a small grant from the County Council, and a grant from the Government of Ontario. A vote of thanks was passed to Miss Counsell for the efficient and faithful manner in which she had discharged her duties as librarian. The election of officers for the ensuing year was next proceeded with, and Mr. E. Martin, Q.C., was unanimously elected president; Mr. Mackelcan, Q.C., vice-president; Mr. W. F. Burton, treasurer; Mr. E. Kittson, secretary; and the following gentlemen trustees: Messrs. Bruce, Q.C., Lazier, Q.C., Staunton, Teetzel, Q.C., and Nesbitt, Q.C., in addition to the officers of the association. Below will be found the reports of the president and treasurer of the most influential society outside of Toronto. Mr. Martin, in moving the adoption of the report, referred to the

great interest taken by members of the profession in the work, and drew attention to the working of the Devolution of Estates Act, urging action being taken to prevent abuse of the same. He also mentioned the satisfactory condition of the finances, and that, owing to the suggestion of the treasurer (Mr. Burton), a successful application for a yearly grant had been made to the Ontario Government.

TRUSTEES' REPORT, 1890.

The trustees beg to present their eleventh annual report, being for the year 1890.

The number of members at the date of the last report was seventy. One new member has been added, namely, Mr. Burkholder, and the present membership is seventy-one.

The annual fees to the amount of $312.50 have been paid.

The number of volumes in the library is *2227*. The increase for the year would have been greater, but the trustees being of opinion that the American series of Reports, to which the association subscribed, was apparently but little referred to though very prolific in numbers, exchanged the volumes for a United States Digest and some other books, which, it is hoped, will be found more useful.

The following periodicals are received, namely:—

The Law Times (English), *The Times Law Reports, The Solicitors Journal, The Albany Law Journal,* THE CANADA LAW JOURNAL, *The Canadian Law Times, The Western Law Times.*

The treasurer's report is submitted herewith giving a detailed statement of the receipts and expenditure and of the assets and liabilities of the association, and the same is in the form required by the Law Society.

The indebtedness to the Law Society is being paid, as agreed, in yearly payments, but $800 still remain unpaid, and these payments are a serious drain on the funds of the association.

The association is to be congratulated on having increased its revenue by the grant made by the Ontario Government to this and other law associations in aid of the purchase of books, and specially designed to be of assistance to the Judges at Assizes, Chancery Sittings, Election Trials, and for the County Stittings; the amount received was $58.83, but a much larger grant is expected this year, and is urgently needed.

The trustees for the ensuing year hope to be in a position to make some very valuable additions to the library.

The trustees would repeat the remarks made in their last annual report regarding the Devolution of Estates Act.

Steps should be taken to devise machinery for the proper working of this Act, having in view the transaction of the business where it arises.

(Sgd.) EDWARD MARTIN, Pres.

Hamilton, January 5th, 1891.

TREASURER'S REPORT, 1890.

Receipts.

1890.					
March 5	By Balance brought forward from last year, including students' deposits. $90				$101 78
	" Annual Grant from the Law Society, arrived at as follows :				
	Grant, 67 members		$325 00		
	Librarian	$200 00			
	Telephone	37 72			
		237 72			
	Less ⅓	79 24			
			158 48		
			483 48		
	Less instalment of advance payable 31st Dec., 1889		100 00		
					383 48
March 14	By Amount of loan raised on joint note of Messrs. Martin and Burton				100 00
July 2	" Grant from County Council				40 00
" 30	" Grant from the Ontario Government under the head of Judges' libraries				58 83
Oct.	" Subscriptions of 61 members at $5.00				305 00
	" " " 3 " " 2.50				7 50
	" Students' deposits during year				30 00
	" One entrance subscription				10 00
	" Interest on deposits				1 79
					$1 038 38

Expenditure

1890.			
March 6	To Paid for Sterling draft to B. F. Stevens	$219 [illegible]8	
	" " " " " Clowes & Sons (2)	146 [illegible]3	
	" " " " " T. C. Watkins, duty on books	53 [illegible]5	
	" Bell Telephone Co.'s accounts	50 74	
	" Carswell & Co. for books	27 00	
	" Weed & Co., *Albany Law Journal*	5 00	
	" Plastow (Caretaker)	5 00	
	" Expenses deputation to Toronto	5 00	
	" Rowsell & Co.'s accounts	7 44	
	" Stamps	3 67	
	" Royal Insurance Co	22 00	
	" Stephens, for frame	2 25	
	" West Publishing Co	6 45	
	" Powis Sinking Fund Tables	4 00	
	" Eastwood & Co. Binding etc	46 26	
	" Printing	1 75	
	" Paid Mr. Papps in full of account for books	34 00	
	" " Mr. O'Reilly in full of account for books	22 00	
	" Miss Counsell, salary for the year	260 00	
	" Petty cash	5[illegible] 00	966 62
	By Balance on hand		$ 71 76

Audited and found correct.

