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DIARY FOR NOVEMBER.

16. Sun .....*23rd Sunday after Trinity.* Wilson, J., Q.B., and Gwynne, J., C.P., 1868.
17. Mon.....Michaelmas Sittings, Com. Law Div. H. C. J., begin.
18. Tues .....Hagarty, C.J., sworn in, Ct. of Q.B., Wilson, J., sworn in Ct. of C. P., 1878.
19. Wed.....Princess Royal born, 1840.
23. Sun.....*24th Sunday after Trinity.*
25. Tues.....Lord Lorn, Governor-General of Canada, 1878.
27. Thur.....Cameron, J., sworn in Q.B., 1878.
30. Sun.....*Advent Sunday.* Moss, J., appointed C. J. of Appeal, 1877.

TORONTO, NOVEMBER 15, 1884.

MR. JOHN M. HAMILTON, Q.C., of Sault Ste. Marie, who has been gazetted Judge for the Provincial Judicial District of Thunder Bay, has gone to Port Arthur to assume the duties of his office. The appointment is an exceedingly good one. In addition to his high personal character and legal abilities he has had a long experience in "frontier law," which will be of great benefit in a place rapidly rising into importance, and where meet the civilization of the older provinces and the ruder energies of a younger country of unlimited capacity and of vigorous growth requiring much strong practical common sense in those who direct its development. Mr. Hamilton was called to the Bar in Mich. Term, 1853, and after practising for some years in Toronto was in May, 1861, appointed Crown Attorney and Clerk of the Peace for the District of Algoma.

THE *Weekly Notes* for October 18th, 1884, contains some supplemental rules of court, to be cited as rules of the Supreme Court, October, 1884. Amongst them is the following which seems specially noticeable, and might, probably with some advantage, be adopted in this country:—

ORDER L. 1A.

11. Whenever an application shall be made before trial for an injunction or other order, and on the opening of such application, or at any time during the hearing thereof, it shall appear to the Judge that the matter in controversy in the cause or matter is one which can be most conveniently dealt with by an early trial, without first going into the whole merits on affidavit or other evidence for the purposes of the application, it shall be lawful for the Judge to make an order for such trial accordingly, and to direct such trial to be held at the next or any other assizes for any place, if from local or other circumstances it shall appear to him to be convenient so to do, and in the meantime to make such order as the justice of the case may require.

TIMES are dull apparently in Western Canada. A person who, we must assume, is a member of our honourable fraternity (he has evidenly mistaken his vocation) thus advertises himself:

M. SULLIVAN,
POSTMASTER, SARNIA, ONT.,
Issuer of Marriage Licenses, no witnesses required,
BARRISTER, ETC.
Office at Post-office, Sarnia.

It is evident that this enterprising party, living as he does at a frontier town, and apparently able to dispense with witnesses in vending his licenses, desires to provide a Gretna Green for Ontario. Being a professional man he will be able to advise the amorous flitters on various legal points which may be of interest to them, and doubtless they would in return see a propriety in paying a fee which could not be collected by process of law by his forerunner, the historical blacksmith.

THE CANADA TEMPERANCE ACT, 1878.

Now that the noise of the advancing chariots of the temperance men sounds loud in our ears, some mention of a matter which has recently been brought prominently before our notice in connection with the so-called Scott Act may be excused, and the more so as public attention has been lately called to this Act in connection with a special case laid before the Supreme Court at Ottawa by the Government, and argued a few days ago, to which we shall presently allude more fully.

The Canada Temperance Act, 1878 (41 Vict. c. 16), nowhere points out or provides any method for securing the proper carrying out of the preliminary steps directed by the Act to be taken by those who desire the bringing into force of the second part of it in any given municipality. For example, sec. 5 provides that the preliminary petition and notice to the Governor-General-in-Council shall be signed "by electors qualified to vote at the election of a member of the House of Commons in the county or city;" sec. 6 provides that the petition and notice shall have appended to it "the genuine signatures of at least one-fourth in number of all the electors in the county or city named in it;" sec. 8 for the insertion of the proclamation of the Governor-General-in-Council so many times in the Canada Gazette and the Provincial Gazette; and sec. 9, sub-sec. 2, that no polling of votes under the Act shall take place on the same day as an election in the same locality for members to serve in the Parliament of Canada and the Local Legislature; and there are a number of other requirements intended doubtless by the Legislature to secure that the second part of the Act, if brought into force in any given locality shall be so brought into force by the undoubted desire of the majority of those qualified to vote. But when one comes to enquire what resort the defeated party would have in the event of these preliminary requirements not having been complied with, and nevertheless a return made to the Secretary of State of a majority being in favour of the second part being brought into force, and an Order-in-Council consequently ensuing calling it into force, he does not find any course pointed out. Sec. 70 indeed enacts that "No polling of votes under this Act shall be declared invalid by reason of a non-compliance with the rules contained in this Act as to the taking of the poll . . . it it appears *to the tribunal having cognisance of the question* that the polling of votes was conducted in accordance with the principles laid down in this Act, and that such non-compliance or mistake did not affect the result of the polling;" but there is nothing to show what is the tribunal referred to. It will scarcely be denied by the most ardent spirits, or rather by the most inveterate haters of ardent spirits, that the second part of the Act, be it a wise piece of legislation or not, is a very grave and serious infringement of the liberty of the subject, and presses very hardly on that majority of persons who do know how to take their "liquor like gentlemen," and are not prone to excess,* besides being a serious blow to the vested interests of many; and, probably, all on reflection would admit that it is most desirable that the requirements of the Act should be very exactly carried out before the second part is brought into force. It, therefore, seems somewhat strange that no method of securing this is provided by the Act. No doubt it is open to any one who considers that the preliminary steps have not been regularly taken to petition the Governor-General-in-Council not to proclaim the Act in force, but this can scarcely be called an adequate remedy. It has, how-

* But, we might add, who do not see any responsibility to give up their liberty for the good of others.—Ed. C.L.J.

ever, been held that sec. 111, which prohibits a *certiorari*, does not take away the right of proceeding by way of *certiorari* where there is a total want of jurisdiction, and one of our main objects in now writing is to call renewed attention to a decision of Mr. Justice Armour of some years back, which we believe attracted considerable attention at the time, but has unfortunately up to the present never been reported.

Sec. 111 enacts that "No conviction, judgment or order, in any such case, shall be removed by *certiorari* or otherwise into any of Her Majesty's Superior Courts of Record." Without dealing with the various decisions in the books as to the meaning of "in any such case" in this section, we would point out that *Reg.* v. *Alexander*, which we believe has never been impeached (and of which, by the courtesy of the officials of the Queen's Bench Division, we are able to give a full report in this issue), shows that the right of *certiorari* is not taken away where there has been a total want of jurisdiction in the convicting magistrate, owing to the second part of the Act never having been legally and validly brought into force. We believe that at the time the opinion of eminent counsel was taken as to whether an appeal from this decision would be likely to succeed, but that was emphatically in favour of the soundness of the judgment. We may also call attention to the subsequent decision in the Supreme Court of New Brunswick in *ex parte Hackett*, 21 New Bruns. 513, where it was held that the right of *certiorari* under sec. 111, is not taken away where there is an excess or want of jurisdiction, and hence the recognition of *certiorari* in sec. 118 is not inconsistent with the prohibitory words of sec. 111. It might have been thought, indeed, and would appear to have been urged before Mr. Justice Armour, that after the Governor-General-in-Council had proclaimed the Act in force, it would be too late to move to quash a conviction under it, on the ground that it had not been brought into force. *The Queen* v. *Alexander* shows the contrary.

At the commencement of this article we alluded to the recent special case before the supreme Court. Sec. 6 of the Canada Temperance Act, 1878, provides that the notice required by sec. 5 to be sent to the Secretary of State of the desire of the signers that the votes of the electors be taken for or against the adoption of the petition must be deposited in the office of the Sheriff or Registrar of deeds of or in the County for public examination, and evidence of such deposit sent to the Secretary of State, with the notice prescribed in sec. 5. In the case of the County of Perth, the notice was deposited with the Registrar of the North Riding only. Thereupon a petition was sent to the government praying that under these circumstances, no proclamation under sec. 7, *seq.*, should be issued by the Governor-General-in-Council. The Governor-General-in-Council thereupon referred the following special case to the Supreme Court:—

> There are two Registrars of deeds for the County of Perth, in the Province of Ontario; one for the North Riding, with an office at Stratford, and one for the South Riding with an office at St. Mary's. With a notice and petition for bringing the second part of 'The Canada Temperance Act, 1878,' into force in the said County, there was laid before the Secretary of State evidence that such notice and petition was deposited, for the purpose and time required, in the office of the Registrar of deeds for the North Riding of the said County.
>
> Is that a compliance, in that respect, with the requirements of the sixth section of the said Act?

