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THE GREAT RAILWAY CASE.

REFERRING to the case now before the Supreme Court *in re* the Province of Manitoba and the Canadian Pacific Railway Company, we gather from the reports in the papers that Mr. Blake contended that the Manitoba Railway in question came within the description of those which had been declared by the Dominion Parliament to be for "the general advantage of Canada," and was, therefore, by the provision of the Constitutional Act in such case, withdrawn from the legislative authority of the Provincial Legislature, and exclusively placed under that of the Dominion Parliament, and was, therefore, unlawfully made under the Manitoba Act, contrary to the said provisions of the Constitutional Act, and was not entitled, under the Railway Act of 1888, to the benefit of the provisions therein made respecting railway crossings. Mr. Mowat, on behalf of the Province, maintaining that the provisions of the Constitutional Act did not prohibit the making of a railway declared to be "for the general advantage of Canada," but made it subject thereafter to the legislative authority of the Dominion Parliament, and placed it, when made, and until the said Parliament should otherwise direct, under the laws governing railways under its authority; that the Dominion Parliament had made no special provision as to the said railway, which was, therefore, entitled to the benefit of the provisions of the Railway Act of 1888, including those respecting railway companies and others, which by section 4 are declared to be applicable "to all railways, whether otherwise under the authority of Parliament or not"; and that this construction of the Imperial Act seemed more consistent with common sense, and with the allowance by the Dominion Government, acting, of course, under the opinion of the Attorney-General, and more consistent the intention of the Dominion Parliament, than the view which supposes it to have been intended to prevent the construction by a Province of a work entirely within its boundaries, because it was declared to be "for the general advantage of Canada."

The Imperial provision has been frequently extended to provincial railways, but always for the purpose, not of prohibiting them, but of extending them, so that they should be for the "greater advantage of Canada." It is difficult to believe that a Parliament which, in the then last session, had repealed the enactments establishing railway monopoly in Manitoba under one form, intended to re-establish it in another, which Mr. Blake's construction of the Imperial enactment would certainly do.

COMMENTS ON CURRENT ENGLISH DECISIONS.

The *Law Reports* for November comprise 21 Q. B. D. pp. 413-460; 13 P. D. pp. 157-166; and 39 Chy. D. pp. 81-186.

PRACTICE—SPECIALLY INDORSED WRIT—BOND—PENALTY—8 & 9 WM. III. C. 11, S. 8.

Tuther v. *Caralampi*, 21 Q. B. D. 414, is a case which deals with a point of practice, which is not very clearly defined under our Consolidated Rules. The writ in the action was indorsed with a claim for £500, as the principal sum due on a bond conditioned for the payment by the obligor to the plaintiff, of an annuity of £26 during the life of a child, and until she should attain sixteen, by quarterly payments; and alleged that two of such payments were in default. Charles, J., had rescinded the order of a Master allowing the plaintiff to sign final payment, under Ord. 14, r. 1, and from this decision the plaintiff appealed to the Divisional Court, contending that the debt sued for was a liquidated demand, for which the plaintiff was entitled to sign judgment, there being no defence. But the court (Lord Coleridge, C.J., and Hawkins, J.) dismissed the appeal, holding that the provisions of 8 & 9 Wm. III. c. 11, s. 8, constituted a special procedure in such cases, which was intended to be saved by Ord. 13, r. 14, which provides, "where the writ is indorsed with a claim or a bond within 8 & 9 Wm. III. c. 11, and the defendant fails to appear thereto, no statement of claim shall be delivered, and the plaintiff may at once suggest breaches by delivering a suggestion thereof to the defendant or his solicitor, and proceed as mentioned in the said statute, and in 3 & 4 Wm. IV. c. 42, s. 16." As we have neither a rule in force similar to the English rule, Ord. 13, r. 14, or the last mentioned statute, it is somewhat difficult to know what the practice in such cases is in this Province. It certainly seems objectionable, and contrary to justice, that the plaintiff should be at liberty to enter judgment, and issue execution for the full amount of the penalty. Such an action, notwithstanding its form, should, we are inclined to think, be either proceeded with as a claim for unliquidated damages, which should be assessed in the usual way, before final judgment is entered; or, if judgment be entered by default for the full amount of the penalty, there should be a suggestion of breaches, and an assessment of damages thereon before execution can properly issue. Although it must be confessed, as all former practice has been abolished, and no other provided to meet the case, it is hard to say what is the proper course.

HUSBAND AND WIFE—AGREEMENT FOR SEPARATION—POWER OF HUSBAND AND WIFE TO CONTRACT WITHOUT THE INTERVENTION OF A TRUSTEE—AGREEMENT NOT TO BE PERFORMED WITHIN A YEAR—STATUTE OF FRAUDS, (29 CAR. II. C. 3, S. 4).

McGregor v. *McGregor*, 21 Q. B. D. 424, was an action by a wife to recover a sum agreed to be paid by her husband for her separate maintenance. The parties had taken out summonses against each other for assault, and had subsequently compromised the matter, and agreed to live apart, the husband agreeing

to allow the wife a weekly sum for maintenance; and the wife agreeing to maintain herself and her children, and to indemnify the husband against any debts contracted by her. The action was brought to recover six weeks' arrears, and the Court of Appeal (Lord Esher, M.R., and Lindley and Bowen, L.JJ.) held, affirming the decision of the Queen's Bench Divisional Court, 20 Q. B. D. 529 (noted *ante* p. 264), that the action was maintainable, and that the husband and wife could make a valid contract for separation without the intervention of a trustee, by way of compromise of legal proceedings. They also held that the agreement was not an agreement "not to be performed within one year," within the fourth section of the Statute of Frauds, and therefore need not be in writing. As regards the first point, the appellate court considered that as to part of the consideration for the contract, it was executed, by the wife withdrawing the summons against her husband, and living apart from him; and this being so, it was immaterial whether or not her contract to maintain herself, and to indemnify her husband against debts contracted by her, could be enforced by the husband. Lindley, L.J., points out that the law on this subject has undergone important changes in recent times. Until *Wilson* v. *Wilson*, 1 H. L. C. 538, it had been considered against public policy for husband and wife to agree to a separation, that decision, however, had established the legality of such agreements. It had been customary to interpose a trustee for the purpose of supplying a consideration in the shape of his covenant, when otherwise there would be none; but, he said, whenever there is a valid consideration as between husband and wife, there is no need of a trustee. As to the Statute of Frauds, the court was unanimously of opinion that when the agreement distinctly shows upon its face that the parties contemplated its performance to extend over a greater space of time than one year, the case is within the statute; but that when the contract is such that the whole may be performed within a year, and there is no express stipulation to the contrary, the statute does not apply; this was the rule laid down by Tindal, C.J., in *Souch* v. *Strawbridge*, 2 C. B. 808, following *Boydell* v. *Drummond*, 11 East 142; and *Davey* v. *Shannon*, 4 Ex. D. 81, in which Hawkins, J., had come to a different conclusion, was therefore overruled.

DOG—"GOODS"—CONSTRUCTION OF STATUTE—MANDAMUS.

The Queen v. *Slade*, 21 Q. B. D. 433, may be referred to as establishing that under a statute authorizing a magistrate to issue a summons against a person detaining "goods" without just cause, he is authorized to issue a summons against a person who detains a dog without just cause. In other words, that a "dog" is "goods" within the meaning of the statute. And a mandamus was accordingly granted to a magistrate who had refused to issue a summons.

NUISANCE—RAILWAY COMPANY—LOCOMOTIVE AT STATION—NOISE OF STEAM.

Simkin v. *London and North-Western Railway Co.*, 21 Q. B. D. 453, was an action against a railway company for damages occasioned by the plaintiffs' horse being frightened by the defendants' engine, blowing off steam at a station, whereby

the plaintiffs' carriage was upset, and the plaintiffs injured. The plaintiffs were leaving the station in the carriage, when the accident happened. It did not appear that the engine was defective, or that it was used in an improper manner, or that the approach to the station was inconvenient; but the jury found that the defendants were guilty of negligence in not screening the railway from the roadway leading to the station, and that such negligence had caused the accident. But, notwithstanding this finding, the Court of Appeal (Cotton, Fry and Lopes, L.JJ.) held (Fry, L.J., reluctantly), that the defendants were not liable, because there was no evidence of any obligation on their part to screen the railway from the road, and affirmed the judgment of Huddleston, B., and Charles, J. It may be mentioned that the station and the roadway, and the fence dividing them, had been in the same condition, as they were at the time of the accident, for twenty years previously, and that 300 trains were accustomed to arrive at the station during every twenty-four hours.

SHIP—DAMAGE—WHARF—IMPLIED REPRESENTATION OF WHARFINGERS.

Proceeding now to the cases in the Probate Division, it may be useful to notice *The Mooreock*, 13 P. D. 157. This was an action brought by the owners of a vessel against wharfingers, for damages caused to the vessel in unloading the vessel at the defendant's wharf. The defendant, for a consideration, had agreed to allow the plaintiffs to unload at his wharf. In order to do this it was necessary to moor the vessel alongside a jetty of the defendants', which ran into a tidal river, and that she should take the ground with her cargo at the ebb of the tide. The vessel at the ebb of the tide sustained damage, owing to the uneven nature of the ground. The bed of the river at this point, where she took ground, was vested in a public body, and the defendant had control over it; but it was admitted they had taken no steps to ascertain whether it was suitable for the vessel to ground upon. It was held by Butt, J., that there was an implied undertaking by the defendants that they had taken reasonable care to ascertain that the bottom of the river at the jetty was not in a condition to cause damage to the vessel, and that they were liable for the damage sustained by her.

VENDOR AND PURCHASER — MISDESCRIPTION — CONDITIONS OF SALE — UNDER-LEASE DESCRIBED AS LEASE—CONDITION THAT MISDESCRIPTION SHALL NOT ANNUL SALE.

In re Beyfus & Masters, 39 Chy. D. 110, was an application under the Vendors' and Purchasers' Act: houses were offered for sale, and in the particulars were stated to be held for ninety years from 24th June, 1844, at a ground rent of £21. The 4th condition provided that the title should commence "with the lease under which the vendor holds, dated 11th July, 1845." The 5th condition stated that "the description of the property is believed to be correct, but if any error should be found therein, the same shall not annul the sale, nor shall any compensation be allowed in respect thereof." The vendor was, in fact, entitled to an under-lease for the residue of the term of ninety years, less two days, at a peppercorn rent, and the owner of the two days could not be found. The Court of

Appeal (Cotton, Bowen and Fry, L.JJ.) held that the representation that the property was held by lease, when it was, in fact, held by under-lease, was a fatal misdescription, and that the 5th condition did not apply, for that "error in the description of the property" meant only errors in the description of the physical property, and not a mistake in the description of the vendor's title; and, therefore, affirming the decision of Kay, J., that a good title could not be made. Fry, J., points out the substantial difference between a lease and under-lease, and that the outstanding two days would make it impossible for the tenant to surrender the lease to the freeholder and take a new lease.

WILL—LEGACY—HUSBAND AND WIFE—GIFT TO WIFE WHILE LIVING APART—CONDITION—LIMITATION.

In re Moore, Trafford v. *Maconochie*, 39 Chy. D. 116, the court was called upon to determine the legal effect of a legacy bequeathed in the following manner: the testator directed his trustee to pay to his sister, Mary Maconochie, "during such time as she may live apart from her husband, before my son attains the age of twenty-one years, the sum of £2 10*s.* per week, for her maintenance while so living apart from her husband." The sister was married some years before the date of the will, but had never lived apart from her husband till sometime after the death of the testator. The testator's son was living, and was an infant. Kay, J., held that the bequest could not be construed as a gift to Mary Maconochie during the joint lives of herself and husband until the son attained twenty-one, upon a condition, that might be rejected as against the policy of the law, that she should live apart from her husband; but that it was a limited gift of weekly payments to be made during a period the commencement and duration of which were fixed in a way the law does not allow, and that, therefore, the gift was void; and in this decision the Court of Appeal (Cotton, Bowen and Fry, L.JJ.) concurred.

