Canada Law Journal.

VOL. XVIII. FEBRUARY 15, 1882. No. 4.

DIARY FOR FEBRUARY.

17. Fri.... William Osgoode, first C. J. of U. C., died 1824.
18. Sat .... Hilary Sittings end.
19. Sun.... *Quinquagesima Sunday.*
21. Tue.... Shrove Tuesday. Supreme Court Session begins.
22. Wed.... Ash Wednesday. First day of Lent.
26. Sun.... *Quadragesima Sunday.*
27. Mon.... Sir John Colborne, Administrator, 1838.
28. Tue.... Indian Mutiny began, 1857.

TORONTO, FEB. 15, 1882.

THE Attorney-General has introduced an Act for simplifying the practice of conveyancing and amending the law of property. It seems to be a reprint, to a great extent, of Lord Cairns' Act, now in force in England. It reaches us too late for further notice at this time.

CHIEF JUSTICE WILSON has held, in *Re Squier* (see *post* p. 74) that the Court of Impeachment for the trial of complaints against County Judges is still in existence, the Act of the Local Legislature assuming to abolish that Court being *ultra vires.* This was the view expressed by an able contributor in an article published in this journal, at p. 445 of last volume.

THERE appears to be only one opinion as to the complete success of the conversazione on Tuesday last, and we may all be proud of the fine appearance both the old building and the new Convocation Hall presented. We print in another column the address presented by the Chairman of the Building Committee and Mr. Edward Blake's reply. Of course most of the credit is really due to two or three specially active members of the committee, whom it would not be difficult to single out. However, like the Oxford man who, in his Divinity examination, was asked to give the names of the major and minor prophets,—we object to invidious distinctions. It is to be hoped so long a period will not again elapse before the Law Society feel justified in giving another "Jamboree"—to use a word which has now received judicial authority in this connection. Possibly the accession of an Edward VII. or an Albert I. to the throne of the British Empire, may afford the next occasion.

THE GUITEAU TRIAL—JUDGE COX'S CHARGE.

It is interesting to read Judge Cox's charge to the jury in the Guiteau trial, in connection with the chapter on "Law and Insanity," or the legal view of responsibility in regard to insanity, in Dr. Maudsley's "Responsibility in Mental Disease," published among the International Science Series. The writer comments severely on the mistaken views of the subject taken by the Courts, and on the answers given to the House of Lords by the Judges in connection with the McNaughton trial in 1843. He gives the substance of those answers thus: "To establish a defence on the ground of insanity, it must be clearly proved that at the time of committing the act the party accused was labouring under such a defect of reason from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong." To this, so far, Dr. Maudsley does not greatly object, for he admits it will, if strictly applied, cover and excuse many acts of insane vio-

lence, for of few insane persons who do violence can it be truly said that they have a full knowledge of the nature and quality of their acts at the time they are doing them. But at the same time he observes that it is calculated to mislead a jury, who are very likely to be misled by the existence of a general knowledge of right and wrong in the accused person, to judge wrongly concerning his knowledge of the particular act at the time. He, however, objects strongly to a formidable exception by which the Judges limited its application. In reply to the question, "If a person, under an insane delusion as to existing facts, commits an offence in consequence thereof, is he thereby excused?"—the Judges declared that "on the assumption that he labours under partial delusion only, and is not in other respects insane, he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real." "Here," says Dr. Maudsley, "is an unhesitating assumption that a man, having an insane delusion, has the power to think and act in regard to it *reasonably*; that at the time of the offence he ought to have and to exercise the knowledge and self-control which a sane man would have and exercise, were the facts, with respect to which the delusion exists, real; that he is, in fact, bound to be reasonable in his unreason, sane in his insanity." These answers of the Judges to the questions put to them by the House of Lords have, he asserts, been unanimously condemned by all physicians who have a practical knowledge of the insane, while the Judges of other countries condemn them with equal earnestness; but since that time the law as relating to insanity in a criminal trial has, in England, been laid down in conformity with their conclusions. The American Courts, however, he asserts, which having inherited the Common Law of England, at first followed docilely in the wake of the English Courts, are now exhibiting a disposition to emancipate themselves from an authority which they perceive to be founded on defective and erroneous views of insanity, and a desire to bring the law more into accordance with the results of scientific observation; and amongst other extracts from the American reports, he cites, as an example, the following passage from the instructions of Chief Justice Perley to the jury, in the case of *State* v. *Pike*: He told the jury that they should return a verdict of not guilty, "if the killing was the offspring of mental disease in the defendant; that neither delusion nor knowledge of right and wrong, nor design or cunning in planning and executing the killing, and in escaping or avoiding detection, nor ability to recognize acquaintance, or to labour and transact business or manage affairs, is, as a matter of law, a test of mental disease; but that all symptoms and all tests of mental disease are purely matters of fact to be determined by the jury." Finally Dr. Maudsley expresses his opinion that the question which will probably be submitted to jury, when the matter is correctly understood, will be: "Was the act the offspring or product of mental disease?" And it will be seen that to lay down any so-called test of responsibility founded on a supposed knowledge of right and wrong, is, as Judge Ladd remarked in the American case of *State* v. *Jones*, "an interference with the province of the jury, and the enunciation of a proposition which, in its essence, is not law, and which could not in any view safely be given to the jury as a rule for their guidance, because, for ought we can know, it may be false in fact."