The case was argued on October 28th last. Hon. R. W. Scott, Q.C., appeared on behalf of the supporters of the proceedings that had taken in reference to the Act in the county, and Mr. C. Robinson, Q.C., for the objectors. The following note of what took place, and of the judgment of

the court, is from the *Globe* newspaper of October 29th last:—

Mr. Scott argued that the intention of the Legislature had been fulfilled. When the petition was filed in the one registry office, it was filed in a registry office within the county. Had the petition been filed in the sheriff's office there would have been no question about its being a legal filing, and the sheriff's and registrar's offices were but a few feet apart.

Chief Justice Ritchie—Then why in the name of common sense, was it not filed in the sheriff's office?

Mr. Scott argued that the convenience of the electors had been fully considered.

Mr. Justice Henry—Why should a man be compelled to travel outside his riding, or away from his registry office, in order to examine such petitions.

Mr. Scott pointed out that a petition lodged in the registry office at L'Orignal, in the County of Prescott, would be valid for the County of Russell.

Mr. Robinson replied briefly.

Chief Justice Ritchie, in giving judgment, said, that in such an important matter, involving the right of a certain class of persons, it was important that every provision of the law should be strictly complied with. This, he held, had not been done. The petition might have been deposited either in the sheriff's office, or in both the registry offices. He held that the filing in the one registry office was insufficient.

Mr. Justice Strong said there could be only one construction of the Act, and no argument could be advanced to sustain the validity of the filing. He was only surprised that it had been found necessary to resort to this court to obtain a decision upon such a question.

The other justices concurred.

A. H. F. L.

CANADA REPORTS.

ONTARIO.

(Reported for the LAW JOURNAL by A. H. F. LEFROY, Barrister-at-Law.)

QUEEN'S BENCH.

THE QUEEN v. ALEXANDER.*

Canada Temperance Act, 1878—Non-compliance with preliminary requirements—Day of voting—Certiorari—Conviction—Jurisdiction—41 Vict. c. 16, D. secs. 9, 111.

Where the requirements of the Canada Temperance Act, 1878, as to the day of voting on the petition had not been properly complied with, *held*, on *certiorari*, that a conviction under it must be quashed, although the Act had been proclaimed in force by Order-in-Council.

[June 1, 1881.—Armour, J.

This was a proceeding by way of *certiorari* to quash a conviction under the Canada Temperance Act, 1878 (41 Vict. c. 16 D.) The circumstances were as follows:—

A proclamation of the Governor-General-in-Council was issued under the above Act for the purpose of putting to the vote the adoption of a petition of certain electors of the County of Lambton for the bringing into force the second part of the Act, and May 29th, 1879, was fixed therein as the day on which the vote was to be taken (*Canada Gazette*, May 10, 1879).

It so happened that by proclamation of the Lieutenant-Governor of Ontario the same day had been fixed for holding the election for the Legislative Assembly for the West Riding of the County, and the said election accordingly commenced on that day, candidates being nominated, and a poll demanded and granted.

Sec. 9, sub-sec. 2 of the Act provides that "No polling of votes under this Act shall be held in any city, county or district, on the same day that any election may take place in such city, county or district for members to serve in the Parliament of Canada or in any of the Local Legislatures of the Dominion."

Nevertheless the voting under the proclamation of the Governor-General took place, and a majority being in favour of the adoption of the petition, the second part of the Act was, by Order-in-Council of June 12th, 1880, declared to be in force (Statutes of Can. 43 Vict. p. cxlviii, *Canada Gazette*, Vol. 13, p. 1,745).

* See Supra p. 374.

On May 12th, 1881, the Mayor of Sarnia convicted Alexander of unlawfully selling liquor contrary to the Act, and fined him $50 and costs.

Mr. James F. Lister, counsel for the defendant, raised the following objection, but was over-ruled by the Mayor :—

"I submit that you, as Mayor or otherwise, have no power or jurisdiction to entertain, try, or adjudicate upon the alleged offence upon which the defendant is charged because the Canada Temperance Act, 1878, under which the information herein is laid is not lawfully in force in the County of Lambton by reason of the polling of votes under the said Act having been taken in the county on the same day that an election of a member to serve in the Legislative Assembly for Ontario was opened and commenced by the nomination of candidates, and in support of my objection I beg to refer you to sec. 9, sub-sec. 2, which provides that no polling under the Act shall take place on the day on which any election may take place in any county for members to serve in the Parliament of Canada, or in any of the Local Legislatures of the Dominion. I submit that the 29th day of May, 1879, was the election day for the West Riding of Lambton within the meaning of the Ontario Elections' Act, R. S. O. c. 10, sec. 26 and following sections. That it was a day on which an election might have been held, and at all events it was the opening and commencement of an election. For these reasons this prosecution should be dismissed."

The matter coming up on *certiorari* before ARMOUR, J., on May 25th, 1881, he granted a rule *nisi* calling on the informant and Mayor to show cause why the conviction should not be quashed "on the ground that the Mayor had no jurisdiction to hear or determine the said charge, the Canada Temperance Act, 1878, not being legally in force in the said County of Lambton by reason of the polling of votes under the said Act having been held in the said county on the same day that an election of a member to serve in the Legislative Assembly of the Province of Ontario took place."

On June 1, 1881, *C. Robinson*, Q.C., moved the rule absolute.

J. Bethune, Q.C., contra.

ARMOUR, J., made the rule absolute to quash the conviction.

His Lordship delivered an oral judgment. The following is a report of his remarks taken from the *Globe* newspaper of June 3rd, 1881 :—

His Lordship, then, in delivering judgment, said : "That it seemed to him quite clear that the proceedings in connection with the polling were irregular, and he might as well dispose of the matter at once, so that if either party desired they could take it at once before the full court, which would still be sitting for several days. For myself I have no doubt that the conviction should be quashed. I think the nomination day is the day upon which an election might take place, and that being so, the polling on that day, under the Temperance Act is prohibited, and it is just as if no such polling had taken place at all. As to the next objection raised in opposing this motion, that the Governor-in-Council had issued a proclamation which is final, I do not think he has any authority to move or dispense with preliminaries required by the Act. Dealing with a case of this kind I cannot say that anything the Governor-General might have done could vary the provision of this Act. He has to act as authorized by the Legislature, and there is nothing in the statutes giving him power to waive the provisions. The rule will, therefore, be absolute to quash the conviction."

Mr. Bethune requested that the rule which would issue should set out the grounds upon which the conviction was quashed as the matter would again be submitted to the Lambton people.

His Lordship said that certainly the rule might issue in that form. He thought it was a rather unfortunate circumstance that a matter like this should be disallowed on such technical grounds.

MASTER'S OFFICE.

(Reported for the CANADA LAW JOURNAL.)

MERCHANTS' BANK v. MONTEITH.

Imp. Act 38, *Geo.* 3, *c.* 87—*R. S. O. c.* 40, *ss.* 34 *and* 35, *c.* 46, *s.* 32—*Infant administrator—Nullity—Suits by an infant—Liability for costs.*

The 6th sec. of 38 Geo. 3, c. 87 (Imp.), prohibiting the grant of probate to infants under the age of twenty-one, is in force in Ontario, either as a rule of decision in matters relating to executors and administrators (R.S.O. c. 40, ss. 34, 35), or as a rule of practice in the Probate Court in England (R.S.O. c. 46, s. 32.)

An infant cannot lawfully be appointed administrator of an estate, and therefore a grant of probate or of letters of administration to an infant is void, and confers no office, and vests no estate in such infant.

An infant had been appointed administrator of an estate, and various suits had been brought in his name on behalf of such estate.

Held, that being an infant he was incapable of bringing suits in his own name, or of making himself, or the estate he assumed to represent, liable for the costs of such suits.