PRACTICE—COSTS AS BETWEEN SOLICITOR AND CLIENT—JURISDICTION—ACTION AGAINST TRUSTEES OF A CHARITY FUND—UNJUSTIFIABLE LITIGATION.

Andrews v. *Barnes*, 39 Chy. D. 133, is a case in which Kay, J., dismissed an action brought by a vicar and churchwardens of a parish to recover from the defendants a fund of small amount, which the plaintiffs claimed was held by them for a charitable purpose connected with the parish, upon a condition which had become incapable of fulfilment; and being of opinion that the action was unjustifiable, he ordered the plaintiffs to pay the defendants' costs, as between solicitor and client. The plaintiffs appealed on the question of costs, but the Court of Appeal (Cotton, Fry and Lopes, L.JJ.), held that he had jurisdiction to make the order as to costs, and refused to alter it. Fry, L.J., who delivered the judgment of the court, points out that the jurisdiction in equity regarding costs was essentially different from that at common law, and, from a consideration of the authorities, he concludes that there was inherent in the Court of Chancery, at the time of its abolition, a general and discretionary power to award costs, as

between solicitor and client, to a successful party, as, and when the justice of the case might so require, and as regards suits within the former equitable jurisdiction, the power still exists in the High Court; but, whether the High Court has power to award costs, as between solicitor and client, in matters of common law jurisdiction, he expressly refrained from giving any opinion.

WILL—LEGACY—SATISFACTION—CONTEMPORANEOUS DEED AND WILL.

Horlock v. *Wiggins*, 39 Chy. D. 142, is an instance of the result, which too often happens, where a testator undertakes to draw his own will. By a separation deed, dated 7th September, 1844, he had covenanted that his executors should, on his decease, pay to his wife, if she survived him, £100, with a proviso that if £6 per month was paid her for six months from his death, the balance should only be paid at the end of that period. By his will, dated the 5th September, 1844, but alleged to have been signed on the 9th, he made the following bequest: "After all my just debts, funeral and testamentary expenses are paid, I bequeath to my wife £100, payable within six months after my decease, £6 to be paid to her or her order until my estate is finally settled, the same to be deducted from the said £100, as per indenture stated in our mutual separation." The testator died in 1887, and the question was, whether this bequest was to be deemed to be a satisfaction of the testator's covenant contained in the separation deed, Kekewich, J., held that it was not, and this view was sustained by the Court of Appeal (Cotton, Bowen and Fry, L.JJ.). One of the grounds on which this decision was arrived at was the fact that the will directed payment of the legacy after payment of the testator's just debts; and the £100 in the separation deed was a debt existing when the will was made. Though the reasons assigned may be sufficient, from a legal point of view, to warrant the construction adopted, we nevertheless feel morally sure that that construction does not really carry out the intention of the testator.

HUSBAND AND WIFE—GIFT TO HUSBAND, WIFE, AND THIRD PERSON—MARRIED WOMAN'S PROPERTY ACT, 1882 (45 & 46 VICT. 75, SS. 1 & 5)—(R. S. O. C. 132, S. 3).

In re Jupp, Jupp v. *Buckwell*, 39 Chy. D. 148, the question which was raised *In re March*, 24 Chy. D. 222, but not actually decided, came up again for decision, viz., whether under a gift to a husband and wife and a third person, made since the Married Women's Property Act, 1882, the parties take severally one-third, or whether the husband and wife together take one moiety, and the third person the other moiety, Chitty, J., assuming the case to be within the Married Woman's Act of 1882, decided that they took in thirds; but on appeal this decision was reversed, on the ground that the case was not within the Married Woman's Property Act, 1882. Now Kay, J., holds that the Married Woman's Property Act, 1882, has made no change in the common law rule in this respect, and that the husband and wife only take a moiety between them. The true view of the effect of the Act he considers to be that it was not intended to alter any rights except those of the husband and wife *inter se*.

WILL — CONSTRUCTION — REMOTENESS — TENANT FOR LIFE, PAST CHILD-BEARING — EVIDENCE.

In re Dawson, Johnston v. *Hill*, 39 Chy. D. 155, the principal question was, whether, for the purpose of maintaining a bequest, which was *prima facie* void for remoteness, it is admissible to prove the tenant for life, to whose grandchildren the bequest was made, was past child-bearing at the time of the testator's death. Chitty, J., held that the evidence was not admissible.

PRACTICE—WRIT OF ASSISTANCE.

In *Wyman* v. *Knight*, 39 Chy. D. 165, it was held by Chitty, J., that although for the purpose of recovering land the old writ of assistance has been superseded by the writ of possession, the writ may still be issued for the purpose of recovering possession of, and preserving, chattels, which had been ordered to be delivered to a receiver. The chattels in question were securities and documents of title, locked up in the safe of an absconding trustee.

POLICY OF LIFE INSURANCE—PAYMENT OF PREMIUMS BY PERSON NOT BENEFICIALLY ENTITLED—TRUSTEE—INDEMNITY LIEN—SALVAGE.

In re Winchelsea, 39 Chy. D. 168, a person, who was a trustee of a term, upon trust to apply the rents in paying the interest due on mortgages made by a *cestui que trust*, and of the premiums on policies of insurance effected by the mortgagor as collateral security for the mortgages. The rents having become insufficient, the trustee, in order to prevent one of the policies from lapsing, paid a premium out of his own moneys. He did this without any request from the mortgagee or mortgagor. The life insured having dropped, the trustee claimed a lien on the proceeds of the policy for the premium so paid by him as against the mortgagees; but it was held by North, J., that he was not entitled to the lien, he not being a trustee of the policy; and that the right of a trustee to be indemnified, out of his trust fund, for money expended by him in its preservation, is strictly limited to the trust fund. The case is a hard one, but the law seems to be sound.

PRINCIPAL AND SURETY—CROWN DEBTS—ADMINISTRATION PRIORITY.

In re Churchill, Manisty v. *Churchill*, 39 Chy. D. 174, North, J., held that a surety to the Crown, who has paid the debt of his deceased principal, is entitled to the Crown's priority in the administration of the principal's estate. See *ante* pp. 431, 487.

SOLICITOR—TRUSTEE—MORTGAGE—NEGLIGENCE—STATUTE OF LIMITATIONS.

Dooby v. *Watson*, 39 Chy. D, 178, was an action against the executor of a solicitor for negligence in making an investment for the plaintiff on a mortgage security. It appeared by the evidence that the plaintiff had approved of the mortgage, and that the solicitor merely did the legal part of the business, and was not in the position of a trustee. It was held by Kekewich, J., that the

Statute of Limitations was a good defence. In the course of his judgment, the learned judge lays down the following rule: A solicitor, in advancing money on a mortgage, may be employed (1) to invest in a particular mortgage; (2) to find securities to be approved by the client, and then invest the money; (3) to find securities, and invest the money, the client taking little or no part in the business; and, in an action for negligence, he holds that the Statute of Limitations would be a good defence in the first case, and also in the second case, if the client has approved of the mortgage; but in the third case, we gather from his judgment, though he does not say so, he becomes a *quasi* trustee, and the statute is no defence.

APPARENT FIXTURES.

IT IS not the chattel mortgage that preserves the original character of the property. It is the intention of the parties. Such mortgage is very cogent evidence of such intention, for no one would mortgage as personalty what was not intended to remain personalty. If the intention then dates back of the annexation, the fact that the mortgage upon the chattel was not executed till afterward cannot affect the question. But if the chattel has once become a fixture, and as such a part of the realty, then no subsequent agreement or intention can affect its character. It is on this ground that the decision in *Trull* v. *Fuller*, 28 Me. 545, can be reconciled with the majority of the cases. The chattel mortgage in this case was upon property already attached to the realty. Of course, such a mortgage could not convert into personal property what had once been real estate. A purchaser without notice at an execution sale of the real property was held to be the owner of the property sought to be affected by the chattel mortgage in a suit brought by the chattel mortgagee to recover the value of such property in trover. The best considered cases hold that a purchase of the realty for value without notice, either actual or constructive, takes title to whatever appears to be a fixture, provided, of course, it was attached to the realty with the knowledge of the person claiming it, or to have a lien upon it. All the decisions heretofore cited, except those from New York and Maine, recognize this rule as sound. In addition, the following cases cited are to the same effect: *Ridgeway Stove Co.* v. *Way*, 141 Mass. 557; S. C. 6 N. E. Rep. 714; *Davenport* v. *Shants*, 43 Vt. 546; *Southbridge Sav. Bank* v. *Exeter Machine Works*, 127 Mass. 542; *Hunt* v. *Bay State Iron Co.*, 97 id. 279; *Thompson* v. *Vinton*, 121 id. 139; *Pierce* v. *George*, 108 id. 88; *Rowand* v. *Anderson* (Kan.), 6 Pac. Rep. 255; *Pierce* v. *Emery*, 32 N. H. 484; *Haven* v. *Emery*, 33 id. 66. See *Strickland* v. *Parker*, 54 Me. 263. These cases all recognize that notice would preclude the purchaser or mortgagee from claiming the chattel as a fixture.

In *Pierce* v. *George* the court practically decided that the recording of the chattel mortgage was not notice. The question was not discussed, but the plain-

tiffs, who sought to recover for the conversion of the property affixed to the realty, claimed under a chattel mortgage thereon duly recorded with the records of personal property. Defendant claimed under a real estate mortgage, and he had judgment as to all of the property attached to the realty. The question of notice, either actual or constructive, is not referred to in the opinion, and the case is far from being satisfactory.

Powers v. *Dennison*, 30 Vt. 752, is an important decision on the question of notice. A building was erected by one upon the land of another. It was so attached to the land that it would have become a fixture had it not been for the implied understanding that the erector of it should have the right to remove it. The court held that a subsequent mortgagee of the real estate took a lien upon the building, and could hold it as against the owner, and that the possession of the building by the owner of it was not notice to the mortgagee of his rights. This case, so far as the question of constructive notice by possession is concerned, cannot be regarded as sound.

The decision of the court in *Voorhes* v. *McGinnis*, 48 N. Y. 278, is, so far as the reasoning of the court is concerned, indefensible. A chattel mortgage was executed upon boilers and an engine, which were subsequently placed in a mill. But they were so attached to the building that they could be removed without material injury either to the building or to the engine and boilers. The court held the lien of a subsequent real estate mortgage prior. The decision was not placed upon the ground that the real estate mortgagee had no actual notice of the chattel mortgage, and that it not being filed, there was no constructive notice. The chattel mortgage may have been filed, but the case does not disclose that fact. The court rested its judgment upon the following reasoning: "I am of opinion upon general principles—that is, unless there be some specific agreement to the contrary, or some circumstances controlling the general rule that the boilers and engines, shafting and gearing, became a part of the realty and passed to the plaintiff upon his purchase. It is said that the execution by Kimmey of a chattel mortgage upon it before it was placed in the mill would be sufficient to preserve its personal character. Although unknown to the plaintiff, this fact existed in the case. It comes to this: A man employs a carpenter and mason to build a brick house for him upon his lot, and pays them in full the price agreed upon. The mason puts his brick in the walls. The carpenter places his joists and timbers in the proper places in the house. The house is finished and is occupied by the owner. It then appears that the maker of the brick held a chattel mortgage upon them, executed by the mason, and that the sawyer of the timber held a chattel mortgage upon it, executed by the carpenter. Are these articles, now a part of the house, still held upon the chattel mortgages so that the creditors can despoil the house to obtain their possession or compel the owner to pay their value?" With all deference to the judge who wrote this opinion, this is *not* what the case came to. The same judge had just before stated in his opinion that the engine and boilers could be removed without material injury. Would that have despoiled the building? The case before the court and the case put by the court, as illustrating to what an injustice the rule

holding the engine and boilers chattels would lead, were widely dissimilar. No one has ever doubted that in the case the court mentioned the property would be real estate. The rule has invariably been stated with the limitation that there must be no material injury to the fixture or the freehold involved in the removal. How illogical, to attack a rule restricted in its operation by citing the consequence of its operation beyond its restrictions. This is the reasoning of the court. There is a strong dissent in the case, the judges standing three to two.