(Sgd.) W. A. H. DUFF, } Auditors.
" CHAS. LEMON, }

(Sgd.) W. F. BURTON,
Treas. Law Association.

Hamilton, Ont., Dec. 31st, 1890.

DIARY FOR JANUARY.

1. Thur.....New Year's Day.
4. Sun.......*2nd Sunday after Christmas.* Chief Justice Moss died, 1881.
6. Tues.....Epiphany. Civil Assizes at Toronto, Hamilton, London, and Ottawa. Christmas vacation ends.
11. Sun.......*1st Sunday after Epiphany.*
12. Mon......County Court Sittings for motions in York. Surrogate Court Sittings. Sir Chas. Bagot Gov.-Gen., 1842.
13. Tues.....Court of Appeal sits.
15. Thur.....Lord Stanley of Preston born, 1841.
18. Sun.......*2nd Sunday after Epiphany.*
21. Wed......Lord Bacon born, 1561.
25. Sun.......*3rd Sunday after Epiphany.*
26. Mon......Sir W. B. Richards died, aged 75.
31. Sat........Earl of Elgin, Gov.-Gen., 1847. Last day for paying fees for Annual Certificates.

Reports.

ONTARIO.

COUNTY COURT, COUNTY OF SIMCOE.

IN RE PLAXTON, A SOLICITOR, ETC., AND IN RE ELLIOTT *v.* MCCUAIG.

Settlement of action—Lien of solicitor.

The defendant having been arrested on a capias order on appeal to the High Court, obtained his discharge from custody, with costs in the cause against the plaintiffs in any event.

Subsequently, and while the cause was pending trial, the plaintiffs effected a settlement of the action with the defendant, without the knowledge or concurrence of his solicitors.

The latter thereupon claimed a lien as solicitor upon the said judgment, or order for costs; but the plaintiffs contended that the settlement relieved them from payment of the same.

Held, that the defendant had not released the plaintiffs from the payment of such costs; and whether or not the settlement purported to do so, the solicitor's right of lien was not extinguished.

[Barrie, Nov. 25th, 1890.

This was an appeal by the defendant from an order made in Chambers staying proceedings, and a petition by his solicitor to have a lien declared in his favor, both made to a County Court *in banc.*

The facts sufficiently appear in the judgment.

Pepler, Q.C., for plaintiffs.

C. W. Plaxton in person, and for defendant.

ARDAGH, Co. J.:—The defendant, McCuaig, having been arrested upon an order made in this court, was thereafter (on the 8th March last) on an application to a Divisional court of the High Court of Justice discharged from custody, and the order of arrest set aside, with costs against the plaintiffs. On the 9th April last the parties appear to have come together in the office of a third solicitor, and entered into a settlement of all matters in dispute.

This settlement is in the words and figures following :—

"Orillia, 9th April, 1890.

"Elliott *v.* McCuaig.

"This case is this day settled and determined by and between the parties thereto, Findlay McCuaig and Jno. Elliott & Sons—on the understanding and agreement that Elliott & Sons, the plaintiffs, deliver up to the defendant the notes sued on herein, and the plaintiffs also allow the defendant to retain as his property, free and clear of all claims, the binder sold to the defendant by the plaintiffs, and the defendant hereby releases and discharges the plaintiffs from all claims, suits, actions, and demands of every nature and kind whatsoever, for and on account of this action, and the order of arrest and other proceedings taken therein by the plaintiffs ; it being the understanding that the defendant releases all actions and claims of every kind against the plaintiffs, and this being a final settlement of all differences, disputes, and actions between plaintiffs and defendant. The plaintiffs and defendant also agree that no further proceedings be taken in the action.

his
Witness, (Sgd) Finlay × McCuaig.
(Sgd) R. D. Gunn. mark.

After being fully explained and read over."