Sections 57 and 58 of the Surrogate Act (R.S.O. c. 46) protect parties *bona fide*, making payments to an executor or administrator, notwithstanding any invalidity in the probate or letters of administration; but they do not protect payments made to third parties by an infant assuming to act as administrator of the estate.

[Mr. Hodgins, Q.C. Sept. 29.

Rae, for plaintiffs.

J. A. Paterson, for creditors.

Black, for infant.

J. Macgregor, for defendant Pritchard.

THE MASTER-IN-ORDINARY.—In this case the executors named by the testator renounced probate, and the Surrogate Court granted letters of administration with the will annexed to the defendant, Monteith, who, as appears by the evidence taken in this matter, was then, and still is, an infant under the age of twenty-one years.

The administration order directs the usual accounts of the dealing of the infant defendant with the assets of the estate; and in proceeding to account for such assets this defendant has brought in accounts showing the payment of nearly the whole assets of the estate to a solicitor for the purposes of litigation.

During the proceedings before me this solicitor claimed to act for and represent this infant defendant without the usual and necessary appointment of a guardian *ad litem*; and he contended before me that such payment of the bulk of the assets of the estate to him, as solicitor for this infant, was rightful, and he relied on *re Babcock*, 8 Gr. 409, as warranting the action of this infant defendant in so doing. The official guardian being unable to attend for this defendant, I appointed Mr. Black to act as his guardian *ad litem*.

It must be to ordinary minds difficult to perceive how an apparent authority to retain $200 on account of costs which the report showed had been incurred to a larger amount can be cited to warrant an administrator handing over $3,385.78, nearly the whole cash assets of the estate, to a solicitor within a few months of his appointment for the purposes of litigation, and without any bills of costs or other evidence of the necessity of such payment. But such claim is made and such argument is strenuously advanced in this case.

In view of this contention it is proper to consider whether the letters of administration granted to the infant defendant are voidable or void. Since the payment to the solicitor, and during the proceedings in this office, the grant of letters has been revoked by the Surrogate Court, and administration *durante minore ætate*, has been granted to the defendant Pritchard.

The statute (Imp.) 38, Geo. 3, c. 87, s. 6, enacts: "And whereas inconveniences arise from granting probate to infants under the age of twenty-one; be it enacted that where an infant is sole executor, administration with the will annexed, shall be granted to the guardian of such infant, or to such other person as the spiritual court shall think fit, until such infant shall have obtained the full age of twenty-one years, at which period, and not before, probate of the will shall be granted to him."

In a note to *ex parte Sergison*, 4 Ves. 147, it is stated that the circumstances of that case had considerable effect in producing the above Act of Parliament. The M.R. in that case would not permit an infant, though he was an executor, to receive the money of the estate, and in his judgment he intimated that the legislature should forbid the ecclesiastical court granting probate to an infant.

In *Hindmarsh* v. *Southgate*, 3 Russ. 324, it was argued that "an infant could not be lawfully clothed with the character of administrator;" and the court refused to direct an account against an infant who had been appointed administratrix.

In re Cunha, 1 Hagg 237, the court adopted the Portuguese law, and granted limited administration to a minor. But that case was not followed in similar applications to appoint minors as administrators. *In re Manuel*, 13 Jur. 664, Sir H. Jenner-Fust declined to give effect to the law of Turkey; and *In re Duchesse d' Orleans*, 7 W.R. 269 when Sir C. Cresswell declined to recognize the law of France—adding, that in this country a minor could not take upon himself the liabilities which the law casts upon an administrator.

It is further stated: "a minor cannot be administrator because he cannot execute the bond which is required by the Act of Parliament, or rather because the authority of the administrator is derived from the statute Edw. 3, which must receive a legal construction, and therefore the administrator must be of age according to the common law, which is twenty-one:" Dodd & Brookes Prob. Pr. 404.

And in 1 Williams, on Executors, 231, it is said: "If an infant be appointed sole executor he is altogether disqualified from exercising his office during his minority."

A similar disqualification exists in the United States.

In *Carow* v. *Mowatt*, 2 How. N.Y. 57, the Vice-Chancellor said: "On account of the incompetency of infants to bind themselves by bond, or to render themselves liable to account for property which may come into their hands during minority, they cannot lawfully be appointed to fill the office of administrator. If, through mistake or inadvertence, the appointment has been conferred upon an infant, it may be revoked by the Surrogate Court." And in *Collins* v. *Spears*, Walk. (Miss.) 310, the Court held that it was error in a Probate Court to grant administration to a minor, although such minor was the widow of the deceased; and they revoked the letters of administration.

The negative words in the English statute pro-

hibit the granting of probate to an infant, and therefore must be construed as taking away any jurisdiction which the Probate Court might have previously had to make such grants: Dwarris on Statutes 743.

The Imperial Act, whether classed as prescribing "a rule of decision in matters relating to executors and administrators" (R.S.O. c. 40, ss. 34, 35), or "a rule of practice in the Court of Probate in England" (R.S.O. c. 46, s. 32), is in force in Ontario. See also *Grant* v. *Great Western Ry. Co.*, 7 C.P. 438; 5 U.C.L.J. 210; *In re Thorpe*, 15 Gr. 76.

These references show that the grant of letters of administration to this infant against the negative mandatory words of the statute was a nullity, and conferred no office, and vested no estate in him, as administrator with the will annexed.

There is evidence that various suits have been brought in the name of this infant as administrator, and that others have been brought against him in respect of this estate, and a claim is made that the costs of such suits should be allowed in his accounts.

If the letters of administration are void *ab initio*, this infant defendant has been dealing with the estate as a stranger, and his acts will not bind the estate. On this, and other grounds, I see no authority for allowing such costs. In Mitford on Pleading, p. 25, it is said: "An infant is incapable by himself of exhibiting a bill, as well on account of his supposed want of discretion as his inability to bind himself, and to make himself liable to the costs of the suit." The case there cited is *Turner* v. *Turner*, 2 Stra. 708, where Lord King, L.C., held, that by the common law an infant could give no pledges; that the power of infants to sue by *prochein ami*, was introduced by the stat. Westminster 2nd; and he held that no case had been cited where an infant had been obliged to pay costs, either at law or in equity

And in Macpherson on Infants, p. 361-2: "If judgment had been given against an infant in an action to which he has appeared by attorney, that is error, upon which the judgment would be reversed; for the same reason a judgment upon a warrant of attorney given by an infant is liable to be vacated, and a warrant of attorney by an infant to confess judgment is absolutely void, and the courts cannot in any case make it good." "The incapacity of an infant and a *non compos* run parallel:" *Hume* v. *Burton*, 1 Ridgw. P.C. 89, 100, 203.

No cases have been cited to me to sustain the claim made in respect of these costs, and, therefore, I must, on the authorities referred to, hold that the grant of administration was void, and that the defendant, being an infant, was incapable of bringing suits in his own name, or of making himself, or the estate he assumed to represent, liable for the costs of the extensive litigation in which he appears to have been a party.

The solicitor is not technically a party to these proceedings, and the report, therefore, while it will lay the facts brought out in evidence before the court, will be no adjudication as to him.

Sections 57 and 58 of the Surrogate Act, R.S.O. c. 46, are intended as a protection to parties *bona fide*, making payments to an executor or administrator, notwithstanding any invalidity in the probate or letters of administration, but they have no application here, nor do they protect the payment of the moneys of the estate made by this infant to the solicitor in this case.

IN THE THIRD DIVISION COURT OF THE COUNTY OF ONTARIO.

NOTT v. GORDON ET AL.

Action against arbitrators to recover back fees paid upon an invalid award.

No action will lie against arbitrators to recover back fees paid for an award which afterwards turns out to be invalid by reason of a defect in the mode of execution on the grounds, (1) that, no fraud or collusion being alleged, such action could not be maintained for neglect or negligence, their functions being judicial; (2) that such action is against public policy; and (3) that the fees having been paid voluntarily could not be recovered back.

[Whitby, Oct. 15.

This was an action against the defendants, of whom two were the arbitrators appointed, one by each of the parties, in a matter of dispute between the present plaintiff and one Mr. W. J. Nott, and the third was the other arbitrator appointed by these two.