The decision in *Fryatt* v. *Sullivan Co.*, 5 Hill, 116, affirmed by Court of Errors, 7 Hill, 529, is placed on the ground that the annexation was of such a nature that the chattel could not be removed without material injury, and it is on this ground that this case is distinguished in *Ford* v. *Cobb*, 20 N. H. 351.

The annexation of the chattel to the land must be with the knowledge of the owner of it, or the one holding a lien on it. The act of the owner of the chattel in attaching it to realty, cannot prejudice the lienor unless he knows of it or impliedly consents to it. This demonstrates the absurdity of the reasoning of the court in the case of *Voorhes* v. *McGinnis*, just cited, for in the case put by the court the chattel mortgagee *could* have insisted upon his lien, even after the brick and timber had become part of the house, if he did not consent to their being used in the construction of the house, or known of it. It is true he could not tear down the house or replevy the materials, but he could sue for conversion, and recover their value as against the owner of the house.

Whether the filing of a chattel mortgage is sufficient to give notice to a purchaser of the realty that apparent fixtures are personalty, is as we have seen a question about which there is a decided difference of opinion. There is certainly less authority against the doctrine that such filing is notice than there is in favour of it. But the spirit of the registry laws of this country are in harmony with it, and would even seem to require such a rule. On the other hand, there are more decisions in support of the contrary rule. Moreover, it cannot be said that the *letter* of the various recording acts comprehends the case of a chattel, which in spite of its annexation to the land, remains personalty, for this would involve the assumption of what is the exact reverse of the fact, *i.e.*, that the chattel has become a fixture. The recording acts do not attempt to affect any property which is not in fact real estate, and when it is admitted, as it is by all the decisions, that in certain cases the chattel does *not* become a fixture, then the letter of the recording act does not touch the case at all. In answer to the argument founded upon the spirit of such acts, may it not be said that notice is given in just the manner that the spirit of such acts requires. It is true that the notice is in a different record, and may be in a different office; but it is a public record, and can the purchaser of the land claim that he was not bound to look to such a record, for the reason that he had a right to assume that the property alleged to be personalty was a fixture? In view of the well-settled rule that such property may or may not be a fixture according to the intention of the parties interested in it, has the purchaser an absolute right to regard it as a fixture without examining a public record where the record of a lien upon it

as personalty would disclose the fact that it is not a fixture? The moment it is admitted that personal property affixed to the realty in a certain manner is not necessarily a fixture, it becomes the duty of the purchaser to ascertain whether it has been incumbered as personal property by an examination of the records where such an incumbrance would be found. Is there any hardship in this? There would certainly be none whatever after the rule had been settled, as purchasers could then conform to it. On the other hand, the interests of trade would be subserved by protecting the chattel mortgagee, for without such protection the vendor of machinery and other property which can be used only by attaching it to the freehold, would be unwilling to sell on this kind of security, and in many instances the purchaser is unable to pay cash or give any other security. The vendor would not care to take a mortgage on the realty, as that would postpone his lien to a prior mortgage not only as to the land as it was before the chattel was attached to it, but also as to the chattel itself, which would then become a fixture. There is a strong dissent from this view by Judge Dillon in *Bringhoeff* v. *Munzenmaier*, 20 Iowa, 513; but what was said was *obiter*, as the chattel which was mortgaged as such was at the time attached to the real estate, and had prior to the giving of the mortgage been a fixture. He says: "They had no constructive notice of the plaintiff's right, because the plaintiff's mortgage was a chattel mortgage, and recorded and indexed as such. There never having been any actual severance of the articles in question, and the same being admitted to constitute as between vendor and vendee part of the realty, a subsequent purchaser would not be bound to take notice of a chattel mortgage thereon; the statute requiring those to be separately recorded and separately indexed. If the defendants at the time of their purchase had been shown to have had knowledge of the plaintiff's mortgage, the question then arising would be much more difficult of solution. But without such knowledge it appeared to us plain that the defendants had the title to the property in question. Any other rule would practically nullify the registry laws, or else introduce the startling doctrine that in examining the titles to real estate, the searcher must also examine the records of chattel mortgages. If the defendants, prior to their purchase from Rawson, had visited the premises, they would have seen the property in question, constituting to all appearances part of the real estate. There would be nothing on the ground, and nothing in the nature of the property, to advise them of the plaintiff's adverse right or ownership. Rawson, and not the plaintiff, it seems was in possession. If defendants should then examine the records of real estate transfers, they would there discover nothing advising them of the plaintiff's claim. They are therefore entitled to and do stand free from it." *Sowden* v. *Craig*, 26 Iowa, 162, appears, as we have seen, to hold the contrary.

In *Sisson* v. *Hibbard*, 75 N. Y. 542, the court ruled that a purchaser at an execution sale was not a *bona fide* purchaser, and could not claim chattels as part of the realty which were annexed to the realty with the understanding that they were to remain personalty.

Nothing can be constructively severed from the freehold and made person-

alty as against an innocent purchaser of the land, even if the contract be recorded, unless, of course, it is recorded among conveyances of real estate. If it is found there, the recording act makes it constructive notice. But if it is a chattel mortgage of what was part of the real estate, the filing and recording of it among chattel mortgages is no notice whatever. Nothing short of an actual severance of the thing will suffice. *Lacustrine Fer. Co.* v. *L. G. & Fer. Co.*, 82 N. Y. 476, where the court say: "We think it must be a general rule that the owner of land cannot by agreement between himself and another make that which in its nature is land, personal property as against a subsequent purchaser for value without notice, there having been no actual severance of the subject of the agreement, when the subsequent grant was made, and we are also of opinion that in the case supposed, the doctrine of constructive severance cannot be applied to defeat the rights of subsequent purchasers."

Fryatt v. *Sullivan Co.*, 5 Hill, 116, is considered as holding that where one converts to his own use the chattels of another by annexing them to the real estate in such a manner that they cannot be removed without serious injury to the freehold and the real estate, with such chattels attached, is afterwards sold to an innocent purchaser, the former owner of the chattels cannot maintain trover against such purchaser of the real estate. This case was affirmed by the Court of Errors, 7 Hill, 529. But it does not lay down any such doctrine. The owners knew that the chattels (engine and boiler) were affixed to the real estate, and they being so annexed to it that they could not be removed without destroying the building in which they were placed, and the owner having knowledge of the annexation, must be deemed to have assented to it as against an innocent purchaser. The decision was based upon this ground. Bronson, J., says: "But there can be no doubt that they acquired just as good a title to the engine and boilers as they did to the rest of the real estate." There was no opinion in the Court of Errors.

In a dissenting opinion in *Morrison* v. *Berry*, 42 Mich. 389; S. C. 36 Am. Rep. 446, Judge Cooley says: "It was said by Mr. Justice Ladd, in *Cochran* v. *Flint*, 57 N. H. 514, 547, that if it were held that A, having in his possession the movable thing of B, annexed it without consent of the owner to the real estate of C, it would thereupon, and by force of that act alone, become the property of C. Such a decision, so far as his investigation had extended, would stand alone, and would be so manifestly contrary to reason and justice, as well as the fundamental principles of law relating to the acquisition and ownership of property, that he could only follow it from a reason of duty that would amount to moral compulsion. We have been as much unable as that learned judge was to find any such decision. One man cannot give away the property of another in this manner. The consent of parties that shall convert a chattel into an inseparable part of realty, is the consent of the parties owning the *chattel* and the realty respectively." The prevailing opinion did not conflict with these views of Judge Cooley. The owners of the chattel had consented to the annexation of the same to the freehold. But Judge Cooley held that this consent was annulled by fraud, and the other judges held that it was not. Here the difference between the two

opinions lay. *Stillman* v. *Flenniken*, 58 Iowa, 450; S. C. 43 Am. Rep. 120, holds another contrary to the above opinion. It appears from the case that the owners of the chattel knew that it was annexed to the land. This is not directly stated in the case, but the reasoning of the court leads to this conclusion. *D. & Bay City R. Co. Busch*, 43 Mich. 571, seems to hold that the grantor of the realty is not liable in any case where the chattel of another has been affixed to the land without his consent, and the grantee subsequently buys the real property.

A railroad company was sued for the conversion of certain ties which had been placed on the road-bed by contractors before the road was turned over to the company. But the language of the court modifies the apparent scope of the decision: "Having deliberately chosen to wait until the property not only changed custody, but was also annexed still more firmly by ballasting, he cannot now treat as personalty in the hands of the railroad company converted by a mere failure to give it up on demand, what became to *his knowledge* a part of the realty in the hands of the contractors, against whom he had a remedy for the only conversion that ever took place.—*Albany Law Journal.*

Reviews and Notices of Books.

Mr. Pollock's treatise on the general principles concerning validity of agreement in the law of England and America has been re-published by the Blackstone Publishing Company, of Philadelphia, from the fourth English edition. It contains notes on the American cases by Franklin S. Dickson. This book will be a valuable addition to the series now so well known to the profession. We notice a large number of valuable text-books recommended by the editor for re-printing next year.

Notes on Exchanges and Legal Scrap Book.

STATUTE OF FRAUDS.—In *Slingerland* v. *Slingerland*, lately before the Minnesota Supreme Court, the defendant had proposed orally to the plaintiff to discontinue four other actions between them, and to allow the defendant the money involved in a fifth one; and, in consideration of so doing, offered to convey to him a certain farm, and the personal property on it, on the day that the plaintiff should marry a young lady then named by him. The plaintiff then orally accepted the proposition, dismissed four of the actions, and allowed the defendant the money involved in the fifth one. He also married the young lady; but when he thereafter demanded the conveyance of the farm, as agreed upon, the defendant

refused to execute it. The case turned upon whether there had been such a part performance as to take the case out of the Statute of Frauds. The plaintiff's marriage does not seem too have been any part of the consideration for the defendant's agreement to convey, and so it may be left out of view. The point was, whether the discontinuing of these four actions by the plaintiff, and his allowing the defendant to have the money involved in the fifth one, was such part performance as to take the case out of the Act. The court held that it was. It was suggested that one remedy open to the plaintiff was to bring an action for damages for the loss sustained by reason of the dismissal of the former actions, and the court thought that though such an action would be novel, it might be maintained, but the difficulties in the way of successfully prosecuting would be very great. It was held that an action for damages could not afford adequate relief. The dismissals were not made on a money consideration, nor did the parties intend the value of the actions to be measured by a money standard. In no way could the loss of the advantage in having the actions tried at the earlier, instead of the later, date be estimated in damages, nor any recovery be had for it.