Subsequently, and notwithstanding this settlement, the defendant's solicitor, Mr. Plaxton, entered the action for trial at the last June sittings of the county court, and gave notice of trial to the plaintiffs' solicitors. This notice was, before said sittings, set aside on the application of the plaintiffs, after hearing all parties, and further proceedings were stayed.

The defendant's solicitor, at the last sittings of this court in July for the hearing of motions, filed his petition setting out that the settlement between the parties was not a *bona fide* one, and that the effect of it was to prevent his recovering the costs to be paid by the plaintiffs under the order of the Division Court of 8th March last, that defendant had no means of paying petitioners' costs against him, and he prayed to have it declared that he was entitled for a lien as a solicitor upon the said judgment

and the costs awarded thereunder, and that the said settlement might be set aside. Defendant's solicitor also, at the same sittings, moved to have the order setting aside the notice of trial for the June sittings and staying proceedings, and asking leave to issue execution upon the judgment of the Divisional Court for costs.

These motions were argued together, and now may fitly be considered together. I do not see my way clear to setting aside the settlement between the parties, so far as to allow the defendant to set the case down for trial. By the settlement the case is settled, and the plaintiffs state they have no further cause of action against the defendant, and under this settlement the defendant seems to have secured very liberal terms. It appears that Mr. Plaxton's object in having the stay of proceedings set aside is that he thinks this stay is in the way of his proceeding to recover the costs ordered to be paid by plaintiffs, by the Divisional Court in Toronto, when the defendant succeeded in having the order for arrest set aside.

Now, when the application was made to set aside the notice of trial given for last county court sittings in June and stay proceedings, my intention was simply to stay further proceedings in the way of a trial about a matter which the parties had settled between them, and where the defendant had obtained the same benefit as if he should succeed at the trial.

I certainly did not consider that I was adjudicating in any way on the defendant's claim to proceed for the costs on the motion before the court above, nor was it necessary for me to do so. So far, then, as the order of June last, staying proceedings, affects either directly or indirectly the right of defendant to proceed for those costs, it must be varied so as to permit the defendant to proceed, if he be so advised, to recover those costs in the usual way. The settlement may, perhaps, then be set up as a defence to defendant's right to recover them. This settlement, which is silent as to any costs, releases the plaintiffs from all "claims, suits, actions, and demands of every nature and kind whatsoever, for and on account of this action, and the order of arrest and other proceedings taken by the plaintiffs."

Does not this appear as if it was intended to relieve the plaintiffs from any liability for what they had done in arresting the defendant? Does it relieve the plaintiffs from liability for costs incurred on proceedings taken by the defendant?

But the settlement goes on to say: "It being the understanding that the defendant releases all actions and claims of every kind against the plaintiffs, and this being a final settlement of all differences, disputes, and actions between plaintiffs and defendant." The question now would be: Has this the effect of preventing defendant's solicitor from recovering the large amount of costs incurred in setting aside the arrest of the defendant and ordered to be paid by the plaintiffs, which Mr. Plaxton says the defendant is unable to pay, and which he must lose if he cannot get them from the plaintiffs? But apart from this, Mr. Plaxton files affidavits to show that the question of costs was expressly excepted when the settlement was made—that the plaintiffs' agent, who made the settlement on their behalf, said that they would pay the costs in question, and that the reason that this agreement to pay these costs was not included in the settlement was, that plaintiffs' agent said that he was not sure what the judgment (meaning, I presume, the order setting aside the arrest) said about the costs. The affidavit of the defendant is contradicted by that of the plaintiffs' agent (one Eggleston), who swears that "each party was to pay his own costs of the action"; and, further, that he agreed to allow the defendant to keep the binder (for which the notes sued on were given) to enable him to pay his solicitor's fees. It might be contended that the "costs of the action" meant only such costs as were yet *in medio*, and respecting which the liability of each party was as yet undecided. The defendant's statement is corroborated by the affidavit of one Thompson, who was present. The solicitor who drew up the settlement was examined before the Master at some length as to what took place at the settlement, but on reading his examination, I cannot come to any conclusion as to which version he supports.

If the agreement was, as Eggleston says, that each party should pay his own costs, he appears notwithstanding to have made the plaintiffs pay them, or a part of them at least, by handing over the binder in question to the defendant towards the payment of the costs for which he was liable—though the agreement itself does not appear to favor Eggleston's story on this point.