They entered upon the reference and took evidence at some length and unanimously made an award in the plaintiff's favour, the latter taking it up and paying the arbitrators' fees, amounting to the sum of $60.

The present plaintiff brought an action on this award which was dismissed, the Court of Common Pleas holding *Nott* v. *Note* (5 Ont. R. 283), that the award was invalid because it was not jointly, and on one occasion, executed by the three arbitrators.

The plaintiff now brings this action to recover back the fees paid by him; in effect alleging that there was a failure of consideration, he having paid his money for an award which was of no avail to him.

DARTNELL, J.J.—I think the form of action is founded upon a fallacy. There is no implied con-

tract on behalf of an arbitrator that his award should hold water—the action is really for damages, for neglect in making such an award as could be enforced. If the defendants are liable to repay these fees they are also liable for the costs the plaintiff has been put to in endeavouring to enforce the award—and what he now sues for is only part of his damages.

I can find no authority which would make an arbitrator liable in such an action. If an arbitrator fraudulently, or corruptly, or collusively, or dishonestly took a course which he ought not to have taken, no doubt an action would lie against him (*per* DENMAN, J., *Stevenson* v. *Watson*, 4 L. R., C. P. D, 161). But nothing of the kind is alleged against these defendants. I have never heard of a case where, when an award has been set aside for the misconduct of an arbitrator, the latter was held liable to refund the fees paid to him: much less where he honestly exercised his judgment, and endeavoured to embody such judgment in a document which unfortunately was invalid by reason of a technical defect.

In the case cited above, Lord Coleridge says (page 159):—"Where the exercise of judgment or opinion on the part of a third person is necessary between two persons, such as a buyer and seller, and, in the opinion of the seller, that judgment has been exercised wrongly, or improperly, or ignorantly, or negligently, an action will not lie against the person put in that position when such judgment has been wrongly or improperly, or ignorantly, or negligently exercised."

Now, the most that can be said against these defendants is that they ignorantly or negligently omitted a formality necessary to give effect to the award they intended to make. I think the authority I have cited is conclusive against the plaintiff's right to recover.

It seems to me also, that, on grounds of public policy, an action like this should be discouraged. Arbitrators are a *forum*, a tribunal erected or created by the parties themselves, and the functions performed by an arbitrator become thereby judicial. In such case no suit would lie against him for acts of omission or commission. The Courts have always encouraged resort to such tribunals; and, if it were established that an arbitrator, after devoting his time, thought, skill and judgment in respect of the matters referred to him, was liable to refund the *honorarium* he had earned, because, through some error of form, his award could not be enforced, it would be difficult indeed to persuade any one to accept the position with such a liability attached. The defendants here were laymen, and the award was drawn up by the present plaintiff's solicitor. It seems to me that it was his duty to see that it was correctly executed. The decision in *Nott* v. *Nott* was somewhat of a surprise to the profession, and the Court reluctantly held against the validity of the award.

There is another ground which I think disentitles the plaintiff to recover in this action, namely, that having voluntarily and without compulsion paid these fees to the defendants, he cannot now recover them back. Moneys paid under a mistake of fact can be recovered back; not so when paid under a mistake of law. The plaintiff believed the award to have been properly executed, the best evidence of which is that he brought an action to enforce it after he had become aware of the mode of its execution or publishing.

For all these reasons, I think the action should be dismissed.

RECENT ENGLISH PRACTICE CASES.

DAVIS v. JAMES.

Imp. 1883, *r.* 200, 309—*Ont. r.* 128, 178.

Pleading—Action on covenants in lease—Embarrassment.

In an action on the covenants in a lease, the plaintiff alleged in his claim that he was entitled to the immediate reversion in the demised premises, and that he was entitled to enforce the covenants as against the defendant who was assignee of the term, and liable to perform the lessee's covenants.

Held, on motion to strike out as embarrassing, that such pleading was insufficient, and that the plaintiff ought also to have shown what the reversion was which the lessor had, and how the plaintiff derived his title to that particular reversion.

[L. R. 26 Ch. D. 778.

KAY, J.,—In a case of this kind, in which the plaintiff can only sue as the assign of the reversion, by virtue of the statute of Henry VIII., and the other statutes which relate to the matter, the proper mode of pleading would be to state that A. B., being seized in fee, or having whatever estate he had, demised by a certain lease something less than his entire interest, and to state distinctly the mode in which the plaintiff had become entitled to that reversion, in such manner as to show that he had a right to sue upon the covenants. Take this case: a plaintiff alleges that he is entitled to the estate of some one who died, we will say, in 1792. He is out of occupation, but he says that that estate belongs to him. Is it enough for him to plead, "The estate is mine; it belongs to me; I am entitled to possession, and I therefore sue?" The question came before the Court of Appeal in *Philipps* v. *Philipps*, 4 Q. B. D. 127, and that was very much the case I have just referred to. It was

an action for the recovery of land of which the plaintiff had never been in possession, and the statement was put in two or three ways, so as to give what Lord Bramwell speaks of as alternative rights to relief; but no deed or documents under or by virtue of which the plaintiff derived or deduced his title were stated, and the plaintiff confined himself to general averments. These were so worded that it was not possible to demur to the pleadings, because demurrers, which were then allowable, would have admitted so much as to put the demurring party out of Court. . . . It was held by the whole Court unanimously that the pleading was an embarrassing pleading because it did not state that which the defendant was entitled to have stated for his own protection, and that, therefore, the pleading must be struck out; and this although it was not possible to demur to it successfully. . . . The case seems to me to be absolutely identical in point of principle with *Philipps* v. *Philipps*. I can see no kind of distinction between them.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

COURT OF APPEAL.

WALMSLEY v. GRIFFITH.

Vendor and purchaser—Misrepresentation by purchaser.

The plaintiff negotiated with the defendants Griffith for the purchase of the lands in question and at different times obtained from them writings giving him the option to purchase for $20.000. Defendants Griffith set up that these negotiations were had with plaintiff as their agent with the view of effecting through him a sale to the Independent Order of Odd Fellows at the same or a higher price for the defendants Griffith—after these options had been given plaintiff on forenoon of 17th February, 1883, agreed to sell to the Odd Fellows for $25.000, afterwards on same day he went to defendants Griffith and offered to purchase for $19.500 in lieu of the $20.000 previously named, he was asked by Griffith whether the sale to the Odd Fellows was off, to which he replied that it was, and in the same conversation informed Griffith that he could not sell the property for $20,000 as a reason why he should get it for $19.500, and the Griffiths themselves agree to sell to plaintiff for $19.500. The same day afterwards plaintiff entered into a contract in writing to sell to the Odd Fellows for $25.000.

Held, that without reference to the question of agency to sell, the evidence showed that a sale to the Odd Fellows was in contemplation of both parties and was the foundation of the transaction, and (reversing the judgment of Proudfoot, J.) that the misrepresentation by plaintiff in regard to the sale to the Odd Fellows was such as disentitled him to a decree for specific performance.

BURTON, J. A., dissentiente.

Moss, Q.C., and *Arnoldi* for the appellants (Griffiths).

Robinson, Q.C., *McCarthy*, Q.C., and *J. A. Paterson*, for the appellants, the Odd Fellows.

S. H. Blake, Q.C., *Maclennan*, Q.C., and *W. Foster*, for the respondent.

McGregor, for other parties.

ELLIS v. ABELL.

Steam threshing machine—Warranty—Defective construction—Verdict of jury—Parol evidence.

The defendant was a manufacturer of steam threshing machines, which were recommended in his advertisements as being safe from fire; that the smoke stack would not throw out sparks and the separator, which was sold and used with the steam threshing machine, did not throw out grain in the chaff and that altogether these were the best thresher and separator in the world. His agent also in going through the country extolled these machines in like manner when soliciting orders therefor. The plaintiff after hearing these recommendations sent an order to the defendant for a steam thresher and separator which, on being used, were said to be defective, the steamer throwing out sparks and the separator wasting the grain by throwing it out with the chaff.

Per HAGARTY, C. J., and ROSE, J.:—That the recommendations of the defendant amounted to a warranty and plaintiff was entitled to damages for the defects in the structure of the machines: and also that the plaintiff was at

liberty to shew by parol evidence the fact of such recommendations, though the written memorandum of sale and purchase made no reference thereto.