INJURY TO TRESPASSING CHILD.—The Supreme Court of Minnesota, in *Twist* v. *Winona & St. Paul Railway Co.*, has also given us a decision on the liability of a railway company for damage sustained by a trespasser. A boy ten or eleven years old, of average intelligence, who had often seen, and had a general knowledge of the structure and working of a railway turn-table, and had often been warned by his father that it was dangerous to play upon it, and that he must not do so, and who knew, too, that the railway company prohibited children from playing upon the table, and that he had no right to do so, was swinging upon it while in motion, and was injured. In an action for damages it was held that, though the boy might not understand the full extent of his danger, yet his conduct amounted to contributory negligence. The plaintiff cited *Keefe* v. *Railroad Co.*, 21 Minn. 287, and *Railroad Co.* v. *Stout*, 17 Wall. 657, in which it is held that the owner of dangerous machinery, who leaves it in an open place, though on his own land, where he has reason to suppose that young children will be attracted to and play with it, and be injured, is bound to use reasonable care to protect such children from the danger to which they are exposed. In the *Keefe* case, the attractiveness of such machinery as a plaything for children, and the danger of its alluring them into perils of which, for their lack of judgment and discretion, they cannot be aware, and against which they cannot protect themselves, was dwelt on; and that such children, it was reasoned, may be said to be induced by the owner's own conduct to come upon the premises; and that what an express invention is to an adult, such an allurement is to a child. In the present case, however, it was held, that when a child of such tender years as not to be capable exercising judgment and discretion cannot be charged with contributory negligence, this rule cannot be applied to all children, without regard to their age or capacity. Children may be liable for their torts or crimes, and may be guilty of negligence.

The opinion of the court seems to favour the modification of the judgment in the *Keefe* case, but upon the facts it was not necessary to determine whether the charge of negligence against the defendant could be sustained. A child is bound to use such reasonable care as one of his age and mental capacity is capable of using, and his failure to do so is negligence.

INJURY TO PERSONS ON RAILROAD TRACK.—The Virginia Supreme Court, in *Virginia M. Railway Co.* v. *Boswell's Administrator*, decides that in the case of a trespasser on their track, who is killed or injured, the railroad company is not liable for anything short of wilful and wanton injury. In this case the track-walker of the railroad company discovered a man, about ten o'clock at night, lying on the track in such a position that a passing train would kill him, and when he aroused him, and warned him of his danger, the man showed no signs of intoxication. The track-walker then passed on, and the trespasser was killed about two hours later by an express train. It was held that the track-walker was guilty of no negligence, which rendered the company liable. It was contended that the failure of the track-walker to signal and stop the train was the proximate cause of the injury, and such negligence on the part of an agent as to leave the company liable for damages. The Court of Appeal decided against the contention. The deceased was a trespasser, and was guilty of gross and culpable negligence, either through wilfulness or intoxication. There was no evidence of his being ill. In cases of intoxication or gross recklessness, such as this, the prevailing opinion is stated to be that the company is not liable for anything short of wilful and wanton injury. In *Herring* v. *Railroad Co.*, 10 Ired. 402, two intoxicated slaves fell asleep upon the track, where they could have been seen by the engineer, if he had been looking, for a distance, variously estimated at from 200 yards to half a mile, and were killed by a passing train. It was held by the court that their being upon the track in a condition of helpless intoxication, was such contributory negligence as should prevent a recovery unless the company was guilty of wanton injury. See also Beach on Contrib. Neg. 294, note; and cases cited there, id. 205, note 3. But it was contended that the case came within the general rule, that the plaintiff may recover, although he has been guilty of negligence or want of ordinary care, which has contributed to cause the accident, if the defendant could, by the exercise of proper care and caution, after having knowledge of the plaintiff's negligence, have avoided the mischief which happened. *Railroad Co.* v. *Anderson's Administrators*, 31 Grat. 815; *Dun* v. *Railroad Co.*, 78 Va. 645; *Rudd's Administrators* v. *Railroad Co.*, 80 id. 546. The question then became whether, in the present instance, the track-walker had done all that could reasonably be expected of him. Upon this point the Supreme Court had no difficulty in deciding in the affirmative. When aroused and told that he must get up and go off the track, Boswell partly raised himself, leaned upon his elbow, and assented to the suggestion in such a way as to convince the track-walker that the deceased was capable of taking care of himself.

MAY RAILWAY COMPANIES EXPEL PASSENGERS?—One of the most annoying incidents in a railway journey is the loss of a ticket; and it is made more acute by the arbitrary manner which railway officials assume in virtue of the accident. Even if the passenger, as too often happens, to save trouble, pay his fare over again, he is treated with impatience by the ticket-collector, and with black looks by his fellow-travellers, who are being delayed. If he does not pay or is without his purse, unless he is a very well-known person, the usual course hitherto has been to turn him out of the carriage with ignominy, detain him till his train has gone, and leave him stranded away from his destination. It has been an article of faith with railway officers, from the chairman to the ticket-collector, that this way of dealing with the matter is just and lawful, and the railway solicitor, when appealed to, has whispered the comforting words, *Wood* v. *Leadbitter*. The case of *Butler* v. *The Manchester, Sheffield and Lincolnshire Railway Company*, 57 Law J. Rep. Q. B. 564, in the Court of Appeal, will rudely dispel these notions, which were sufficiently rooted to be accepted by Mr. Justice Manisty at the trial at Leeds. All the judges of the Court of Appeal agree that *Wood* v. *Leadbitter* has no application whatever, and that the company's by-laws, even assuming them to have any force, do not authorize turning passengers adrift. The decision turned entirely on the meaning of the by-laws, and assumed, by way of argument, a great deal in favor of the railway company, which is not law. The only word said in favour of them was by Lord Justice Lindley, who confessed a doubt whether railway companies are not occasionally placed in great difficulties by reason of the unscrupulousness of some persons, and reserved his opinion whether a by-law might not be framed to justify them in doing what was done in the present case. As to this doubt, it is not shared by Lord Justice Lopes; and as to the difficulties in which railway companies are placed, it is not easy to see them. If a fraud is being committed, they no doubt have a right to act as they do; but, like everyone else, if they make a mistake they must take the consequences. The facts of the case were of a very familiar type in railway litigation. Mr. Butler paid the company half-a-crown for a ticket, from Sheffield to Manchester and back, by an excursion train. He gave up one-half, and on his return-half being demanded he found himself without it. Mr. Butler gave the ticket-collector his name and address, and explained the facts, but would not pay the 3*s.* 5*d.* demanded of him, being the full third-class fare from Manchester to Sheffield. Thereupon he was removed from the carriage, detained for some time, and eventually turned off the company's premises. The ticket had on it the usual "See back," supplemented by an endorsement that it was issued subject to the conditions contained in the company's time-tables, which duly displayed the familiar series of by-laws. Among these was, of course, the intimation that any traveller without a ticket shall be required to pay the fare from the station whence the train originally started. This by-law appears to be still sanctioned by the Board of Trade, although it is obviously unreasonable and contrary to law, and has been so pronounced. It never could have been the intention of Parliament to allow railway companies to fine a passenger who travels from Willesden to Euston to the extent of the fare from

Edinburgh. The continued vitality of this by law is an illustration of the helplessness of the travelling public in the hands of the railway companies. Even if it were reasonable, it would not be binding on the passenger as part of the contract, as it is equally well established that taking a ticket with a mere reference of this kind does not incorporate the by-law in the contract. These points were not dwelt upon in the judgment of the court, but if possible a still weaker point in the company's case was fixed upon—namely, that the by-law did not profess to authorize the removal of a passenger as a penalty for its infringement. Such an authority was professed to be given in the case of illicit smoking, drunkenness, and such eccentricities as insisting on travelling on the roof, in the guard's van, or on the engine. The company's defence was somewhat mixed. A contract arising from the by-law, or implied from the contract of carriage was set up; but, even assuming its existence, it would only give the company a right to damages for the breach of it by the passenger, and would not justify them in turning the passenger out of the carriage or off the premises. The only plausible defence of the company lay in *Wood* v. *Leadbitter*, 14 Law. J. Rep. Exch. 161, the well-known case of the ticket for a grand stand, which was held merely to constitute a revokable license, and not to be a grant of a temporary easement. The railway company could only rely on this case in their character as proprietors of the soil. It is possible that they are entitled to rely on it to the extent that removing the plaintiff was not a trespass in the strict sense of the term. A person who sits in the carriage of another, whether the carriage is in the high road or on the land of the owner of the carriage, may be removed from it by the owner using, as in this case, only necessary force; but while the act does not amount to a trespass or assault, it may amount to a breach of contract, if there is a contractual relation between the parties. Railway companies are carriers first, and proprietors of land secondly. If they break their contract of carriage by any act which is justified in their character of proprietors, they must pay damages not for assault, but for breach of contract, which comes to the same thing. The plaintiff in the case under discussion brought his action for an assault and false imprisonment, and in so far as there was detention, no doubt there was a trespass; but the case is an authority where there is no detention, and where the act amounts to a breach of contract only, and can be justified from the proprietor's point of view. In such a case it is well to frame the claim for a breach of contract, with, perhaps, a claim for an assault in the alternative. This distinction was in the mind of Lord Justice Lindley, when he made an even more disturbing suggestion than that as to the potentiality of the by-law-making powers of railway companies—namely, that of *Wood* v. *Leadbitter* is "no authority that an action will lie not for breach of a contract to give an easement." Could it be said that the contract in that case was not a contract concerning an interest in land in the words of the Statute of Frauds? On the other hand, it cannot be said that a contract to carry from London to York concerns an interest in land at all.—*English Law Journal.*

DIARY FOR DECEMBER.

2. Sun.....*1st Sunday in Advent.*
4. Tues ...General Sessions and C.C. sittings for trials in York.
6. Thur....Chancery Division H.C.J. sits.
8. Sat.....Sir W. Campbell, 6th C.J. of Q.B., 1825. L. S. Michaelmas term and H.C.J. sittings end.
9. Sun.....*2nd Sunday in Advent.*
11. Tues....General Sessions and Co. Ct. sittings for trials, except in York.
16. Sun.....*3rd Sunday in Advent.*
21. Fri.....Shortest day St. Thomas.
23. Sun.....*4th Sunday in Advent.*
24. Mon....Christmas vacation begins.
25. Tues ...Christmas day. Sir M. Hale died, 1676, æt. 67.
26. Wed....St. Stephen.
27. Thur....J. F. Spragge, 3rd Chan., 1869.
30. Sun.....*1st Sunday after Christmas.* Holt, C.J., born, 1642.

Reports.

THIRD DIVISION COURT OF THE COUNTY OF ONTARIO.

[Reported for the CANADA LAW JOURNAL.]

RAY *v.* ADAMS *et al.*

Horse-race — Statutes 13 *Geo. II. c.* 19, *and* 18 *Geo. II. c.* 34*—Division of purse — Construction of racing rules.*

The statutes of Geo. II. affecting horse-racing are in force in this country, and, therefore, a race for a purse of $200, divided into $120, $50 and $30, for first, second and third horses is illegal, and the purses cannot be sued for.

Where there is a discrepancy as to the conditions of a race between the newspaper advertisement and the bill-posters, the former should govern. But, assuming that the race was legal, the plaintiff having clear notice before he entered his horse of the conditions under which it would be run, and having failed to follow up his protest before the tribunal appointed by the Rules of the Canadian Turf Association to consider such protests, he was not entitled to recover.

[DARTNELL, J.J.—Whitby.