Defendant's story is in a manner corroborated, as to *his* understanding of what took place, at least, by the fact that the day after the settlement he wrote to his solicitor, Mr. Plaxton, saying that he had settled, "they pay all costs and give me the binder, but could not get no money from them." On receiving this letter, Mr. Plaxton swears that he wrote at once to defendant, saying that he would not recognize any settlement that would deprive him of his right to look to the plaintiffs personally for his costs, which, as his bill shews, amounted to the sum of $226 at that time, after giving credit for all moneys received from defendant; and that the day following he wrote to the plaintiffs and to Messrs. McCarthy & Pepler, their solicitors, to the same effect. On the 19th of April the defendant himself sent a telegram to the plaintiffs (residing at London), in these words, "I wont abide by the settlement unless you decide to pay my solicitors the costs under the judgment herein."

All this would show that if it had been necessary, the defendant's solicitor had in good time repudiated the settlement, provided that the effect of it was to deprive him of his costs. This was not a case, however, in which it was necessary to give notice to prevent the money being paid over. There is, as Mr. Pepler contended, no fund upon which defendant's solicitor could claim a lien, unless indeed it may be the judgment or order of the Divisional Court obtained against the plaintiffs for the defendant's costs through the exertions and by means of his solicitors. Assuming this to be a "fund" or whatever we may call it (and practically it was one in favor of defendant's solicitors, and not himself), two questions may be asked: 1. Was this judgment order or "fund" such as the defendant could release and surrender to the plaintiffs without his solicitor's consent or concurrence; and (2) did he actually effect this release by the terms of the settlement entered into. If it were necessary to consider whether the liability for those costs was under a "judgment" or an "order," the case of *Onslow* v. *Commissioners I. R.*, L. R. 25 Q.B.D., 465, would seem to show that it was an "order."

Mr. Plaxton claimed a lien upon this "fund" (to call it so for the present), and the answer was that a defendant's solicitor could not claim a lien in the same way as a plaintiff's solicitor. The case of *Wardell* v. *Trenouth*, 8 P.R. 142, shows that a *defendant's* solicitor has a lien on a fund as well as a *plaintiff's* solicitor. Be the order or judgment against the plaintiffs what it may, it was something that was obtained by the industry and partly at the expense of the defendant's solicitor, and the proceeds of which he would have a right to retain whenever received.

Had he not succeeded in the application, to set aside the arrest, the defendant would have been liable to his solicitor for the costs of the proceedings—his success relieved defendant from such liability so long as the plaintiffs were able to pay them. Now, the defendant is worthless, and if the plaintiffs are relieved from payment, the solicitor must go without. The second question, "Are the plaintiffs relieved from the payment of the costs ordered, by reason of this settlement?" I think that where the liability of the plaintiffs for those costs, is upon an order made against them, and upon which execution might issue, there must be something very clear indicating that such liability has been released. This is not clear from the terms of the settlement, and the evidence *dehors* tends, in my opinion, to shew the contrary.

I have examined some of the cases referred to: *Ross* v. *Buxton*, L.R. 42 Chy. D., 190, *Morgan* v. *Holland*, 7 P.R. 74, and *Friedrich* v. *Friedrich*, 10 P.R. 308, and from the principles laid down there, I do not think I would be wrong in holding, if it were necessary to do so, that whatever the costs in question may be called, the right of the defendant's solicitor to them should not be ousted by this settlement.

Looking at the circumstances attending the settlement, while, perhaps, it might be going too far to say that collusion was proved, still I must say a strong suspicion is raised that plaintiffs' agent knew he was doing something that the defendant's solicitor, and indeed I might say, plaintiffs' solicitor also, would not approve of or consent to. Defendant swears, and is not contradicted, that he wished to see his solicitor before he made any settlement, but that the plaintiffs' agent dissuaded him from it, saying his (defendant's) lawyer would advise him to keep the case going, and that he had no money to do it; and he finally persuaded him to go to a third solicitor to have a settlement carried out.

Whether then this settlement purports to release the costs in question or not, I think it should be declared that the right of defendant's solicitor to enforce the payment of such is not extinguished; that it should be referred to the Master of this court, to ascertain the amount of those costs, and that the plaintiffs should be ordered to pay the same, together with the costs of these applications.

Early Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE OF ONTARIO.

COURT OF APPEAL.

7th D.C., Stormont, etc.] [Dec. 12.

SULLIVAN *v.* FRANCIS.

Execution—Fraud — Collusive purchase—Division Courts—Practice—Appeal—Notes of evidence—Security.