The reader of Judge Cox's charge in the Guiteau case will see that he seems, as it were, to hover between the more specific form of question for the jury, which accords with the English rule, and the more general form of question which Dr. Maudsley advocates. Thus he said in one part of his instructions:—

"If the accused had sufficient use of his reason to understand the nature of the act with which he was charged, and to understand it was wrong for him to commit it, he was criminally responsible for the act, whatever peculiari-

ties might be shown by him in other respects. On the other hand, if his reason were so defective in consequence of brain disease, that he could not understand what he was doing or could not understand that what he was doing was wrong, he ought to be treated as irresponsible."

But elsewhere we find him putting the matter as follows:—

"Whenever this partial insanity was relied on for a defence, it must appear that the crime charged was the product of a delusion or other morbid condition, and connected with it as the effect with the cause, and that it was not the result of sane reasoning which the party might be capable of, notwithstanding his limited and circumscribed disorder. Assuming that infirmity of the mind had a direct influence on the crime, the difficulty was to fix the character of the disorder which fixed responsibility or irresponsibility in law. The test was whether the conduct of a man and his thoughts and emotions conformed with those of persons of sound mind, or whether they contrasted harshly with those.

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"The subject was treated to a limited extent in judicial dicisions, but more was learned from works on medical jurisprudence and expert testimony.

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"The question for the jury to determine was, What was the condition of the prisoner's mind at the time this project was executed? If he were sufficiently sane then to be responsible, it mattered not what might have been his condition before or after. Still, evidence had been properly admitted as to his previous and subsequent condition, because it threw light prospective and retrospectively on his condition, inasmuch as these disorders were of gradual growth and indefinite continuance. If he were insane shortly before or shortly after the commission of the crime, it was natural to infer that he was so at the time. But still all the evidence must centre around him when the deed was done. The jury had heard a good deal of evidence respecting the peculiarity of the prisoner through the long period of time before this occurrence, and it was claimed on the part of the defence that he was during all this time subject to delusions. The jury must determine whether at the time the act was committed the defendant was labouring under any insane delusion prompting and impelling him to do the deed."

It certainly does seem clear that the question whether a man is sufficiently sane to be rightly held responsible for any particular act committed by him, is a question of fact and not of law; that the correctness with which this question of fact can be answered must depend on the stage which scientific knowledge has attained to at the time of answering; and that like other questions of fact, it should be left to the decision of the jury, aided by expert testimony, and unhampered by what an American Judge calls defective medical theories usurping the position of common law principles.

RECENT DECISIONS.

We can now at length proceed to consider the cases in the voluminous December Number of the Chancery Division Law Reports, Vol. 18, pp. 297—710.

The first case in *re Knapman*, *Knapman* v. *Wreford*, concerning costs incurred by an executor in a Probate action brought by legatees, has been already noted among our recent English Practice Cases, 17 C. L. J., 414, the note there being taken from 45 L. T. 102 where the case is also reported.

CHARITY—CY-PRES.

Of the next case, *re Campden Charities*, p. 310, it is sufficient to say that it illustrates the doctrine of cy-pres as applied to the application of a charitable bequest under the altered circumstances brought about by a great lapse of time.