This was an action brought to recover the sum of $30, under the following circumstances:

A self-constituted committee, of which the defendants Meharry and Gordon were members, arranged for a summer race meeting in Port Perry last July; stated to be "under the auspices of the Ontario Central Agricultural and Driving Park Association," of which the defendants, Adams and Christie, were officers, and whose names, as such officers, were appended without their knowledge or assent to the advertisements of the event. They did not take any part in the conduct of the race, and were present only as spectators. One of the events for competition was a trotting race for a purse of $200, divided into $120, $50 and $30, for first, second and third horses respectively. According to the advertisement, drawn up by one McKay, with the knowledge and approbation of the other members of the committee, except Adams and Christie, this race was to be open to all trotting horses who had not beaten 2.40 before the first of June; in other respects the Rules of the Canadian Turf Association were expressed as governing. By these rules, if no date of qualification is published, the last day for entry would be the date of such qualification; in this instance being 30th June. Subsequently a draft from the advertisement from memory was made by McKay, and bill-posters, intended to be a duplicate of the advertisement, were prepared and distributed as advertisements or posters. In the last no mention was made of the 1st of June as the time for qualification. This was stated to have been an inadvertent omission, as the first advertisement was what was intended should fix the date. It was stated on oath that the earlier date was fixed for the purpose of inducing owners at a distance to enter their horses. This advertisement was inserted in the *Canadian Sporting Times*, which, it is stated, is regarded as the official organ of the Turf Association, and has a large circulation throughout the Dominion and elsewhere. This was seen in Montreal by one Winch, who thereupon entered his horse, as he states, upon the faith of the conditions, and without even having seen, up to the day of the race, the printed posters.

The plaintiff admitted that he had seen the advertisement in the *Canadian Sportsman*, and also the posters, before he made his entry; and, for the defence, it was sworn to that, before making his entry and paying his entry fees, he was told that the race would be trotted under the rules in the advertisement in the *Times*, and not those in the posters. As he was not called to deny this, it must be taken as proved that he entered and started his horse with that knowledge.

Before the horses started, a written protest was handed in to the judges on behalf of one Sebert, who also had a horse entered, claiming that Winch's horse was disqualified, as having made 2.37½ on the 19th of June, at

Montreal, a fact which Winch admitted. The judges allowed the horses to start, subject to the protest, and first place was awarded to Winch's horse, "Sleepy Dan," plaintiff's horse being fourth. The defendant, Meharry, subsequently paid over first money to Winch, and the plaintiff brings this action on the ground that, Winch's animal being disqualified, his horse is entitled to third money. The judges came to no decision as to which date was to be regarded, the 1st or 30th of June, nor were any steps taken to bring them together to arrive at any decision, and, in fact, the money was paid over apparently without their interference or direction.

The Rules of the Turf Association point out the duty of dissatisfied parties in respect to following up the protest for the purpose of obtaining a decision from the judges, or the appellate tribunal. Under such rules this has to be done within three weeks of the race, after which the stakeholder is at liberty to pay over stake or purse. No such steps appear to have been taken in this case, and it is contended for this reason also the plaintiff is out of court.

DARTNELL, J.J.—Horse-racing, like wagering, is not illegal at common law, and any contracts expressed or implied arising thereout can be adjudicated upon in the courts, unless there is statute law to the contrary.

The statutes of England relating to horse-racing, passed prior to 1792, appear to be in force in Canada, unless varied or repealed by any statutes passed here since that date; but any statutes passed in England varying or repealing such former Acts have no effect in this Province.

Parliament in England during 400 years has passed a series of Acts relating to the subject. These are as follows:—

16 Car. II. c. 7. This is the first statute in which horse-racing is mentioned. Under it, persons winning by fraud or cheating at various sports, including horse-racing, were to forfeit treble the sum or value of the money so won.

9 Anne, c. 14, "Which statute, although repealed in England, is not repealed as regards this Province" (per HARRISON, C.J., *Bank of Toronto* v. *McDougall*, 28 C. P. 352). Under this Act all mortgages or securities, the consideration of which was for money won at gaming or betting, are void; the loser of £10 or upwards might sue within three months of the loss; failing, an informer could do so, and recover treble value. The winning of money by fraud was declared an indictable offence, the guilty party to forfeit five times the value, and be punished as for wilful perjury. The word "games" in this Act was held to comprehend horse-racing (*Bank of Toronto* v. *McDougall*, supra; *Blaxton* v. *Pye*, 1 Wils. 309). Therefore, any race for £10 a side or upwards was illegal. It is stated that, after the passing of this Act, "the number of horse-races had very much increased, and in consequence of their being run under £10 a side, and, therefore, for small plates, they had contributed very much to the encouragement of idleness; and the breed of strong and useful horses was supposed to be much prejudiced." These considerations led to the passing of

Geo. II. c. 19. By this Act, all horses were to be entered by their real names, and no person was to start more than one for the same plate, under pain of forfeiting the horse. No plate was to be run for under the value of £50; any person starting a horse for a plate of smaller value was to forfeit £200, and any person advertising such a race was subject to a penalty of £100; arbitrary standards of weights for age were fixed, and every race was to be begun and ended on the same day; second horse was entitled to his entrance money. There was a distinction between a "match" and a "race;" for while a race, if for £50 or upwards, could be run anywhere, matches were required to be run either at Newmarket or Black Hambleton.

18 Geo. II. c. 34, was passed in order, among other things, "to restrain and prevent the excessive increase of horse-races." Under this Act it was made lawful for any person to run any match, or to start and run for a plate worth £50 or upwards, at any weights and at any place, without being liable to the penalties of 13 Geo. II. The stake could be made up by each party putting up £25 a side. (*Bidemead* v. *Gale*, 4 Burr. 2432.)

For nearly one hundred years no statutes affecting horse-racing were passed in England.

5 & 6 Wm. IV. c. 4, repealed portions of the statutes of Anne and Charles, but did not affect the statutes of Geo. II.

3 & 4 Vict. c. 5 (1839), repealed so much of 13 Geo. II. as related to horse-racing. Before this Act it was decided that steeple-chases were legal (*Evans* v. *Pratt*, 1 Dowl. N. S. 505), and also trotting matches along a road (*Challand* v. *Bray*, 1 Dowl. N. S. 788; 3 M. & G. 18). "It has been termed the new charter of horse-racing" (*Evans* v. *Pratt*, *supra*). Some time after its passing the celebrated case of *Applegarth* v. *Colley*, 10 M. & W. 728, was decided. This case was cited in argument as being in the plaintiff's favour, but it is not an authority here, being founded upon 3 & 4 Vict. c. 5, which is clearly not in force in Ontario.

Soon after this decision, and in consequence of it, very many *qui tam* actions were brought by common informers against a large number of sporting men in England for the penalties under the statutes of Charles and Anne, and 7 & 8 Vict. c. 3, afterwards extended by 7 & 8 Vict. c. 58, was enacted, which had the effect of stopping all these proceedings. It further provided that no common informer, but only the actual loser, or his representatives, could commence any proceedings for the penalties under the former statutes.

Then came 8 & 9 Vict. c. 109, which, as it were, consolidates and amends all former statutes relating to wagers and games, so that, in England, there are now no longer any restrictions with regard to racing; and transactions of this description are governed by the same laws as all other contracts: but this Act is not in force or been enacted in Ontario.

The only other English Act is 42 & 43 Vict. c. 18, by which it was declared that horse-racing within ten miles from Charing Cross in London should be unlawful, unless licensed, as therein provided.

There are no statutes of Canada or Ontario bearing upon the subject; except, in Ontario, the Agricultural and Arts Act, R. S. O. c. 39, s. 86, prohibits the carrying on of horse-racing during the days of any exhibition by any Association or Society formed under the Act, or within five miles of holding the same. Section 87 imposes a penalty of $50 or thirty days' imprisonment upon any persons guilty of a violation of this section.

This Act is openly and flagrantly violated. The object thereof and that of the old statutes is defeated; and I take it that any device such as calling these contests "Speeding in the Ring," or any other name, would be regarded by the courts as an evasive subterfuge.

There is also the Statute of Canada (R. S. O. 159), imposing penalties upon various classes of people engaged in betting, wagering, pool-selling, etc., but specially excepting stake-holders in any legal horse-race.

There are not many cases in our own courts in which the subject is discussed or considered.

The first of these is *Sheldon* v. *Law*, 3 O. S. 85. A bet B £75 to £50 upon a horse-race, and deposited the money in the hands of C, as stakeholder. They did not own either of the horses which were to run, and this bet was the only sum up on the event. A, having lost, gave C, notice not to pay over the money to B, but C did so. *Held*, that A could recover the deposit from C, because the wager was illegal as contrary to 13 Geo. II. c. 19. ROBINSON, C.J., in the course of his judgment, says: "I can see no pretence for contending that the statutes referred to (Anne and the two statutes of Geo. II.) are not in force here." This case was decided in 1833.

Cronyn v. *Widder*, 10 U. C. Q. B.; 12 Geo. II. c. 28 (the Lotteries Act), has been assumed to be in force in Upper Canada by reason of our adoption of the Criminal Law of England, as it stood in 1792. The statute 13 Geo. II. c. 19, against horse-racing has, in like manner, been held to be in force in Upper Canada, and has, in several cases, been acted upon. We are bound to hold 12 Geo. II. c. 28, to be in force; first, because it comes within our adoption of the Criminal Law of England, and next, because this statute, and other statutes of a like nature, and resting on the same footing, have been treated in our courts as being in force" (per ROBINSON, C.J., pp. 360, 361). "The provisions of that statute are considered in force, although they may have been frequently disregarded or evaded" (per MCLEAN s. c. 365).

Corby v. *McDaniels*, 16 U. C. Q. B. 356, and *Marshall* v. *Platt*, 3 U. C. P. p. 13, are to the same effect.

Fulton v. *James*, 5 U. C. C. P. P. 182, decided that a trotting match for £50 between two horses driven in harness, is a legal horse-race within the statutes 13 Geo. II. c. 19, and 18 Geo. II. c. 34. The court, having held in this case that the race was legal because the horses

were entered by the owners, and the stakes were equal to £50, it seems to me logically inevitable that, having recognized what was made legal by these statutes, it follows the court must be bound to take cognizance of what was declared illegal in the same statutes.

Anderson v. *Galbraith*, 16 U. C. Q. B. 57, follows *Sheldon* v. *Law*, quoted above. The bet was declared illegal, because neither of the parties owned the horses, and they were not running for any other stakes, and the stakehold was held liable for paying over after he had been notified not to pay them over.

Hastelow v. *Jackson*, 8 B. & C. 221, is cited by ROBINSON, C.J., as supporting this latter dictum. See also to the same effect *Varney* v. *Hickman*, 5 C. B. 281.

Wilson v. *Cutten*, 7 U. C. P., is valuable as showing that the court will consider the Rules of Horse-racing when necessary for a decision. Here the race being for £50, and the horses run by the owners, it was adjudged by the court to be a legal race.

Gorham v. *Boulton*, 6 O. S. 321: in this case it was held that the decision of the race judges was final, and could not be reviewed by the court. ROBINSON, C.J., characterized the action as being an "attempt to make a court and jury judges over this horse-race instead of the stewards."

Battersby v. *Odell*, 23 U. C. R. 452, decided that the race in question was illegal under 13 Geo. II. c. 19.

Davis v. *Hewitt*, 9 O. R. 435, is a decision of BOYD, C., following *Battersby* v. *Odell*, saying "that this is an illegal contract under 13 Geo. II. c. 19 (because one of the participants was not the owner of the horse he bet upon), is not open to argument."

After careful consideration of all the authorities, I have come to the following conclusions:

1. The law in England in relation to horse-racing, as it stood in 1792, is in force in Canada, and any English statutes passed since that date are not in force here. The Riot Act, passed to prevent the disorderly assembling in the streets of London of supporters of the Pretender, is undoubtedly in force here, as also the Statute of Mortmain. Both these statutes were passed in this reign.