The goods of a tenant were seized for rent and offered for sale by a bailiff. The tenant bid them in and they were immediately seized under an execution against him on behalf of an execution creditor of the tenant. They were then claimed by a third person who alleged that the tenant was in reality bidding for him, and this claimant paid the purchase money:

Held, that if the goods were sold at an undervalue owing to the bids being made by the tenant ostensibly for himself as part of a scheme between the tenant and claimant to (effect that end) defeat creditors by keeping down the price, the sale would be fraudulent and void as against the creditors of the tenant, though it would be good as far as the purchase money was concerned, which could not in any event be recovered back by the claimant.

Appeal allowed and new trial ordered.

The right of appeal from the Division Court is not lost because the judge omits in an appealable case to take down the evidence at the trial in writing.

The security to be given on a Division Court appeal is now regulated by 53 Vict., c. 19 (O.), and is to be either by a bond in the sum of $100 or a cash deposit of $50.

H. H. Dewart for the appellant.

A. H. Marsh, Q.C., for the respondent.

HIGH COURT OF JUSTICE.

Queen's Bench Division.

STREET, J.] [Dec. 6.

IN RE SIMS v. KELLY.

Prohibition— Division Court—Erroneous interpretation of statute—Husband and wife—Magistrate's order for payment of maintenance money under 51 Vict., c. 23, s. 2—Action to recover arrears.

Where new rights are given by a statute with specific remedies for their enforcement, the remedy is confined to those specifically given. And where a wife obtained a magistrate's order under 51 Vict., c. 23, s. 2, for payment by her husband of a weekly sum for her support;

Held, that her rights were subject to the provisions of the statute, one of which was that payment could be enforced only in the manner pointed out by the statute, and that if the husband succeeded in shewing the magistrate that he was unable to pay, payment would not be enforced; and therefore an action in the Division Court for arrears of payments, under the order, could not be maintained against her husband.

The facts not being in dispute, prohibition to the Division Court was granted on the ground that the judge in that court had given an erroneous interpretation to the Act referred to in holding that the magistrate's order was equivalent to the final judgment of a court, and that an action upon it would lie.

Wilkes, Q.C., for the defendant.

W. D. Jones for the plaintiffs.

Chancery Division.

FERGUSON, J.] [Nov. 28.

BUNNELL *v.* GORDON.

Declaration judgment—Inchoate right to dower—Purely contingent possibility—R.S.O., 1887, c. 44, s. 52, s.s. 5.

Action for a declaration that the plaintiff was entitled to an inchoate right of dower in certain lands.

Held, that though an inchoate right of dower might be considered as a present right to a contingent future interest in the land in question, yet it was not a case where a declaratory decree such as was asked should be made, though

R.S.O., 1887, c. 44, s. 52, s.s. 5, no doubt enabled the court to make such a decree even in a case like this, where no consequential relief was or could be claimed.

What was asked was a declaration as to a claim which might be made by another or others under circumstances which might or might not happen, and to grant such a declaration would be making a radical change in the rules and practice of the court, which R.S.O., 1887, c. 44, s. 52, s.s. 5, was not intended to do.

O'Gara, Q.C., for the plaintiff.

Snow for the defendant Gordon.

Henderson for the other defendants.

BOYD, C.] [Dec. 5.

McCORMICK *v.* TOWNSHIP OF PELEE.

Municipal corporation—Reparation of highway—Highway washed away by lake.

Where a highway running along the side of a lake had been eaten away by the action of the water so as no longer to be traversable,

Held, that the municipality were not called upon by law to restore it. The municipality were not bound to erect a sea-wall to keep off the action of the water, and without one any ordinary reparation would be ineffectual.

T. M. Morton and *J. L. Murphy* for the plaintiffs.

M. A. McHugh for the defendant.

BOYD, C.] [Dec. 6.

BANKS ET AL *v.* THE CORPORATION OF THE TOWNSHIP OF ANDERDON ET AL.

Municipal corporation — By-law — Separate School.

A municipal corporation cannot by by-law extend the boundary of a Protestant separate school section into or over an adjoining public school section when the teacher in the latter is not a Roman Catholic.

Armour, Q.C., and *Kirkland*, for plaintiff.

McHugh and *Murphy* for defendants.

ROBERTSON, J.] [Jan. 2.

GOULD *v.* ERSKINE.