Per BURTON, J. A., and CAMERON, C. J.:— That defendant's language was mere commendation of the machines and did not amount to a warranty.

The jury at the trial rendered a verdict for $200 more than the plaintiff claimed as damages which the Divisional Court refused to interfere with. On appeal to this Court, the ruling of the Court below was sustained.

Maclennan, Q.C., for the appellant.

Lount, Q.C., for the respondent.

CAMERON v. BICKFORD.

Conflicting evidence—Reserving finding of judge.

The learned judge who tried the case, in which the evidence was conflicting and irreconcilable, rested his conclusion in favour of the defendant on the documentary evidence and the probabilities arising in the case. This Court, while not differing from the judge as to the credibility of the parties or their witnesses, having come to a different conclusion on the whole evidence allowed the appeal and reversed the judgment of the Court below.

McCarthy, Q.C., and *Moss*, Q.C., for the appellant.

S. H. Blake, Q.C., and *Maclennan*, Q.C., for the respondent.

MIDLAND RAILWAY v. ONTARIO ROLLING MILLS.

Judgment of the Court below, 2. O. R. 1, was affirmed.

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

Osler, Q.C., and *Laidlaw*, for respondents.

MALCOLMSON v. HAMILTON PROVIDENT AND LOAN SOCIETY.

Verdict of jury.

The father of the plaintiff applied to the defendant company for a loan of $2,500 secured by land valued by the company's appraisers at $3,500. In answer to certain printed questions put to the applicant, he stated himself to be the owner of certain horses, cows, sheep and other stock, the plaintiff being present with his father at the time of making the application, although he swore in his evidence that he was not aware of the answers given by his father as to his personal assets, stock, etc. The defendants subsequently sued and obtained execution against the father, under which they seized certain live stock in the possession of the son, who had been residing apart from his father, and from whom, at that time, he had purchased several of the cattle, etc., and had ever since continued to feed and care for the cattle, etc.

In an action brought by the son against the company, the jury found in favour of the claim of the plaintiff, which verdict the Judge of the County Court refused to set aside.

On appeal, this Court refused to disturb such ruling of the County Judge, although, had the verdict been in favour of the defendants, this Court would have been better satisfied; the question being one proper for the decision of the jury.

Crerar, for the appeal.

Wm. Bell, contra.

COOK v. PATTERSON.

Purchase of hay—Shrinkage—Loss by hay spoiling—Decision on the merits—Reference as to damages.

The plaintiff contracted with the defendants for the purchase of a quantity of hay amounting to about 2,270 tons which was to be delivered at certain points, from which the plaintiff was to ship it to the New York market, and which was to be subject to examination before shipping. The plaintiff, without examination of the hay, forwarded it to New York, whereupon the agents of the plaintiff offering the same for sale, it was found to be greatly damaged by having become musty, thereby materially reducing its market value; and the weight had shrunk to the extent of about 200 tons. In an action to recover for the shortage and defective quality, the plaintiff asked for a reference as to damages, but the judge who tried the case refused the reference and entered judgment for the defendants.

Held, that when the evidence is contradic-

tory the Court would not interfere with the decision of the judge who tried the case:

Held, also that in an action of that nature the questions must be tried by the judge; and the plaintiff is not entitled to give *prima facie* evidence of the breach of contract and ask for a reference as to damages.

Bethune, Q.C., and *D. Smart*, for the appellant.

Hector Cameron, Q.C., and *H. J. Scott*, Q.C., for the respondents.

ALEXANDER v. WANELL.

Trust deed—Fraudulent contrivance.

Held (reversing the judgment of the County Court), that an insolvent debtor on executing an assignment of his effects, where done *bona fide*, may empower the assignee to sell the business as a going concern, or to carry on the same until the assignee shall deem it advisable to distribute the estate—and, in thus carrying on the business to expend moneys of the estate in purchasing new goods and employing assistants in carrying out the trusts of the deed.

HAGARTY, C.J.O., dissenting, who thought that the mere fact of such stipulations being inserted in the instrument, no matter with what *bona fides* the same may have been done, renders it liable to be impeached as a fraudulent contrivance to hinder and delay creditors.

Osler, Q.C., and *Teetzel*, for the appellant.

W. F. Walker, for the respondent.

BURNS v. YOUNG.

Half-breed rights—Transfer of scrip.

The plaintiff had agreed with the defendant to purchase the claim to land scrip, in Manitoba, of a half-breed, and defendant did assign to plaintiff the claim of one alleged to be a child of a half-breed. This turned out to be incorrect and the scrip which had been issued to him was worthless.

Held (reversing the judgment of the County Court), that the plaintiff was entitled to recover from the defendant the amount paid by the plaintiff on the assignment of the so-called right; the plaintiff to assign to the defendant, *quantum valeat*, the land scrip he had received.

A. Hoskin, Q.C., for appellant.

J. Roaf, for respondent.

PEART v. GRAND TRUNK RAILWAY.

Liability of railways—Neglect to sound whistle or bell.

A locomotive of the defendants ran over and killed one P. In an action brought against the company by his representatives, it was sworn by several witnesses, who were near by at the time of the accident, that no bell was rung or whistle sounded. The jury found in favour of the plaintiffs, notwithstanding that the driver and other officers on the train swore that the bell was rung and the whistle sounded on approaching the crossing, when P. was killed, which the Divisional Court refused to set aside. On appeal to this Court the judgment of the Divisional Court was affirmed; CAMERON, C.J., dissenting.

Bethune, Q.C., for the appellants.

Van Norman, Q.C., for the respondents.

[October 20.

BELL v. RIDDELL.

Promissory note—Illegal consideration—Compounding felony.

The judgment reported 2 O. R. 25, affirmed by this Court.

Osler, Q.C., and *Plumb*, for appellent.

Falconbridge, for respondent.

GARRETT v. ROBERTS.

Action by a common informer—Infant.

An infant cannot maintain an action for a penalty as a common informer.

The defendant was one of the deputy returning officers in the Lennox election. And on an alleged voter requesting a ballot claiming a right to vote as a tenant, it was alleged the voter had removed from the division where he claimed to vote. The returning officer insisted that the voter should take the oath stating that he was still resident within such division, the fact being that the voter had property there though resident outside which oath the voter refused to take; and the plaintiff, an infant under twenty-one years, instituted proceedings for the penalty of $200, for which he recovered judgment in the County Court.

Held, on appeal to this Court, reversing the County Court, that the Statute 18 Eliz. ch., was in force in this Province and being so the

plaintiff was incapable of maintaining the action by his next friend.

Hector Cameron, Q.C., for appeal.

Riddell (Cobourg), contra.

CHANCERY DIVISION.

Wilson, C. J.] [September 21.

WEST v. PARKDALE.

Municipality—Ultra vires—Performing work outside limits—Trespass.

By 46 Vict. cap. 45 (O) it was provided that the City of Toronto and the Village of Parkdale might agree to construct a subway beneath the several railways which intersect Queen Street at and about the limits between Toronto and Parkdale, with power to expropriate and compensate property owners, etc. By an order of the Governor-General-in-Council passed in pursuance of 46 Vict. cap. 24 the Railway Companies whose railways crossed Queen Street were authorized to construct the subway; and the order recited a previous agreement by the Village of Parkdale to undertake the work. It was agreed between the Village and the Railway Companies that the Village should construct the subway and that the expenses should be shared equally. The village in performing the work destroyed the frontage of the plaintiff's land which was in the City of Toronto.

Held, that the Village of Parkdale were not acting under the Ontario Statute but under the Order in Council, that they could not exceed their power as a municipality and were therefore wrong doers with respect to the work done to the plaintiff's property.

S. H. Blake, Q.C., *Lash*, Q.C., and *Snelling* for plaintiffs.

C. Robinson, Q.C., *Foster* and *Proctor* for the City of Toronto.

Osler, Q.C. and *J. H. Macdonald* for the Village of Parkdale.

Proudfoot, J.] [September 30.

BEATTY v. HALDAN.

Appeal from Master—Ascertaining amount due by administrator pendente lite to an estate—Moderation of his solicitor's costs.