RAILWAY DEBENTURES—PRIORITY.

The next case *Harrison* v. *Cornwall Minerals Ry. Co.*, p. 334, was a special case to settle the priorities of debenture stock issued by a railway company at different periods under three several special acts.

ADMINISTRATOR—FOREIGN ASSETS—COSTS.

In *Eames* v. *Hacon*, p. 347, the plaintiff had been appointed administrator in Ireland, and

part of his intestate's assets being in India, he sent out a power of attorney to F. & Co., a firm there, who procured letters of administration to be granted to them there for the use and benefit of the plaintiff, received the Indian assets, paid the Indian debts, and remitted the surplus to their agents in England. The Irish letters having been duly sealed in England, the Court of Appeal held that the said agents were bound to hand over the fund to the plaintiff, and could not require the concurrence of the next of kin, since the latter had not taken any proceedings to prevent the plaintiff from receiving the assets. Jessel, M. R., said: "Assets collected by the agent of a trustee have often been intercepted in the agent's hands by the *cestuis que trust*, but if they take no steps for that purpose the agent is safe in paying the trustee. So here, because F. & Co. might be sued by the next of kin, it does not follow that they cannot, when they have not been sued, hand over the money to the plaintiff. The two propositions are not correlative;" and the money in question being admittedly an ascertained surplus, the principal administrator was held entitled, as is generally the case, to call on the limited administrators to pay it over. Moreover, though the defendants, the limited administrators had acted under advice, yet as they had chosen to raise technical objections as to so small a sum, they were ordered to pay costs.

CONSTRUCTION OF DEEDS—COVENANTS.

Of the next case, *Dawes* v *Tredwell*, p. 354, it seems only necessary to say that it is one on the construction of deeds, decided on the principle that where the operative part of deed is clear, a recital cannot control it, and that it illustrates the rule that "where you have such words as 'it is hereby agreed and declared between and by the parties to these presents,' that some one will do an act or make a payment, and that some one is a party to the deed, it is a covenant by him with the others, not a covenant by all of them;" (per Jessel, M. R.) And so a husband having thus covenanted in a marriage settlement to do all things necessary to bring after-acquired property of the wife into settlement, it was held this covenant by him could not be held to relate to property over which he had no power and in which he had no interest, and that the wife, therefore, was not bound to bring into settlement property given to her separate use.

SPECIFIC PERFORMANCE—DOUBTFUL TITLE.

We can now proceed to *Palmer* v. *Locke*, p. 381, which was an action by the vendor for specific performance of a contract for the sale of a certain residuary personal estate, which had been paid into Court. The vendor failed to comply with a requisition by the purchaser for particulars as to a certain stop order obtained by one E. and for the discharge of E's interest by the vendor, saying that he did not know the required particulars and that his deed over-rode E.'s incumbrance. But the Court of Appeal refused to force the title on the purchaser on the general doctrine "as laid down by a long series of decisions of Judges of the greatest eminence," determined before, but explained in *Pyrke* v. *Waddingham*, 10 Ha. 1, that: "When the Court finds, according to the principles explained in that case, that there is a question open to doubts of the kind there mentioned, and that a title ought to be forced upon the purchaser, it is neither necessary, nor generally convenient or desirable that the Court, whatever may be the opinion it has formed upon the question, and on the materials presented in a suit for specific performance, should think that that should conclude all questions as against persons who are not before it;" (per Lord Selborne, L.C.) Therefore the Court held it was enough to consider whether there were not serious grounds for doubting that the title of E.'s mortgage ought to be considered to be a thing in which the purchaser had no concern, and in the opinion of the Court there were such serious grounds.

Recent Decisions.

TRADE MARK—TENDENCY TO DECEIVE.