2. The race in question herein is an illegal race, not being for a stake or purse of £50. It was argued that there was such a stake, being $200 divided into three purses, but the statutes say that stake is for the "winning horse," the second only saving his entry.

3. In such case the plaintiff cannot bring action for a portion of a stake to which he has alleged he is entitled. He ran his chance of winning first, or some place, and cannot now fairly complain. His only remedy would have been to recover back his entrance money, provided he had demanded it from the proper custodian before the purse was paid over. This he did not do, nor does he ask it in his particulars of claim.

4. The courts will only aid the parties to a legal race when the judges appointed have failed to give a decision, or where they did not comply with, or made variations from, the rules supplied for their government. Here the judges made no decision. Assuming, for argument, that the race in question was legal, the plaintiff could have, notwithstanding this fact, followed up the protest, and brought the matter before the tribunal appointed for such purposes, and obtained their decision, which would have been binding. He did nothing in support of his protest, and let the three weeks go by, within which time he had to make it; and for this reason alone, if no other, I think he is out of court.

As to whether the condition as set out in the advertisement or that in the posters should govern, it seems to me that in all reason the former should have the preference. It was meant to reach the knowledge of horse owners near and far. They were the parties most interested in the race in question. The posters were intended for the general public, and would not reach as many readers as the advertisement published in a largely-circulated journal of sporting news. In this case, however, it does not signify, because the plaintiff had distinct notice that the race was to be run under the conditions by which Winch's horse was eligible.

The defendants, Adams and Christie, are entitled to their costs, if any. I dismiss this action, but I give no other costs against the plaintiff, as the blunder of the other defendant was the cause of the action.

The following English cases may be referred to: *Parr* v. *Wintringham*, 28 L. J. Q. B.; *Brown* v. *Overburry*, 11 Ex. 715; *Davis* v. *Wolf*, 2 L. R. 280; *Smith* v. *Littlefield*, 15 L. & R.

69; *Weekly Reports*, 10 C. L. 248; *Weller* v. *Deakins*, 2 C. & P. 618; *Greville* v. *Chaplin*, 5 Q. B. 745; *Challand* v. *Bray*, 1 Dowl. N. S. 783; *Marryatt* v. *Broderick*, 2 M. & W. 369; *Daintree* v. *Hutchinson*, 10 M. & W. 89; *Charleton* v. *Hill*, 5 C. & P. 147; *Benbow* v. *Jones*, 14 M. & W. 193; *Carr* v. *Martinson*, 1 El. & Ec. 456; *Batty* v. *Mariott*, 5 C. B. 818; *Diggle* v. *Higgs*, 2 Ex. D. 422; *Hampden* v. *Dalsh*, 19 Q. B. D. 189; *Houson* v. *Hancock*, 8 T. R. 575.

Early Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE FOR ONTARIO.

Queen's Bench Division.

Armour, C.J.] [Nov. 16.

In re WELLER.

Married woman—Devise to—Restraint on alienation—R. S. O. c. 132, s. 8.

Certain lands were devised to W., with the proviso that she should not alienate or incumber them until her sister should arrive at the age of forty years, and the proviso that the devise should be for her separate use, independent of her husband's control.

W. applied, under R. S. O. c. 132, s. 8, for an order to bind her interest, for her own benefit, in these lands.

Held, that the restraint against alienation was valid, and would have been so even if the applicant had been a *femme sole*.

Earls v. *McAlpine*, 27 Gr. 164; 6 A. R. 145; *Pennyman* v. *McGregor*, 18 C. P. 132; *Smith* v. *Faught*, 45 U. C. R. 484; *Re Winstanley*, 6 O. R. 315, followed in preference to *Rosher* v. *Rosher*, 26 Chy. D. 801.

Held, also, that the restraint on alienation was not a restraint on anticipation, within the meaning of the statute.

R. S. Cassels, for the applicant.

Divisional Court.] [Nov. 19.

GRANT *v.* CORNOCK.

Husband and wife—Breach of promise of marriage—Statute of Limitations—Successive promises—Independent contracts—Justification of breach—Use of obscene language by the plaintiff—Mitigation of damages—General reputation.

In an action for breach of promise of marriage, the jury found that there was at first a mutual promise to marry in six months, and a subsequent mutual promise to marry on the death of the defendant's father. The jury were also asked (Q. 3), "After the father's death in April, 1879, did the defendant, in response to a question by the plaintiff, say that all was left to his brother to share, and that until his brother shared with him he could not marry her?" To which they answered, "Yes." The division of the father's estate did not take place till December, 1887.

Held, FALCONBRIDGE, J., dissenting, that the answer to the third question was a finding of a mutual promise to marry upon a division of the defendant's father's estate, and, as a breach of that promise did not take place until December, 1887, the cause of action arising thereupon was not barred by the Statute of Limitations at the time the action was brought, in 1888. The several mutual promises were all independent contracts, the promise of the one party being a consideration for the promise by the other, so that each successive mutual promise became a new and independent contract, from the breach of which only the statute would begin to run.

Costello v. *Hunter*, 12 O. R. 331, distinguished.

Per FALCONBRIDGE, J., that the answer of the jury to the third question did not show a new or substituted agreement, but an excuse for delay or a continuance of the original promise, and the case was therefore governed by *Costello* v. *Hunter*.

Held, also, FALCONBRIDGE, J., dissenting, that want of bodily chastity is the only misconduct which affords a justification in law for a breach of a promise to marry. It is no justification to show that the woman had been heard to use obscene language; nor is such evidence admissible in mitigation of dam-

ages, although general evidence of reputation may perhaps be admissible.

Wallace Nesbitt and *W. M. Douglas* for the plaintiff.

Shepley, for the defendant.

Chancery Division.

Divisional Court.] [Sept. 22.

REGINA *v.* LOGAN.

Conviction—R. S. C. c. 158, s. 6—Distress for the penalty—R. S. C. c. 178, ss. 87, 88.

A conviction under R. S. C. c. 158, s. 6, was quashed, because it provided for *distress* in default of payment of the fine.

Held, also, that as the extreme penalty for the offence was imposed, the irregularity in the conviction in the provision for distress was not cured under R. S. C. c. 178, ss. 87, 88.

Regina v. *Sparham*, 8 O. R. 580, approved of.

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

Shepley and *Badgerow*, contra.

Boyd, C.] [Oct 6.

MCLEOD *v.* AVEY.

Second mortgagee taking timber—Right of first mortgagee to make him account on security proving insufficient to satisfy his claim.

The court will not restrain a mortgagor in possession, or any one claiming under him, at the suit of a mortgagee, from cutting standing timber, unless it is proved that the acts complained of are likely to render the security scanty.

The defendant F., being a second mortgagee, entered into possession of the mortgaged premises, and cut down and sold timber thereon. In an action by the first mortgagee to realize the amount due him in which the lands were sold, but did not realize enough to pay his claim, it was

Held, that a reference should be directed to ascertain the value of the timber sold by F., and that he must account therefor.

The remedy is not limited to a mere prevention of the mischief by way of injunction; if the security falls short of satisfying the first mortgagee's claim, he can pursue the other, and make him account, by way of damages, for injury done to the property.

Brown v. *Sage*, 11 Gr. 239, referred to.

C. J. Holman, for the plaintiff.

Moss, Q.C., contra.

Boyd, C.] [Oct. 16.

THE LONDON AND CANADIAN LOAN AND AGENCY CO. *v.* GRAHAM.

Acquisition and retention of land by Co.—Sale within certain time—Sale not carried out—Power to re-sell—Recital of facts in deed to subsequent purchaser.

A loan company which, by the terms of its charter, was bound "to sell any real estate acquired in satisfaction of any debt within five years after it shall have fallen to them," acquired certain land from a mortgagor by quit claim deed, dated Oct. 21, 1878, in which was contained a provision against the merger of the debt in the estate acquired by agreement, dated August 23, 1882, the company sold to a purchaser, who went into possession; but, on default by the purchaser in the terms of the agreement, the company had to resume the property.

In a suit to compel the defendant, a subsequent purchaser, to carry out a purchase, who objected to the title on the ground that the company had not sold the land within five years, and that a release should be obtained from the former purchaser and registered, it was

Held, that giving the liberal construction against forfeiture, which is a principle of statutory construction in cases like this, any *bona fide* sale was enough, though it fell short of conveyance, to prevent a forfeiture—a sale not carried out through the default of the purchaser, is such a transaction as satisfied the statute—and that, as by the contract, any default left the company at liberty to determine the agreement, and as power to re-sell is a term of any contract respecting the sale of lands, it was competent to the company to sell to the defendant.

Held, also, that no necessity existed for obtaining a release from the former purchaser, and that as a matter of conveyance, and for

the purpose of registration, it was sufficient to recite in the deed to the defendant a sale within five years, and the subsequent ending of the contract to sell for non-payment by the former purchaser.

Arnoldi, for the plaintiff.

Hewson, for the defendant.

Boyd, C.] [Nov. 23.

THE LONDON AND CANADIAN LOAN AND AGENCY CO. *v.* GRAHAM.

Title—When shown—Demand of abstract—Costs.

On the hearing on further directions of this case (reported above), it was

Held, that showing title is the manifestation on the abstract of all matters essential to a good title, and that as defendant had demanded no abstract before action, he could not complain that title was first shown thereafter, and he was ordered to pay the costs thereof.

Bridges v. *Longman*, 24 Beav. 27, cited and followed.

Arnoldi, for the plaintiffs.

Hewson, for the defendants.

Ferguson, J.] [Nov. 13.

Re MACDONALD AND THE NOXON BROTHERS MANUFACTURING CO. (Limited), AND REVISED STATUTES OF ONTARIO (1887) C. 183.

Winding-up proceedings—"Contributory"—R. S. O. (1887) *c.* 183, *s.* 5.

A paid-up shareholder in a company is such a "contributory" within the meaning of section 5 of R. S. O. (1887), c. 183, as is entitled to initiate winding-up proceedings.

Hoyles, for the Co.

W. Nesbitt, for the petitioning shareholder.

Rose, J.] [Nov. 21.

MCDONALD *v.* MCDOUGALL.

Vendors' and Purchasers' Act—R. S. O. (1887), *c.* 112, *s.* 1—*Memorial of will over twenty years old—Contents—Evidence—Life estate.*

In an action for possession of land, the plaintiff claimed under a deed from John McD., dated March 27, 1872. John McD. had been in possession for many years (more than twenty), and died Sept. 27, 1881. The defendant claimed under a deed from Jas. McD., son of John McD., who claimed title under his grandfather's will, and offered in evidence a memorial of the will, dated Dec. 10, 1832, and registered the following day, containing the following statement: "He did also bequeath and give to Jas. McD., his grandson, the (describing the land), so as not to deprive his father during his lifetime."

Held, following *Gough* v. *McBride*, 10 C. P. 166, that the memorial could be received as evidence under R. S. O. (1887), c. 112, s. 1, and was good evidence of the devise, and that the plaintiff by his conveyance only obtained a life estate, which ended when John McD. died, and he was not entitled to possession.

D. B. McLennan, Q.C., and *J. W. Liddell*, for the plaintiff.

James Leitch and *R. A. Pringle*, for the defendant.

Boyd, C.] [Nov. 22.

CHRISTIE *v.* HOWARTH *et al.*

Unpaid stock—Liability of shareholder for—Return of nulla bona against the company before suit against shareholder—R. S. C. c. 119, *s.* 55.

A shareholder in a company is not liable to an action for unpaid stock by any creditor of the company until an execution at the suit of such creditor has been returned unsatisfied in whole or in part. Until the return of *nulla bona* in whole or in part, there is no right of action.