On an appeal from a certificate of the Master in which he held, that under an order which directed him "to ascertain and state what amount (if any) is properly chargeable by J. H. against the estate of T. W., deceased, in respect of legal proceedings taken by the said J. H. as administrator *pendente lite* of the said estate in the Courts or otherwise," the bills of costs of the solicitor of the administrator should be taxed in order to ascertain the amount due. It was,

Held, that the Master was wrong. That the bills should if necessary be subjected to moderation and not taxation. That moderation is a well understood term, and is a more liberal proceeding than taxation, even as between solicitor and client.

Hoyles, for the appeal.

O'Donohoe, Q.C., contra.

Proudfoot, J.] [October 2.

RE MORTON.

Vendor and Purchasers' Act, R. S. O. c. 109—Tax title—Necessary proof—Treasurer's books and returns—Treasurer's certificate.

On an application under the Vendors and Purchasers' Act, R. S. O. cap, 109, to compel a purchaser to carry out a purchase it was shown that the vendor claimed through a tax sale and declined to produce any further evidence of the validity of the tax sale than was shown by Treasurer's deed and what might be obtained from the Treasurer's books, returns and warrants, to which he referred the purchaser.

Held, that the Treasurer's lists of lands in arrear for taxes furnished to the warden would be as valid evidence of the non-payment as the Treasurer's warrant to the sheriff under 16 Vict. c. 182, s. 55, was made by the judgment in *Clarke* v. *Buchanan*, 25 Gr. 559, and that coupled with the warrant from the warden, there would be no doubt about it and would afford evidence of non-payment up to the time of the sale.

Held, also, that the certificate of the Treasurer that the land was not redeemed is sufficient, and that an affidavit cannot be required from a public officer as to the proper discharge of his duty.

More evidence may be required as between a vendor and purchaser than in a suit where

the owner or those claiming under him are parties.

E. D. Armour, for vendor.

F. E. Hodgins, for purchaser.

Proudfoot, J.] [October 9.

LAIRD V. PATON.

Reference as to title—When good title first shown—Registration of deed to vendor—When interest begins to run—Costs.

On a reference as to title under a judgment which contained this clause, "And in case a good title can be made, an enquiry when it was first shown that such good title could be made." It was

Held, that these words meant when was a good title first shown upon the abstract.

Held, also, that a vendor does not complete his title until his deed is registered; *i.e.*, that registration is essential to the title.

A purchaser becomes liable to pay interest, when no time is fixed by the contract, from the time when he could prudently take possession and in the case of the purchase of several properties under an indivisible contract he cannot prudently take possession until the title to the whole is made.

The ordinary rule in a vendor's suit is that the costs are given against him up to the time when he has first shown a good title, but where the question as to title is not the chief matter in dispute, the costs will follow the result.

Where purchaser's objections to the title have caused the litigation and have been overruled he will be liable for cost notwithstanding any decision in his favor in particular points in dispute.

J. R. Roaf, for the vendor.

Allan McNabb, for the purchaser.

Boyd, C.] [October 29.

COLE V. CANADA FIRE AND MARINE INSURANCE COMPANY.

CLOSE'S CASE.

Company—Winding up—Contributory—Laches—Delay in consummating transfer on books of company—45 Vic. c. 23 D.

Appeal from the judgment of the Master at Hamilton placing the appellant on the list of contributories of the above company which was being wound up under 45 Vic. c. 23 D., in respect of thirty shares.

The shares in question were purchased by C. in 1878; but the papers required to make a formal transfer to C. in the books of the company, were not furnished to the company till December 20th, 1881. On February 11th, 1882, C's name was entered on the list of shareholders, but there was no formal approval of the transfer by the Board of Directors until May 10th, 1883. But before this, on November 15th, 1882, C. was notified of a call on the shares and requested to pay the same. This was the first intimation C. received that the papers furnished by him had been acted upon, but he appeared to have made no further enquiry from the company after December 20th, 1881. The company ceased to do business on May 13th, 1883, and the winding up order was made on October 9th, 1883. It did not appear that C. had taken any steps to repudiate his position as a shareholder before these winding up proceedings; nor did he show any prejudice resulting to him from the failure of the company to notify him that the transfer to his name had been actually consummated on the books of the company.

Held, that under the above circumstances C. was rightly placed on the list of contributories, for having regard to the leisurely way of dealing between the parties, there did not seem to have been unreasonable delay in putting C's name on the lists of shareholders.

Shepley, for appellant.

Laidlaw, contra.

Boyd, C.] [Nov. 1.

TRINITY COLLEGE V. HILL ET AL.

Opening foreclosure—New account—Interest on principal—Interest and costs as found due by original decree—Special order as to costs by Court of Appeal—Execution—R. 351.

Appeal from the Master's report.

This was a suit for foreclosure of a mortgage in which a decree was made on November 14th, 1877, and a final order of foreclosure obtained June 14th, 1878. In October, 1882, a petition was brought before BOYD, C., by the defendants to open the foreclosure, which indulgence was refused by him: 2 O.R. 348.

The defendants thereupon appealed to the Court of Appeal who reversed this decision, and granted the indulgence prayed for, making an order to open the foreclosure on the usual terms of paying principal, interest and costs of the plaintiffs (including the plaintiffs' taxed costs of opposing the petition before BOYD, C,), and of the purchaser, Grattan (not including any costs of the appeal), together with any costs incurred by the purchaser in connection with his purchase of the property: 20 C.L.J. 262.

In taking the accounts the Master allowed to the plaintiffs interest on the whole amount of principal, interest and costs as found by the original decree of November 14th, 1877 (*supra* p. 359).

Held, that the Master was right in so doing.

The Master also allowed to the plaintiffs interest on the taxed costs of opposing the petition to open the foreclosure before BOYD, C.

Held, as to this, the Master was wrong. The costs payable under the order of BOYD, C., on that petition were not recoverable by force of that order, which was reversed, otherwise interest might properly have been recovered under Rule 351; but they were payable simply owing to the direction given by the Court of Appeal, that the plaintiffs' taxed costs of opposing that petition were to be paid by the defendants as a term of getting the indulgence craved by them.

The Master also allowed to the plaintiffs the costs of a writ of execution issued by them upon the order of BOYD, C., to recover their costs taxed thereunder.

Held, that the Master was wrong. The vacating of that order had the effect also of levelling the writ of execution, and there was no provision for the payment of the costs of that writ in the direction for payment of costs given by the Court of Appeal, for such costs are not part of the taxed costs of the petition, but incurred subsequently.

Bain, Q.C., for the appeal.

S. Vankoughnet, Q.C., contra.

O'Brien, for the purchaser.

Boyd, C.] [November 5.

KAISER v. HAIGHT.

Legacy—Receipt—Legatee not bound to execute release—Costs.

J. B., being the owner of certain lands, by his will gave his son M. B. a legacy of $150, and charged it on the land which he devised to his son W. B., an infant, with a provision that his son J. B. should occupy it during the minority of W. B., and pay the legacy. The land was so occupied and the legacy paid, and a receipt for its payment taken. W. B. subsequently sold the land to T. B., and T. B. sold it to J. C., who retained $150 of the purchase money because the legacy was not released, but by an agreement agreed to pay T. B. the $150 as soon as he should furnish release, duly executed by M. B. The right to receive the $150 under this agreement, and any right that he had to get this release was assigned by T. B. to M. B., M. B. then tendered a release for execution to T. B., who declined to execute it, and upon a suit being brought to compel him so to do, it was

Held, that although the plaintiff was entitled to a judgment declaring that the legacy was paid, which might be registered; still, as the defendant had done no wrong, and had given a receipt for the legacy when it was paid, he was not compelled to sign anything else, and should not be punished by being ordered to pay the costs for not doing that which he was not bound in law to do.

The purchaser should not have objected to the title on account of the legacy, if there was proof of its being paid.

T. H. Bull, for the plaintiff.

No one appeared for the defendant.

Proudfoot, J.] [Nov. 8.

CORE v. THE ONTARIO LOAN AND DEBENTURE CO.

Mortgage—Marshalling securities—Registry Act—Prior equity.