The next case, the *Singer Manufacturing Co.* v. *Long*, p. 395, has a special interest at the present moment from the fact that another of the same kind, on a bill filed by the same plaintiffs is awaiting hearing before Ferguson, V. C., in the Chancery Division. In the English case the plaintiffs, who use the word "Singer," as a designation of all the sewing machines manufactured by them accompanied by specific words to distinguish different kinds, but who have no longer any patent rights in connection with such manufacture, sought to restrain the defendant from selling sewing machines, which he described in his invoices, price lists and circulars as being made on the Singer system and the like, with explanations showing that they were made in Berlin. The question of law was a simple one, the judgments being mainly concerned with discussing the question of fact. In the Court of Appeal, James, L. J., says, p. 412:—"Upon the question of law which is involved, there is, to my mind, no dispute whatever. I have often endeavoured to express what I am going to express now, * * * that is, that no man is entitled to represent his goods as being the goods of another man: and no man is permitted to use any mark, sign or symbol, device or other means, whereby, without making a direct false representation himself to a purchaser, who purchases from him, he enables such purchaser to tell a lie or to make a false representation to somebody else who is the ultimate customer. That being, as it appears to me, a comprehensive statement of what the law is upon the question of trade-mark or trade designation, I am of opinion that there is no such thing as a monopoly or a property in the nature of a copyright, or in the nature of a patent or in the use of any name. Whatever name is used to designate goods, any body may use that name to designate goods: always subject to this, that he must not, as I said, make directly, or through the medium of another person, a false representation that his goods are the goods of another person. That I take to be the law." The other two judges of Appeal, Cotton, L. J., and Lush, L. J., concurred in this statement of the law, the former pointing out, as does also Bacon, V. C., in the Court below, that there was no necessity to show any fraudulent intention in the use of circulars, etc., complained of. "Who ever heard," says Bacon, V. C., p. 403, "that a Court of Common Law had any jurisdiction over 'moral' fraud, for it is moral fraud which we are talking of now. In an action of trespass on the case the Court has nothing to do with fraud." But it will be observed that the Court of Appeal herein dissent from Bacon, V. C., in so far as he says, p. 402,—"The plaintiffs say, 'We are the owners of property, the defendant has injured our property, and we desire that the law should redress that injury.' That is the whole case;" and adds,—"I take it to be very old law—I do not think it is necessary to refer to any modern cases to show—that a man's trade mark is his property, and I do not know that his trade name differs in the character of property from his trade-mark," referring to *Sykes* v. *Sykes*, 3 B. & C., 541. Lush, L. J., says distinctly, p. 424,—that the plaintiffs have not "any right of property in the name 'Singer' in the sense in which they seek to use it, viz., in the sense that they can restrain every competitor using the word 'Singer' as descriptive of the kind of machine, however he may qualify or explain it. There is no such thing, to my mind, as a property in a word in that sense. What they have a right to require is that which is common to every manufacturer of goods, viz., that no competitor shall be at liberty to attempt to put off goods of his own manufacture as being the manufacture of another."

RAILWAYS—SALE BY TRUSTEES—POWERS.

The next case, *Peters* v. *Lewes and East Grinstead Ry.*, p. 429, raises some important questions under the Imperial Lands Clauses Act 1845, sects. 7, 9 (*cf* R. S. O. c. 165, sect. 13, and sect. 20, subs. 4), and, though unnecessary for the decision of the case,

contains some remarks by Jessel, M. R., on what he calls "a very curious point indeed," viz., as to the time during which a power of sale given by a will will last. The Court of Appeal decided in this case (i) that where trustees under a will profess to sell the land of their testators to a Railway under the provisions of the Imp. Lands Clauses Act, the validity of the sale must be determined without reference to any power of sale, which they may possess under the will of the testator; (ii) that trustees of land for *femes covertes* who are absolutely entitled for their separate use are not persons competent to contract with a railway company for the sale of the land under Sec. 7 of the said Act (R. S. O. c. 165., s. 13); (iii) that where trustees selling to a railway appoint one of themselves as surveyor to value the land under the Act, the sale will be invalid. The principal judgment is that of Jessel, M. R., who as to (ii) observed, p. 437, after reading the section empowering trustees to sell and convey,—"It is on behalf of a *cestui que trust* under disability—a person who cannot convey—and that is the reason why nobody has dreamt of applying it to a bare trustee for a man. The same thing must apply to a bare trustee for a woman who is entitled for her separate use free from restraint on anticipation, etc."; while as to (iii) he says that the whole theory of the Act is that an independent person is to be called in.