Action for seduction—Action brought by mother in life-time of father—Demurrer—Common law right of action.

Demurrer to statement of claim in action of seduction brought by the mother of the girl seduced, it being alleged therein that the father was not resident in Ontario either at the time of the birth of the child, or at the commencement of the action ; the said demurrer being on the ground that the plaintiff had no right of action, which, if any, was in the father.

Held, that in the absence of the father from the Province, the mother, with whom the girl had been living and doing service, had a common law right to bring the action, and this was all that was necessary. The statute R.S.O., 1887, c. 58, is an enabling Act, and does not interfere with the common law right of action.

Johnston, Q.C., for the demurrer.

Hilton and *McCulloch*, contra.

BOYD, C.] [Jan. 8.

RE ABBOTT *v.* MEDCALF.

Mortgage—Power of sale—Notice of sale—Execution creditor.

In taking proceedings under a power of sale in a mortgage drawn under the Short Forms Act in these words, " Provided that the said mortgagee, on default of payment for one month, may, on giving one month's notice, enter on, and lease or sell the said land,"

Held, that execution creditors of the mortgagor come within the scope of the word "assigns," and as such are entitled to notice under power of sale ; but only those entitled at the time notice is given need be served. Execution creditors coming in subsequently to the notice given, but before the sale is carried out, are not entitled to be served.

Worrel, Q.C., for the vendor.

Coatsworth for the purchaser.

Practice.

C.P. Div'l Ct.] [Dec. 1.

GRÆME *v.* GLOBE PRINTING CO.

Security for costs—Libel—R.S.O., c. 57, s. 9—Action frivolous.

Where an action of libel was brought by one Græme, complaining of statements published in a newspaper, imputing a crime to one Graham, and it appeared that it was stated in the article complained of that no one would believe the charge against Graham, and that in an article published in the same newspaper after the commencement of the action, it was stated that the

person referred to in the former article was not the plaintiff,

Held, that the action was frivolous, and the defendants were entitled to security for costs under R.S.O., c. 57, s. 9.

Hilton for the plaintiff.

Langton, Q.C., for defendants.

ROSE, J.] [Nov. 29.

TORONTO DENTAL MANUFACTURING CO. *v.* MCLAREN.

Judgment—Application by plaintiffs to vacate their own judgment — Fraud — Mistake— Merger.

Judgment was recovered by the plaintiffs against the defendant upon a promissory note given for part of the purchase money of goods sold by the plaintiffs to the defendant.

Under the execution issued upon the judgment the goods sold were seized, and were claimed by the defendant's wife under a bill of sale from her husband, which recited that in purchasing the goods he acted as her agent.

Held, upon the evidence that fraudulent collusion between the husband and wife to defeat the plaintiffs' claim, was not established; and in the absence of fraud or mistake the court would not grant the plaintiffs the extraordinary relief of vacating the judgment against the defendant in order to allow them to proceed against the wife.

Held, also, that so long as the judgment stood, no action could be brought upon the original cause of action, which had become merged.

G. G. Mills for the plaintiffs.

J. M. Clark for the defendant.

C. J. Holman for Janet McLaren.

BOYD, C.] [Dec. 3.

KELLY *v.* WADE.

Order of court—Delay in issuing—Abandonment—Effect of pronouncing judgment on merits.

The plaintiff in an action of tort recovered a verdict which was set aside and a new trial granted by the order of a Divisional Court in June, 1889. The plaintiff died in the spring of 1890, and at the time of her death the order had not been issued.

Held, upon an application in December, 1890, that the defendants were entitled to issue the order; the delay affording no evidence of an intention to abandon it.

A judgment pronounced by the Court, affecting the merits, is an effective judgment from the day it is pronounced; the formal signature of the judgment is merely the record that it has been pronounced.

MacKelcan, Q.C., for the plaintiffs, by revivor.

Aylesworth, Q.C., for the defendants.

OSLER, J.A.] [Dec. 6.

DAVIDSON *v.* TAYLOR.

Attachment of debts—Judgment for damages—Non-entry of—Solicitor's lien for costs—Amount of—Powers of Division Court Judge —R.S.O., c. 51, s. 197.

The judgment of the judge who tries the cause, with a jury or without one, is now an effective judgment from the day on which it is pronounced; and where damages are awarded thereby, they are attachable as a debt without the formal entry of judgment.

Holtby v. *Hodgson*, 24 Q.B.D., 103, followed.