Held, also, that notwithstanding a judge's order for the issue of the *scire facias* was granted (*ex parte*), it could not avail against the express language of the Act R. S. C. c. 119, s. 55.

The return of *nulla bona* is that act which fixes the shareholder's liability to be sued, and without that essential ingredient there is no right to resort to the court.

Delamere and *E. T. English*, for the plaintiff.

Dr. Snelling, for the defendant Howarth.

J. M. Clarke, for the defendant Mathers.

Ferguson, J.] [Nov. 28.

Re MARA.

Vendors' and Purchasers' Act—R. S. O. (1887), *c.* 112—*Memorial of assignment of mortgage endorsed on mortgage—Discharge by assignee—Recital of assignment.*

In an application under the Vendors' and Purchasers' Act, R. S. O. (1887), c. 112, in which a registered memorial of a deed poll or endorsement made on the back of a mortgage (describing the mortgage) *habendum*, "to have and to hold the said mortgaged premises unto (assignee) his heirs and assigns, etc., subject to the provisos and conditions in said mortgage, which said deed poll or endorsement by way of assignment is witnessed, etc., was offered as evidence of the assignment.

Held, sufficient.

A discharge of mortgage executed by an assignee contained these words: "And that such mortgage has been assigned to me," instead of giving the particulars of the dates of and parties to the assignment, was also

Held, sufficient.

Frank Denton, for the vendor.

Coatsworth, for the purchaser.

Boyd, C.] [Nov. 28.

KLINCK *v.* THE ONTARIO INDUSTRIAL LOAN AND INVESTMENT CO. *et al.*

Mortgage—Power to distrain—Interest or rent—Distress after maturity without fixing new tenancy—Interest as damages—Rent more than six months overdue.

In the year 1881, A made a mortgage to the defendants, maturing in 1886, in which was contained a proviso under the "short form" that the mortgagees might distrain for arrears of interest, and a special provision by which A leased the lands until the maturity of the mortgage at a rental of the same amount as the interest. A mortgaged his goods to B in January, 1887. In August, 1888, the defendants distrained on these goods for rent or interest due in 1886, 1887 and 1888. In two actions for illegal distress brought by A and B respectively,

Held, on the evidence that there was no definite tenancy after the maturity of the mortgage in 1886; that the interest after maturity was recoverable, not by the terms of the contract, but as damages; that a distress could not be made, as more than six months had elapsed after the expiry of the tenancy, and the rent becoming uncertain after the maturity of the mortgage, required a new fixation, and, therefore, there was no right of distress.

Powell v. *Peck*, 15 A. R. 138, and *Bickle* v. *Beatty*, 17 U. C. R. 469, cited and followed.

George Moberly, for plaintiffs.

McCarthy, Q.C., for defendants.

Practice.

Armour, C. J.] [Nov. 22.

In re YOUNG *v.* PARKER & CO.

Prohibition—Division Court—Judgment summons—Partnership—R. S. O. c. 51, *s.* 108, *s.s.* 4, 5, 6.

After judgment obtained against the firm of P. & Co., in a Division Court, after service of summons upon M. P., who was in fact the only member of the firm, an after-judgment summons was issued and served on R. P. The Division Court judge determined that R. P. had made himself liable as a partner by holding himself out as such, and was bound by the judgment, and liable to be examined as a judgment debtor.

Held, on motion for prohibition, that s.s. 4, 5 and 6, of s. 108, of the Division Courts Act, R. S. O. c. 51, are applicable only to persons who are in truth partners, and prohibition was ordered.

Munster v. *Roilton*, 10 Q. B. D. 475; 11 Q. B. D. 435; 10 App. Cas. 680, referred to.

Lennox, for the motion.

A. H. Marsh, contra.

Mr. Dalton.] [Nov. 17.

IRWIN *v.* BROWN.

Counter-claim—Defence—Reply—Jurisdiction of court—Foreign defendant—Assets in jurisdiction—Set-off—Con. Rules 3, 271, 373.

A counter-claiming defendant is not a plaintiff in an action, nor is a counter-claim an action.

The defence of the plaintiff to a counter-claim is technically the plaintiff's reply, notwithstanding Con. Rule 379, and there can, without leave, be no further pleading by the defendant but a joinder of issue.

To a counter-claim against the plaintiff, who lived out of Ontario, seeking the recovery of a debt contracted out of Ontario, the plaintiff pleaded that the court had no jurisdiction, and the defendant replied, without obtaining leave, that the plaintiff had assets in Ontario to the value of $200.

Held, that this reply, even if leave were obtained, was bad, because sub-sec. (*e.*), of Rule 45 O. J. A., has not been incorporated in the Consolidated Rules. See Con. Rule 271.

Semble, that set-off, not in the shape of a counter-claim by cross-action, is now abolished. See Con. Rules 3, 373.

W. M. Douglas, for the plaintiff.

Douglas Armour, for the defendant.

Law Students' Department.

EXAMINATION DATES FOR 1889.

Hilary Term commences 4th January.

Primary Examination, Tuesday, 15th January.

Graduates and Matriculants, Thursday, 17th January.

First Intermediate, Tuesday, 22nd January.

Second Intermediate, Thursday, 24th January.

Solicitor Examination, Tuesday, 29th January.

Barrister Examination, Wednesday, 30th January.

Last day for Call Notices for Easter Term, 16th February.

Last day for Primary Notices, 5th January.

Last day for filing papers and fees (final examination) 19th January.

Easter Term commences 20th May.

Primary Examination, Tuesday, 30th April.

Graduates and Matriculants, Thursday, 2nd May.

First Intermediate, Tuesday, 7th May.

Second Intermediate, Thursday, 9th May.

Solicitor Examination, Tuesday, 14th May.

Barrister Examination, Wednesday, 15th May.

Last day for Call Notices for Trinity Term, 8th June.

Last day for Primary Notices, 20th April.

Last day for filing papers and fees (final examination) 4th May.

Trinity Term commences 2nd September.

Primary Examination, Tuesday, 13th August.

Graduates and Matriculants, Thursday, 15th August.

First Intermediate, Tuesday, 20th August.

Second Intermediate, Thursday, 22nd August,

Solicitor Examination, Thursday, 27th August.

Barrister Examination, Wednesday, 28th August.

Last day for Call Notices for Michaelmas Term, 14th September.

Last day for Primary Notices, 3rd August.

Last day for filing papers and fees (final examinations) 17th August.

Michaelmas Term commences 18th November.

Primary Examination, Tuesday, 29th October.

Graduates and Matriculants, Thursday, 31st October.

First Intermediate, Tuesday, 5th November.

Second Intermediate, Thursday, 7th November.

Solicitor Examination, Tuesday, 12th November.

Barrister Examination, Wednesday, 13th November.

Last day for Call Notices for Hilary Term, 7th December.

Last day for Primary Notices, 19th October.

Last day for filing papers and fees (final examinations) 2nd November.

LAW SOCIETY EXAMINATION BEFORE TRINITY TERM, 1888.

CALL—HONOURS.

CONTRACTS—EVIDENCE—STATUTES.

1. A is insured by a valued policy on a cargo for $5,000. He recovers on another policy $5,000. The true value was $7,000, and the loss was total. How much can he recover on the valued policy? Why?

2. How do you prove an award?

3. A brings an action against B for goods sold and delivered by A to C; B was the undisclosed principal of C, with whom A dealt; it appears on the trial that B has paid C for the goods. How far is this a defence in A's action?

4. Explain the rule "a legal obligation for another's debt will be equivalent to a previous request."

5. A common carrier refuses to carry goods except on conditions which appear to the customer unfair and unreasonable. What course ought the customer to pursue, and what remedy has he?

6. A document is tendered in evidence for the purpose of defeating the Statute of Limitations; distinguish the functions of the judge and jury respecting such document, and facts connected with it.

7. What distinction is there between contracts within the Statutes of Frauds and written contracts under the common law as to variations by a new contract not in writing?

8. A claim and counter-claim are both dismissed with costs. What is the rule as to he costs of the proceedings?

9. A document is subscribed by an attesting witness. What are the rules as to calling such witness to prove the document?

10. What species of act on the part of the defendant is necessary to enable the plaintiff to maintain an action for conversion of goods, and what evidence must plaintiff adduce to prove his case?

Harris on Criminal Law.

Broom's Common Law, Books 3, 4.

Blackstone, Vol. I.

1. Explain briefly the law as to the liability of one who employs a contractor to do work in the execution of which the latter commits a tort.

2. State what is meant by the *trespasser ab initio*, and explain the *Six Carpenters' Case*.

3. Explain the difference between natural and artificial watercourses, as regards the rights of adjoining proprietors.

4. Define the crime of conspiracy; and distinguish the three classes into which the cases are divided.

5. Mention all the cases you can in which a prisoner may be convicted of a crime not charged in the indictment.

6. Define and distinguish principal in the first degree, principal in the second degree, accessory before the fact, and accessory after the fact.

7. Explain what is meant by seditious libel.

8. Distinguish manslaughter from homicide *se defendendo*.

9. Explain the meaning of misprision of felony.

10. In which House of Parliament must a bill for the granting of a subsidy originate, and what is the reason?

Equity.

1. What effect, if any, has the lunacy of a partner upon the partnership?

2. State the relative rights and liabilities existing between mortgagor and mortgagee, when the latter is in possession of the mortgaged premises.

3. A and B become sureties for C, a contractor erecting certain works, the contract provided that three-fourths of the work as finished should be paid for periodically, remainder on completion, payments were made exceeding three-fourths of the work done. What effect, if any, would this have? Explain, giving law.

4. Explain the equitable doctrine of conversion. Is there any provincial legislation which may effect the same? If so, what?

5. A enters into a sufficient agreement with B for the sale to him of a house in Toronto; he dies intestate before completing the sale. Has B any remedy? If so, what? Reasons.

6. Under what circumstances is a tenant, who is entitled to pay rent, entitled to relief by way of interpleader, where there are several persons claiming title to it? and when not? Explain.

7. Are there any circumstances under which a private individual may maintain an action to restrain a public nuisance?

8. A trader in insolvent circumstances goes to a creditor, asking an advance to enable him to carry on his business. The creditor agrees to advance him the necessary funds on being secured for the debt then owing him. Security is given. The trader fails, and makes an assignment, and the assignee seeks to have the security so given set aside as a

fraud on the other creditors. Can he succeed? Reasons.

9. Discuss the several rights of vendor and vendee in a case of contract for the sale of lands where there is a misdescription of the property to be conveyed.

10. State the law as laid down by Mr. Justice Story as to the relief granted in cases of mistake of law and fact under submission to arbitration.

REAL PROPERTY AND WILLS.

1. The Conveyancing Act enacts (1) that it shall not be necessary to use words of inheritance in a conveyance, etc.; (2) that in certain cases covenants shall be implied in a conveyance. State these circumstances, and criticise and show the objections to both enactments.

2. What is the present state of the law as to the validity or invalidity of conveyances by married women with defective certificates?

3. Where no provision is made in a will or settlement for the appointment of new trustees in the place of those retiring, dying, or refusing to act, how may they be appointed without resorting to an application to the court? How do you procure the estate to be vested in them?

4. An insured house is burned pending a contract for sale. The agreement makes no provision as to the insurance. Who is entitled to the insurance money? How does it effect the rights and liabilities of vendor and purchaser respectively?

5. Upon the death intestate of the owner of the property after 1st July, 1886, the only child being of full age sells the timber on the property to A B, who removes it. Administration is afterwards taken out by a creditor. Will an action for trespass to land lie against A B by the administrator? If not, what redress, if any, has he? Explain fully.

6. What is the law as to the use of special conditions of sale by fiduciary vendors? Explain fully.

7. What are the liabilities and duties of an auctioneer selling lands (1) with respect to the terms of sale; (2) with respect to the deposit and purchase money?