In discussing the point as to the time during which a power of sale given by a will will last, the M. R. observes, that in order to limit powers of sale, though framed in general terms, so as to bring them within the general rule,—that you cannot have a power of sale to change the nature of the interests limited by the instrument so as to exceed the limit of time prescribed by the rule against remotness or perpetuity,—the Courts have decided that these powers are limited by the nature of the limitation sustained in the settlement or will, so that when, by reason of the expiration or cesser of the limitations contained in the settlement the absolute interests come into existence, then the power is considered to be at an end. But he adds, although a general power, exerciseable at any period, of course, would be bad in law, there may be a valid power even where there are nothing but absolute limitations of interests given in the first instance, or in other words, where the power is to take effect on the coming into existence of the absulute limitations, and this though there be a preceding life estate. Thus a limitation to a person for life, and after the death of the tenant for life, upon trust to divide among my twelve children, with power, for the purpose of division, to sell, would not be void, for the trustees are bound to make a division within reasonable time, the power "is limited from the nature of the purposes for which it is to be used." We may add that the very next case affords an example of an invalid power of sale; (see page 446-47).

WILL.—GIFT TO CLASS.—REMOTENESS.

Of the next case, *Goodier* v. *Johnson*, p. 441, it is only necessary to say that the Court of Appeal there decided that a gift to all the children of A. and B., and the issue of such as may be dead at the time of distribution, could not—at any rate when the other clauses of the will were considered—be treated as a gift to such of the children as are then living, and the issue of such of them as may be then dead,—but that it was a gift to all the children of A. and B., with a gift over by way of substitution of the shares of such of them as might die before the period of distribution leaving issue. And we may add the case also illustrates the rule that when the gift over of any share is void for remoteness, this does not affect the original gift.

SOLICITOR AND CLIENT—MORTGAGEE IN POSSESSION.

Cockburn v. *Edwards*, p. 449, illustrates the care a solicitor must use where he lends money to a client on mortgage, not to draw the mortgage deed in an unusual form without fully explaining it to the client. All the judges of the Court of Appeal deprecate the practice of solicitors lending money to clients.

In this case the power of sale in the mortgage did not contain the usual proviso that notice should be given, or the interest should be three months in arrear; and as it was not shown that the mortgagee explained to his client that the power was not in the usual form, it was held (i) that a sale under the power was an improper sale unless it could be shown that some interest was three months in arrear; and (ii) also that the fact that the mortgagee had received rents to an amount more than sufficient to pay the interest, would not by itself prove that there was no interest in arrear if no appropriation was shown to have been made. As to the first point the M. R., indeed, expresses an opinion, (p. 456,) that as the client had a right to be informed what the terms were upon which the estate could be sold, the absence of such information was of itself sufficient to make the sale improper, whether there was interest in arrear or not; while as to (ii), he says:—"A mortgagee in possession first deducts expenses, and then what remains goes against principal and interest, but till an account is taken there is no set-off, there is no appropriation of the rents," and he declares the dictum wrong in *Brocklehurst* v. *Jessop*, 7 Sim. 438, that receipt of rents is *prima facie* payment. It was also held (iii) that the difference between party and party costs, and solicitor and client costs of the present action could not be given to the plaintiff by way of damages, as Brett, L. J., says, p. 462:—"The law considers the extra costs which are disallowed on taxation between party and party as a luxury for which the other party ought in no case to be liable, and they cannot be allowed by way of damages."

Passing by *Parker* v. *Wells*, p. 477, a case on the subject of discovery, which we noted among our recent English Practice cases, *supra* p. 44, we reach *Ex parte Best, in re Best*, p. 488.

BANKRUPTCY—PRESENCE OF DEBTORS AT CREDITORS' MEETING.

Here it was decided that the meaning of section 126 of the Imp. Bankruptcy Act, 1869, which requires that "the debtor, unless prevented by sickness or other cause satisfactory to such meetings, shall be present" at the meetings of his creditors to consider a proposed composition, (compare Insolvent Act, 1875, Dom. s. 23), is that the debtor must, as a rule, be personally present at such meetings, and that it is not sufficient that he should be in a room immediately adjoining that in which a meeting is held, ready to be called in if the creditors wish to examine him, even though the creditors are informed of this.