W. W., sen., owned north half Lot 14. and two lots in Village of Blyth, and applied for a loan to the above Loan Company, who required additional security. Accordingly, by mortgage of August 16th, 1880, W. W., sen., and W. W., jun., joined in a mortgage to the company, the

former mortgaging the above lands, and the latter the south half of Lot 16, Con. 8, and it was agreed in the mortgage that the mortgagors should have the right to have the south half of Lot 16 released when $500 were paid, the village lots when $600 were paid, or both the said properties when $1,100 were paid. The mortgage was to secure $4,000, and the evidence showed, though not so expressed in the mortgage, that W. W., jun., was only surety for his father, and received no part of the mortgage money. By deed of June 13th, 1882, W. W., jun., in consideration of $500, sold the south half of Lot 16 to J. W., subject to $500 to the Loan Company. By deed of February 14th, 1883, W. W., sen., having borrowed from him $1,000 upon the security of the north half of Lot 14, granted the same to the plaintiff in fee, "Subject, however, to a mortgage of $4,000 to the Loan Company, to be divided between the following lands, as follows: $2,900 on the north half of Lot 14, $500 on the south half of lot 16, and $600 on the two village lots." This deed was registered before the deed to J. W., of which the plaintiff had no notice. Default being made under the mortgage of August 16th, 1880, the company, on April 4th, 1881, sold the lands, when the village lots fetched $300, and the north half of Lot 14 $4,450, which was more than enough to pay the company, but the surplus was not enough to pay the plaintiff.

The plaintiff now brought this action, claiming a lien on the south half of Lot 16 to the amount of $500 at least, and a proportionate part of the arrears of interest due to the company on their mortgage towards satisfaction of the balance due to him after the application of the surplus proceeds of the sales already paid, and, if necessary, to stand in the place of the Loan Company, with all their rights and powers under their mortgage to the extent of $500 and interest, maintaining that the company, having had security on several parcels of land, should not be allowed to realize their debt out of the one parcel on which he had alone security, and that the equitable right or interest of J. W., being unregistered, could not prevail against his subsequent registered equity without notice.

Held, that the plaintiff was not entitled to the lien claimed. If the Registry Act could in any case apply with regard to the equities now in question it certainly could not apply here, for the plaintiff was not a grantee of the south half of lot 16 at all, and J. W.'s equity was to have that land relieved from the mortgage, the debt having been paid by the sale of the land of the principal debtor. It is essential to the doctrine of marshalling, not only that there should be two creditors of the same person, but that one of them should have two funds belonging to the same person to which he can resort; and marshalling is not enforced to the prejudice of third parties. The case shortly resolved itself into the case of two equities of which the plaintiff's was the later. He was entitled to the surplus in the hands of the Loan Company, and J. W. was entitled to have the mortgage to the company released as to the south half of Lot 16.

The American cases are equally clear that a court of equity will not compel a creditor to proceed against the estate of a surety, in order to leave the principal's estate free for the discharge of his debt.

Quaig v. *Sculthorpe*, 16 Gr. 449, cited as decisive of the present case.

PRACTICE.

Ferguson, J.] [June 16.

McMILLAN v. WAUSBURGH.

Examination of witnesses pending motion—Chy. G. O. 266.

On an appeal from a taxing officer.

Held, overruling *Monaghan* v. *Dobbin*, 18 C. L. J. 180 that Chy. G. O. 266 has not been superseded by rule 285, O. J. A., and is still in force.

Masten, for the appeal.

Hoyles, contra.

Mr. Dalton, Q.C.] [September 13, 19.
Osler, J. A.]

CLARK v. RAMA TIMBER TRANSPORT CO.

Security for costs—Class suit.

An application by the defendants for security for costs from the plaintiff on the ground that the latter was without means and merely a nominal plaintiff suing for the benefit of others.

It appeared that the plaintiff asserted a cause of action in which no one but himself was interested, viz.: a claim for damages for the flooding of the land leased by him but that there were several other persons interested in establishing the liability of the defendants for flooding their lands by the same overflow of which the plaintiff complained and that these persons had agreed to contribute to the plaintiffs costs of this suit. It was alleged by the defendants, but denied by the plaintiff, that he had not means sufficient to pay the costs of the action if it was decided against him.

Held, that the defendants were not entitled to security for costs.

Clark v. *St. Catharines*, 10 P. R. 205, distinguished.

Arnoldi, for motion.

Holman, contra.

[October 20.

KEEFER v. MCKAY.

Registry Act—Subsequent deed registered first—Clouds on title.

The policy of the Registry Act is to make the Registry Office the place where the records of title to every man's property must be registered and to make the registration of instruments notice. To enforce that policy it provides that a subsequent deed from the same grantor shall, on registration, divest a grantee of an estate conveyed by a prior but unregistered deed, and vest such estate in the subsequent grantee.

The registration of any instrument which casts doubt or suspicion on a title, or which embarrasses the owner in maintaining his estate, or in disposing of his property, is a cloud upon the title against which the courts will relieve. And in such case it is sufficient if there be a registered instrument apparently valid on its face accompanied by a claim of title, although an intruder on the claim of title, which is likely to work mischief to the real owner.

It is a principle of Courts of Equity that they will not sell or enforce a sale of lands with a cloud on the title or where the title is too doubtful to be settled without litigation, or where the purchase would expose the purchaser to the danger of litigation.

A purchaser at a sale of lands, held under an order of court, objected to the title on the ground that four deeds had been registered against half of the lot by parties who apparently intruded the deeds on the registered title, one of which parties notified the purchaser that he claimed some interest in the lands:

Held, that such registered deeds were clouds upon the title and that the purchaser could not be compelled to take such title.

Osler, J. A.] [October 29

THE QUEEN v. BASSETT.

Conviction under the Vagrant Act.

A motion for the discharge of the prisoner who was convicted by the Toronto Police Magistrate and sentenced to five months imprisonment under the Vagrant Act.

Held, that the Vagrant Act does not warrant an arrest much less a conviction on mere suspicion of dishonest intentions or suspicion of vagrancy. Before a person can be convicted of being a vagrant of the first class named in the Act ("all idle persons who not having visible means of maintaining themselves live without employment") he must have acquired in some degree a character which brings him within it, as an idle person who having no visible means of maintaining himself, *i.e.*, not "paying his way" or being apparently able to do so yet lives without employment.

The prisoner was arrested at the Union Station, Toronto, having been pointed out to the police by some railway officials as a suspicious character, and had upon his person when arrested two cheques, one for $1.700, the other for $900, which were sworn to be such as are used by "confidence men," a mileage ticket (nearly used up) in favour of another person, and $8 in cash. He vouchsafed no explanation of the cheques or the ticket and gave no information about himself. Under these circumstances an order was made for the prisoner's discharge.

Morison, for the prisoner.

J. R. Cartwright, for the Attorney-General.

Mr. Hodgins, Q.C.] [December 14, 1883. October 30, 1884.

CLARK v. UNION FIRE INSURANCE CO.

Solicitor and client—Taxation—Practice—Retainer—Jurisdiction of Master—Shareholder.

In proceeding on a judgment for winding up a company, the former solicitor brought in a claim for bills of costs alleged to be due him which the Master referred to one of the taxing officers to tax.

Held, that the Master had authority to direct such reference.

The taxing officer has a discretion as to allowing the attendance of parties claiming a right to attend on such taxation and such discretion will not be lightly interfered with.

On such a reference the taxing officer gives his opinion as to whether the fees and charges claimed should be allowed or disallowed and on that opinion the Master makes his adjudication.

The taxing officer's allocatur is sufficient proof that the business charged for was done by the solicitor. The rule requiring special circumstances to warrant the re-opening or taxation of a bill of costs does not apply where the bill has been delivered after a company has been ordered to be wound up.

The general manager of a company had authority to do acts which occasionally required legal advice:

Held, that he had implied authority to retain a solicitor whenever in his judgment it was prudent to do so, but that such authority ceased on the suspension of the company's license.

Where the directors of a company have power to appoint officers and agents and dismiss them at pleasure.

Held, that their appointment of a solicitor need not be under the corporate seal. Where a solicitor had instructions to defend a suit which was discontinued and a new one for the same cause of action was commenced:

Held, that the original retainer to defend continued in the new suit.

A solicitor for a company is entitled to charge such company for special work and journeys undertaken at the request of individual directors and general managers.

In proceeding under a judgment for the winding up of a company the Master has the same jurisdiction to try claims for unliquidated damages arising out of breach of contract as he would have in an administration proceeding.