Where solicitors claimed a lien for costs upon a judgment recovered, the amount of which was the subject of a garnishee suit in a Division Court,

Held, that the judge in the Division Court had power under s. 197 of the Division Courts Act, R.S.O., c. 51, to decide upon the proper sum to be allowed in respect of such lien, and was not bound to refer it elsewhere.

W. M. Douglas for the appellant.

W. H. Blake for the respondent.

STREET, J.] [Dec. 18.

MCLEAN *v.* ALLEN.

Receiver— Equitable execution—Share uuder will—Construction of will—Security—Creditors' Relief Act—Appointment of receiver in action in which judgment recovered.

Motion by the plaintiff to continue an order for the appointment of a receiver by way of equitable execution, and motion by the defendant to discharge the order.

The interest of the defendant in the property sought to be realized was acquired by him under a will devising an interest to the defendant during his life for the support and maintenance of himself and his children, with remainder to the heirs of his body or to such of his children as he

might devise the same to. The property in question consisted of real as well as personal property.

Held, that the defendant was entitled under the will to a beneficial interest which should be applied in payment of his debts; but it could not be decided upon this motion whether his creditors were entitled to the whole or only to a portion.

2. That as the rights of the receiver were limited to receiving those moneys which were the absolute property of the debtor, free from any trust, it was not improper to make the appointment without security.

3. That the provisions of the Creditors' Relief Act form an exception to the general rule, and are not to be extended to cases not actually provided for by that Act; and therefore the appointment of the receiver was properly made for the benefit of the plaintiff alone.

4. That costs should not have been awarded against the defendant upon an *ex parte* motion.

5. That it is proper to appoint the receiver in the action in which judgment has been recovered.

A. H. Marsh, Q.C., for the plaintiff.

D. W. Saunders for the defendant.

ROSE, J.] [Dec. 29.

WATSON *v.* ONTARIO SUPPLY CO.

Married woman—Judgment debtor—Commitment.

An order may be made for the commitment of a married woman to gaol, for refusal to attend for examination as a judgment debtor. Rules 926 and 932 and R.S.O., c. 67, s. 7, considered.

Metropolitan L. & S. Co. v. *Mara*, 8 P.R. 355, followed.

Aylesworth, Q.C., for the plaintiff.

C. Millar for the defendant Capewell.

DIVISION COURTS.

The Junior Judge of the County of Ontario has sent to the clerks in his county the following memorandum for their guidance, which will be found useful by others of their brethren :—" In consequence of the interpretation put upon the 'Married Woman's Property Act' by the courts, it would appear that the ordinary forms of judgment and executions are not applicable as against a defendant who is a married woman; and, further, that no judgment by default, such as is permitted in cases of 'Special Summons' is valid as against a married woman.

"Clerks will, therefore, in cases in which claims are put in against persons who they know, or have reason to believe, are married women, not to issue, as against such, the 'Special Summons,' but the 'Ordinary Summons' only; and to add to the 'Particulars of Claim' the following statement: 'The defendant (A.B.) is a married woman, and has separate estate, and contracted the liability in question in respect of such separate estate.' The clerk will not enter judgment in such cases, but will put them on the list for hearing at the ensuing sittings. The form of entry of judgment will be as follows: 'It is adjudged that the plaintiff do recover $— and costs; such sum and costs to be payable out of the separate property hereinafter mentioned, and not otherwise. And it is ordered that execution herein be limited to the separate property of the said defendant, not subject to any restraint against anticipation, unless by reason of Section 20 of the 'Married Woman's Property Act' such property shall be liable to execution notwithstanding such restriction.' The warrant of execution thereon will be varied so as to read: 'You are required to levy of the separate property of the said defendant, in said county not exempt from execution and not subject to any restraint against anticipation, unless by reason of Section 20 of 'The Married Woman's Property Act' such property shall be liable to execution notwithstanding such restriction, the said moneys and your lawful fees, etc.' "

Flotsam and Jetsam.

PROLONGED SITTINGS.—Some extraordinary judicial doings are reported from Queensland, Australia. The presiding judge was in a hurry to get away, and tried cases continuously for thirty-six hours. At one stage all the available jurors were occupied in considering verdicts, and, not to lose time, the judge ordered the doors of the court room to be locked, and then impounded every person in the audience qualified to serve. Many of the jurors were so exhausted by continuous service that they fell asleep in their seats, but the trials went on.-*Ex.*