Ex parte Williams, p. 495, is another case under the Bankruptcy Act, in which it was held that when the Registrar is satisfied, either from the small amount of composition offered or otherwise, that resolutions accepting a composition have been passed in the interest of the debtor, and not for the benefit of the creditors, it is his duty to refuse to register them, under s. 126 of the Imp. Act, 1869, even though no creditor opposes the registration. It seems well to note this decision as it might be held to apply to the case where the Court or Judge is applied to to confirm a proposed composition and discharge, under s. 54 of our Insolvent Act, 1875.

POWER OF APPOINTMENT—WILLS ACT.

The next case *Freme* v. *Clement*, p. 499, raises "an entirely new point," and one which the M. R. consequently decides upon principle, "that is, principle to be extracted from former decisions, from the general rules of the Court, and from the nature of the law." Without attempting to sketch his somewhat elaborate reasoning, it seems sufficient to say that the new point thus decided is as follows:—An instrument exercising a special or general power of appointment over property must be executed and construed according to the rules for the time being applicable to instruments of that kind, although the power may have been created before but exercised after, an alteration in the law as to the construction and mode of execution of

such instruments. Furthermore, after going through every section which has any bearing on the question, the M. R. in this case arrives at the conclusion that, having regard to all these numerous sections, the word "devise" in the Wills Act, Imp. 1 Vict., c. 26, (R.S.O. c. 106), includes, unless a contrary intention appears by the will, a devise by way of appointment under a special or a general power conferred on the testator as to property not his own; consequently, it is so to be read in the 25th section, (R. S. O. c. 106, s. 27), and so a devise of real estate by way of appointment which fails or is void, falls into the residuary devise (if any) by way of appointment. In the course of his reasoning on this latter part of the case he observes, p. 510,—"It must be remembered that, after all, every will is in exercise of a power, not technically but generally. It is a power given by the Legislature to a man to direct what shall become of his property after his death. It is a mere power." And moreover, at p. 508, is a dictum which seems worth special note, viz.:—"If we can fairly construe an Act so as to carry out what from the nature of the case must obviously have been the intention of the Legislature, although the words may be a little difficult to deal with, and although they may possibly admit of more than one interpretation, we ought to adopt that interpretation which will make the law uniform and will remedy the evil which prevailed in all the cases to which the law can be fairly applied."

A considerable portion of the December number of the Chancery Division Law Reports still remains for review. Fortunately, however, the recent January instalments are very brief, and therefore we may hope, in our next number, to bring this review up to date.

SELECTIONS.

LORD JUSTICE LUSH.

The death of Lord Justice Lush will be regreted, both on personal and public grounds. A lawyer who has made his way to the highest judicial offices solely through his individual merits, is always looked upon with favour by his contemporaries, and none the less when he has won his success step by step in the law without the sudden upward push which politics are apt to give, and when his career has begun almost at the very bottom of the professional ladder, as an articled clerk in a solicitor's office. Besides these elements of popularity, the late judge possessed an energy and rapidity in his work, combined with a perfectly forensic habit of thought and manner, which made him one of the most desirable of judges before whom to try a cause. He could be relied upon to show no caprice or crochet, and to do his judicial work with a fairness and patience which inspired confidence in all concerned. But his businesslike capacity in Nisi Prius and in courts of practice have been lost to the public since he was more than a year ago raised to the Court of Appeal. His elevation was a well-peserved compliment, just as his admission to the Privy Council was a recognition, tardily made, of his services. But in the Court of Appeal the late Lord Justice has been looked upon, less as likely to illuminate the law by judgments which would last, than as one of the few judges able by his experience to carry the traditions of the past into the present. It would seem as if the new system were having a fatal effect on our judges. With the exception of Lord Blackburn, who was raised to the bench three years after the late Lord Justice, there is now no occupant of the bench created since 1868, and nearly half the judges have been made since the Judicature Acts came into operation. Lord Justice Lush's presence on the bench was one of the links with the past system of procedure, now rapidly becoming fewer and fainter, and his death leaves a gap impossible to fill.