Where a conditional agreement to take shares in a company is broken the shareholder is freed from liability on such shares. But where a collateral agreement to take such shares is broken by the company the shareholder is liable on such shares but has a right of action for indemnity or damages against such company.

Boyd, C.] [Nov. 3.

IN RE WALKER, A SOLICITOR.
WALKER v. ROCHESTER.

Taxing solicitors' bill—Effect of payment—Special circumstances.

Upon an appeal from the order of the Master in Chambers directing the taxation of the bills of costs which were sued on in the action *Walker* v. *Rochester*.

Held, that after payment the Court will not disturb the bill on the ground of overcharge unless it appears to be a case of gross and exorbitant claim amounting to fraud. But before payment it is enough if the items are unusual or more than ordinarily large so as to require justification and if no such explanation is furnished then a reference will be ordered.

The following circumstances were held not to be special circumstances which would entitle the client to tax the solicitor's bills after a year from the delivery because these circumstances could be as well considered at the trial of the action as on a reference to a taxing officer. (1) That the bills sued on contained certain items included in the other bills paid by the client. (2) That some work was charged for which never was done. (3) That a payment of $200 on account by the client was disputed.

Held, however, that the conjunction of the following circumstances, viz.; that the relationship of solicitor and client was continued after delivery of the bills; that there was an offer by the solicitor to make a substantial deduction from the bills sued on, and, that there were items of apparent overcharge as to which no explanation was offered by the solicitor, supported the order for taxation.

Holman, for the appeal.

Clement, contra.

Mr. Dalton, Q.C.] [Nov. 5.

BROWN v. NELSON.

Interpleader—Fi. fa. goods—Shares.

A sheriff having seized certain shares of the capital stock of a public company under a writ of *fi. fa.* goods and having received notice of a claim to the shares made by an assignee of the judgment debtor applied for the usual interpleader order.

Held, that goods and chattels include "stock" for all the purposes of the Execution Act, and of the clauses for relief to the sheriff by interpleader.

Interpleader order made.

Aylesworth, for the sheriff.

C.R. W. Biggar, for the execution creditor.

Wallace Nesbitt, for the claimant.

Mr. Dalton, Q.C.] [Nov. 8.

BROWN v. NELSON.

Set-off—Costs—Solicitor's lien.

A motion by the defendent to set-off so much of the money recovered by the defendent against the plaintiff on defendant's counter-claim as will cover the costs adjudged to the plaintiff on his recovery against the defendant on his statement of claim.

The plaintiff's solicitors asserted a lien for costs which they contended should operate to prevent the set-off.

Held, under the circumstances that the plaintiff's solicitors had no right to interpose his interests to prevent equity being done between the principal parties.

Set-off ordered.

C. R. W. Biggar, for the motion.

Wallace Nesbitt, contra.

Master's Office.]

MERCHANTS' BANK v. MONTEITH.

Imp. Act 38 *Geo.* 3 *c.* 87—*R. S, O. c.* 40, *sec.* 34 *and* 35, *c.* 46, *sec.* 32—*Infant—Administration—Nullity—Suits by an infant—Liability for costs.*

The 6th sec. of 38 Geo. 3. c. 87 (Imp.) prohibiting the grant of probate to infants under the age of twenty-one is in force in Ontario, either as a rule of decision in matters relating to executors and administrators (R. S. O. c. 40, sec. 34 and 35) or as a rule of practice in the Probate Court in England (R. S. O. c. 46, sec. 32).

An infant cannot lawfully be appointed administrator of an estate; and therefore a grant of probate or of letters of administration to an infant is void and confers no office and vests no estate in such infant. An infant had been appointed administrator of an estate and various suits had been brought in his name on behalf of such estate.

Held, that being an infant he was incapable of bringing suits in his own name or of making himself or the estate he assumed to represent liable for the costs of such suits.

Sections 57 and 58 of the Surrogate Act (R. S. O. c. 46) protect parties *bona fide* making payments to an executor or administrator notwithstanding any invalidity in the probate or letters of administration, but they do not protect payments made to third parties by an infant assuming to act as administrator of the estate. See *ante* p. 377.

FLOTSAM AND JETSAM.

ORIGIN OF TRIAL BY JURY.—1. Phillips and Probst maintain that it originated among the Welsh, from whom it was borrowed by the Anglo-Saxons.

2. Coke, Von Maurer, Phillips, Selden, Spelman and Turner, regard it as having been original with the Anglo-Saxons.

3. Bacon, Blackstone, Montesquieu, Nicholson and Savigny hold that it was imported from *primitive* Germany.

4. Konrad Maurer thinks it is of *North* German origin.

5. Warmius and Warsaae agree that it was derived from the Norsemen through the Danes.

6. Hicks and Rees thinks it came from the Norsemen, through the Norman conquest.

7. Daniels says the Normans found it existing in France and adopted it.

8. Mohl thinks it derived from the usages of the Canon law.

9. Meyer thinks it came from Asia by way of the Crusades.

10. Maciejowski says it was derived from the Slavonic neighbours of the Angles and Saxons.

11. Brunner, Palgrave and Stubbs derive it from the Theodasian Code through the Frank Capitularies.

12. Hume says that it is derived from the decennary judiciary, and is "an institution admirable in itself, and the best calculated for the preservation of liberty and the administration of justice that was ever devised by the wit of man."

Law Society of Upper Canada.

OSGOODE HALL.

TRINITY TERM, 1884.

During this term the following gentlemen were called to the Bar:—Samuel Clement Smoke, William Durie Gwynne, Stephen Frederick Washington, Thomas Thomson Porteous, Alexander Duntroon McIntyre, Matthew Munsell Brown, William Grant Thurston, Thomas Edward Williams, John Stewart, Napoleon Antoine Belcourt, George Washington Field, Francis Henry Keefer, Douglas Armour, Flavius Lionel Brooke, Alexander Carpenter Beasley. The names are arranged in the order in which the candidates were called.

The following gentlemen were admitted as students-at-law:—Graduates, James Morris Balderson, Alexander Robert Bartlett, Joseph Hetherington Bowes, Samuel William Broad, George Filmore Cane, John Coutts, George Henry Cowan, Robert James Leslie, Archibald Foster May, John Mercer McWhinney, James Albert Page, Horatio Osmond Ernest Pratt, Thomas Cowper Robinette, Robert Karl Sproule, Ernest Solomon Wigle, James McGregor Young, Roderick James Maclennan, George Frederick Henderson, Samuel Walter Perry, Richard S. Box, William Wallace Jones, William Louis Scott, Edmund Kershaw. Matriculants: Henry Herbert Johnston, Albert E. Baker, Herbert Holman, Charles D. Macaulay, George Albert Thrasher, John Williams, Seymour Corley. Junior Class: Henry Elwood McKee, Edward Lindsey Elwood, Walter Scott MacBrayne, Edwin Owen Swartz, Joseph Frederick Woodworth, Owen Richards, William Allan Skeans, Richard Lawrence Gosnell, Frederick Ernest Chapman, Nathaniel Mills, James McCullough, jun'r., John McKean.

The following gentlemen passed the examination of Articled Clerks:—John Alfred Webster, Alexander William McDougauld.

BOOKS AND SUBJECTS FOR EXAMINATIONS.

Articled Clerks.

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

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

Students-at-Law.

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

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

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

Translation from English into Latin Prose.

MATHEMATICS.

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

ENGLISH.

A Paper on English Grammar.

Composition.

Critical Analysis of a Selected Poem:—

1884—Elegy in a Country Churchyard. The Traveller.

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

HISTORY AND GEOGRAPHY.

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

Optional subjects instead of Greek:

FRENCH.

A paper on Grammar,

Translation from English into French prose.

1884—Souvestre, Un Philosophe sous le toits.

1885—Emile de Bonnechose, Lazare Hoche.

or NATURAL PHILOSOPHY.

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

First Intermediate.

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

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

Second Intermediate.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Gov-

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ernment in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

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

For Certificate of Fitness.

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

For Call.

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

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

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

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

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

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

5. The Law Society Terms are as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

15. A Student-at-Law is required to pass the First Intermediate examination in his third year, and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second year, and his Second in the first six months of his third year. One year must elapse between First and Second Intermediates. See further, R.S.O., ch. 140, sec. 6, sub-secs. 2 and 3.

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

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

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

FEES.

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

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