8. Since the Devolution of Estates Act, can the devisee of a mortgaged estate require the mortgagee to be paid of out of the general estate for his benefit? Explain fully.

9. In examining a title you find a discharge of mortgage in statutory form signed by one only of two executors. Would you accept it as sufficient? If not, what further information or conveyance would you require? Would it make any difference whether the mortgage was made to the testator or to the executors?

10. A devise is made to A B in tail, but if he marries, the estate is to go to C D in fee simple. Construe this devise.

Miscellaneous.

THE LATEST DECISION.—Mr. Beach was once arguing a motion before his brother-in-law, Judge Rosekrans, in which the judge said he was against him; but Beach continued arguing and cited an authority, which he pronounced the very latest. "You are mistaken, Mr. Beach," said the judge; "there is a later one the other way." "I am not aware of any such decision," said the eminent lawyer. "Oh, yes," sweetly replied the judge; "the one I made in this case ten minutes ago. Any other motions, gentlemen?"

A JUDGE presiding over one of the Paris courts was recently removed from his office for two very curious offences. It appears that, after examining a witness for several hours in his court, he invited the witness to dine with him at a neighbouring restaurant. Plying him there with wine, the judge put a number of questions to his guest, and having drawn out of him certain damaging facts, forthwith caused his arrest. His other offence was still more flagrant. He talked by telephone to a witness, pretending that he (the judge) was one of the persons accused in court, and so led the witness to betray himself and his accused friend. No wonder that he was deemed no longer fit to act as a judge.

THE tales in Lord Westbury's life are in the mouths of lawyers as household words, and the biographer does not always give the best version. Bethell said to (not of) a judge who, after hearing the argument, said he would reserve the point in order to turn it over in his mind: "May it please your lordship to turn it over in what your lordship is pleased to call your lordship's mind"—not that the judge

would turn it over in what he is pleased to call his mind. The answer to the question, "Why old Cranny always sits with the Lord's Justices?" was, "The fact is that Cranny does not like to sit alone in the dark"—not, "I take it to arise from a childish indisposition to be left alone in the dark." The story about the Great Seal is a pointless application of a play upon words exhausted by a witty predecessor of Lord Westbury, when Lord Erskine, commenting on Captain Parry's statement that in the Polar Seas he had lived on seals, said: "Very good living, too, if you keep them long enough." If Lord Campbell had not been Chancellor, Bethell might have said, "I mistook you for the Great Seal." If he said what is put into his mouth, he was not only rude, which is probable, but stupid, which is unlikely. —*Eng. Law Journal.*

THE LATE MR. JUSTICE KEATING.—Sir Henry Singer Keating, who died a short time ago full of years and honours, leaves a name which will, in the history of English law, be associated with the latter days of the Court of Common Pleas. Those days were, perhaps, more brilliant than the last days of all immediately preceding the extinguishment of this great court, although Sir Henry Keating took part in both. When, in 1875, the Court of Common Pleas was merged in the High Court of Justice, to re-issue for a brief period as the Common Pleas Division, Lord Coleridge was Chief Justice, and the justices were, Keating, Brett, Grove, Denman, Archibald and Lindley. When Sir Henry Keating joined the court in December, 1859, Sir William Erle was Chief Justice, and the justices were, Vaughan Williams, Crowder, Willes, Byles and Keating, which last took the place left vacant at the top by Lord Campbell becoming Lord Chancellor, whose successor in the Court of Queen's Bench was Sir Alexander Cockburn, translated from the chiefship of the Common Pleas. A stronger court, perhaps, never sat in Westminster Hall. Every judge of it represented the best traditions of the English bench, and it was specially famed for its knowledge of commercial law. It was a court of men saturated with the learning of the law of England, but a business-like court withal, and not wanting in breadth of view.

If any two contemporaries on the bench of Common Pleas became more closely associated than the others, they were Keating and Willes. Both were born in Ireland, of English extraction, and educated at Trinity College, Dublin. Keating was ten years older than Willes, but was still a laborious junior on the Oxford Circuit, and attending the Oxford and Gloucester Sessions, when Willes was called to the bar. The first meeting took place on a winter's morning in the Temple Gardens. Keating had risen early for his studies, and, to clear his brain, was taking a brisk walk beside the river, when he met Willes on the same errand. Similarity of tastes led to a close friendship, and a few years afterwards Willes was associated with Keating as editor of "Smith's Leading Cases." In 1849 Keating took silk, leaving Willes to plod on as a stuff gown until he was made a judge in 1855, on the same bench to which Keating was added four years later. Meanwhile Keating diverged into politics. He entered Parliament as the representative of Reading in 1852, supported Lord Palmerston, and was Solicitor-General twice. He did not forget the law, but, as a private member, introduced an Act of Parliament which goes by the name of "Keating's Act." Its object was to provide a summary remedy in actions brought on negotiable instruments, which were too commonly defended merely for the purposes of delay. The principle has since been further applied, and the late judge may be considered as the inventor of that very effective and comprehensive legal weapon which goes by the name of "Order XIV." His own Act has never, we believe, been repealed, but only replaced, and has the solitary distinction of a special rule for that purpose among the rules of court. Since his retirement from active service on the bench, Sir Henry Keating has taken part in the judgments of the Judicial Committee of the Privy Council. He was never so great a lawyer as Mr. Justice Willes, but his judgments were always brief and to the point, and his judicial manner perfect. Unlike his colleague, Mr. Justice Vaughan Williams, he seldom differed from Chief Justice Erle, who, in summing up the qualities of the three judges, who usually sat with him, estimated Willes as a man of profound learning, Vaughan Williams as rather obstinate, and Keating as of singular sense.—*Eng. Law Journal.*

Appointments to Office.

DIVISION COURT CLERKS.

Prince Edward.

Francis McManus, of Picton, Clerk of the First Division Court, County of Prince Edward, *vice* Walter Ross, deceased.

Middlesex.

William C. Harris, of Delaware, Clerk of the Fourth Division Court of the County of Middlesex, *vice* Chas. G. Anderson, deceased.

BAILIFF.

Middlesex.

John A. McAlpin, of Mosa, Bailiff of the Fifth Division Court of the County of Middlesex, *vice* James A. Watterworth, resigned.

Law Society of Upper Canada.

CURRICULUM.

1. A Graduate in the Faculty of Arts, in any University in Her Majesty's Dominions empowered to grant such Degrees, shall be entitled to admission on the Books of the Society as a Student-at-law, upon conforming with Clause four of this curriculum, and presenting (in person) to Convocation his Diploma or proper Certificate of his having received his Degree, without further examination by the Society.

2. A Student of any University in the Province of Ontario, who shall present (in person) a Certificate of having passed, within four years of his application, an examination in the subjects prescribed in this Curriculum for the Student-at-law Examination, shall be entitled to admission on the Books of the Society as a Student-at-law, or passed as an Articled Clerk (as the case may be) on conforming with Clause four of this Curriculum, without any further examination by the Society.

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

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

5. The Law Society Terms are as follows:—

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The Primary Examinations for Students-at-law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity, and Michaelmas Terms.

7. Graduates and Matriculants of Universities will present their Diplomas and Certificates on the third Thursday before each Term at 11 a.m.

8. Graduates of Universities who have given due notice for Easter Term, but have not obtained their Diplomas in time for presentation on the proper day before Term, may, upon the production of their Diplomas and the payment of their fees, be admitted on the last Tuesday in June of the same year.

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

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

11. The Solicitors' Examination will begin on the Tuesday next before each Term at 9 a.m. Oral on the Thursday at 2.30 p.m.

12. The Barristers' Examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2.30 p.m.

13. Articles and assignments must not be sent to the Secretary of the Law Society, but must be filed with the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

14. Full term of five years, or, in the case of Graduates, of three years, under articles must be served before Certificates of Fitness can be granted.

15. Service under Articles is effectual only after the Primary Examination has been passed.

16. A Student-at-law is required to pass the First Intermediate Examination in his third year, and the Second Intermediate in his fourth year, unless a Graduate, in which case the First shall be in his second year, and his Second in the first seven months of his third year.

17. An Articled Clerk is required to pass his First Intermediate Examination in the year next but two before his Final Examination, and his Second Intermediate Examination in the year next but one before his Final Examination, unless he has already passed these examinations during his Clerkship as a Student-at-law. One year must elapse between the First and Second Intermediate Examination, and one year between the Second Intermediate and Final Examination, except under special circumstances, such as continued illness or failure to pass the Examinations, when application to Convocation may be made by petition. Fee with petition, $2.

18. When the time of an Articled Clerk expires between the third Saturday before Term and the last day of the Term, he should prove his service by affidavit and certificate up to the day on which he makes his affidavit, and file supplemental affidavits and certificates with the Secretary on the expiration of his term of service.

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

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

21. Candidates for Call or Certificate of Fitness are required to file with the Secretary their papers, and pay their fees, on or before the third Saturday before Term. Any Candidate failing to do so will be required to put in a special petition, and pay an additional fee of $2.

22. No information can be given as to marks obtained at Examinations.

23. An Intermediate Certificate is not taken in lieu of Primary Examination.

FEES.

Notice Fee	$1 00
Student's Admission Fee	50 00
Articled Clerk's Fee	40 00
Solicitor's Examination Fee	60 00
Barrister's Examination Fee	100 00
Intermediate Fee	$1 00
Fee in Special Cases additional to the above	200 00
Fee for Petitions	2 00
Fee for Diplomas	2 00
Fee for Certificate of Admission	1 00
Fee for other Certificates	1 00

BOOKS AND SUBJECTS FOR EXAMINATIONS.

PRIMARY EXAMINATION CURRICULUM, For 1888, 1889 and 1890.

Students-at-Law.

1888.	Xenophon, Anabasis, B. I. Homer, Iliad, B. IV. Cæsar, B. G. I. (1-33.) Cicero, In Catilinam, I. Virgil, Æneid, B. I.
1889.	Xenophon, Anabasis, B. II. Homer, Iliad, B. IV. Cicero, In Catilinam, I. Virgil, Æneid, B. V. Cæsar, B. G. I. (1-33.)
1890.	Xenophon, Anabasis, B. II. Homer, Iliad, B. VI. Cicero, Catilinam, II. Virgil, Æneid, B. V. Cæsar, Bellum Britannicum.

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

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

MATHEMATICS.

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

ENGLISH.

A paper on English Grammar.
Composition.
Critical reading of a selected Poem:—
1888—Cowper, The Task, Bb. III. and IV.
1889—Scott, Lay of the Last Minstrel.
1890—Byron, The Prisoner of Chillon; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

HISTORY AND GEOGRAPHY.

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

Optional subjects instead of Greek:—

FRENCH.

A Paper on Grammar.
Translation from English into French Prose.

1888 } Souvestre, Un Philosophe sous le toits.
1890 }
1889 Lamartine, Christophe Colomb.

or NATURAL PHILOSOPHY.

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

Articled Clerks.

In the years 1888, 1889, 1890, the same portions of Cicero, *or* Virgil, at the option of the candidate, as noted above for Students-at-law.

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

RULE *re* SERVICE OF ARTICLED CLERKS.

From and after the 7th day of September, 1885, no person then or thereafter bound by articles of clerkship to any solicitor, shall, during the term of service mentioned in such articles, hold any office, or engage in any employment whatsoever, other than the employment of clerk to such solicitor, and his partner or partners (if any) and his Toronto agent, with the consent of such solicitors in the business, practice, or employment of a solicitor.

For Certificate of Fitness.

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

For Call.

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

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

Trinity Term, 1887.