The career now brought to a close has a consistency about it which makes it not difficult to estimate. If he had a fault on the bench, it was over-confidence in his opinion, and tenacity of the view once formed. When

made a serjeant, he chose *Tenax justitiæ* as his motto, and thus aptly and, perhaps, consciously expressed his own character; for *justitia* can only mean the view of law and justice held by him who is described as tenacious. This quality which rendered it sometimes difficult to dislodge an opinion formed, it might be, on insufficient knowledge—although in his way on the bench, was of the highest use to him at the bar, where the necessity for speedy action makes a rapid judgment essential. This characteristic, combined with an acknowledged superiority in practice, an excellent knowledge of law and great fluency of expression, was the cause of his success at the bar. His cases were naturally those which are known as 'heavy causes,' in which sterling qualities, as well as tact and knowledge of the world, are required, but in which verdicts are not won by eloquence or strokes of genius. On the bench his best title to fame is that he was the most perfect Nisi Prius judge of his time. His briskness was communicated to counsel, witnesses, and jurors without ever degenerating into hurry. The tenacity already referred to did not display itself in the appreciation of facts, and on points of law was tempered by complete candour when once an opinion was shown to be unfounded. Mr. Justice Lush did not possess the smallness of mind which makes some ashamed to retract an opinion. He had too much confidence in his own reputation for any such weakness. On the hundred and one collateral questions which arise in a trial of any complication, he gave his decision rapidly, and, what was more, was generally right. The ease with which he fell into the trial of criminal cases is often quoted as an example of adaptability. Until he was made a judge, Mr. Justice Lush had never, it is said, seen the inside of a Criminal Court, and yet after a very short time he was equally efficient in trying prisoners as at Nisi Prius. He saw the crucial point of the evidence with marvellous quickness, kept the case within its due bounds without any appearance of impatience, summed up shortly and clearly to the jury, and dismissed the prisoner, if there was a conviction, with a few practical words of warning. Few could discover, from seeing Mr. Justice Lush on the bench, that he was a man of deep religious feeling and a preacher at the Baptist Chapel in the Regent's Park which he attended. He knew his business too well to preach in Court; and the only point at which his religious opinions can be said to have come to the surface was in the form of words used by him in sentencing to death. Instead of the usual form at the end of the statutory sentence, 'And may God have mercy on your soul! Mr. Justice Lush would say, 'And may you be led to seek and find salvation!'

The late Lord Justice will not take the highest rank among the lawyers of the past. It was as a practical worker that he must be judged. He wrote books, but none of them have survived. A reputation as a legal writer can hardly be made on the sandbank of procedure, although a successful look on Practice may give a push to a lawyer's success. All that can be said of the late Lord Justice's books is that they were valuable in their time, but they are permanent neither in subject nor treatment. A similar observation might with some truth be made on his judgments. He did not leave his mark in any branch of the law, although he did good service in all branches. Possibly it would have been a more fitting termination to his career if he had died a judge of first instance. He was made a judge of appeal too late, when the elasticity of his mind had begun to fail. Possessed of a good knowledge of equity, he might at an earlier period of his life have done as good work in deciding Chancery appeals as he had already done in other departments of the law. But partly from the cause already assigned, and probably still more from the loss of his wife, which took place early in the year, Lord Justice Lush did not appear at home on the bench of the Court of Appeal, especially in hearing Chancery cases. Some signs of failure were visible last summer assizes, when he appeared to have lost a part of his vivacity and acuteness of perception. Recently he showed an appearance of physical breaking up, alarming to all who had known him long. The result justified the fears then felt. He has left behind him as high a reputation as any judge may wish to leave for singleness of purpose and honest and efficient labour in the high station which he filled.—*Law Journal.*

NOTES OF CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

QUEEN'S BENCH DIVISION.

Wilson, C. J.] [Jan. 27.

RE SQUIER.

County Judge—Misconduct—Commission of Enquiry—Prohibition.

Enquiries under 22 Geo. III, ch. 75, must be before the Governor General in Council, and without oath.

The authority to enquire cannot be delegated, nor enquiry under oath authorized by commission.

The commission to enquire is not a common law right where it constitutes a tribunal to hear and enquire, which does not determine.

The Act of the Ontario Legislature assuming to abolish the Court of Impeachment, created by the Consolidated Statutes of Upper Canada, is *ultra vires*.

McCarthy, Q. C., for the motion.

Robinson, Q. C., contra.

Wilson, C. J.] [Feb. 3

MORRISON V. TAYLOR.

Judgment before appearance—Rule 324, O. J. A.

Judgment under Rule 324 (a) cannot be ordered by a Judge in Chambers to be signed, but resort must be had to the Court.

Rose, McDonald & Merritt for application.

Caswell, contra.

COMMON PLEAS DIVISION.

Cameron, J.]

LIGHTBOUND V. HILL.

Judgment — Estoppel — Insolvent Act, 1875, sec. 136.

Where judgment was recovered for a debt, without fraud being charged, under sec. 136 of the Insolvent Act of 1875, the plaintiff is barred by such recovery from bringing another action charging the fraud, even although the judgment was recovered by default, for the plaintiff might, instead of signing judgment, have declared averring such fraud, and had the question tried.

Quære, whether, where an insolvent's estate vested in an assignee under the Insolvent Act before its repeal, the action for the alleged fraud commenced after such repeal, was a proceeding that might be continued thereunder under the terms of the Repealing Act, 43 Vict., ch. 1, D., or was protected by the Interpretation Act, 31 Vict., ch. 1, D.; and whether also the said sec. 136 was *ultra vires* of the Dominion Parliament?

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

Bethune, Q.C., for the defendant.

CHANCERY DIVISION.

Proudfoot, J.] [Jan. 27.

HENDRIE V. BEATTIE.

Practice—Injunction — Undertaking by plaintiff.

On a motion to vary minutes of an order nothing can be done at variance with the order pronounced, though additions or variations may be made so as to carry out the intention of the court when pronouncing it.

By arrangement between the parties an injunction was granted to restrain the defendants, the one from handing over, and the other from receiving the Toronto, Grey and Bruce Railway. In drawing up the order the defendants desired to have inserted an undertaking of the plaintiff's not to do anying with the railway, which the Registrar declined to introduce into the order. On motion to vary the minutes the Court (Proudfoot, J.) refused to insert such an undertaking, but delayed the issue of the order for ten days so as to afford the defendants an opportunity of making a substantive motion to obtain the desired relief.

E. Blake, Q.C., for plaintiff.

McCarthy, Q.C., for defendant.

Proudfoot, J.] [Jan 25.

KING V. HILTON.

Liability of one executor for acts of another.

A testator named two executors, one of whom, his brother J., took upon himself the active management of the estate with the knowledge and consent of his co-executor. J. applied

moneys of the estate to his own use, and the Master at ——— charged the co-executor C. with the amount so misapplied by J. On further directions the Court (Proudfoot, J.) reversed such ruling of the Master, and declared that C. could not be held liable for this default of J.

Winchester for plaintiff.

Hall for defendant.

Proudfoot J.] [Jan. 26.

INGLEHART v. GAGNIER.

Vendors' and Purchasers' Act—Building Society.

The plaintiffs—the president and treasurer of a building society—took a mortgage which they accepted without affixing the seal of the society thereto:

Held, that the fee was vested in these officers of the company, and they could make a good title to a purchaser at a sale under the power contained in the mortgage, and the purchaser was bound to accept such title.

Dingwall for petitioner.

Furlong for respondent Curtiss.

Proudfoot, J.] [Jan. 26.

JOSEPH v. HAFFNER.

Insolvency—Practising attorney dealing in lands.

C., a practising lawyer, dealt to a large extent in lands, and having become involved in such dealings, proceedings were taken against him in insolvency, and the defendant was appointed his official assignee. The plaintiff having some years previously purchased a mortgage created by C., instituted proceedings to foreclose the equity of redemption.

Held, that C. was not subject to the Insolvency Acts; that the equity of redemption was still vested in him notwithstanding the insolvency proceedings; and that the objection could be taken at the hearing of a motion for judgment by a party interested in a portion of the property sold to him after the creation of the mortgage.

Rae for plaintiff.

H. Cassels for defendant Dickson.

CHAMBERS.

Mr. Dalton, Q. C.] [Jan. 17.

DOCKSTADER v. PHIPPS.

Counter-claim.

Action by an infant to recover as heiress of her mother possession of certain land leased by her deceased father to the defendant for a term of years not yet expired, and for mesne profits for the occupation of the land since the death of the father. The defendant set up a years' tenancy, and alleged that the plaintiff's claim for mesne profits had been satisfied by two successive distresses for rent, and set up a counter-claim making the bailiff a party, and claiming damages against the plaintiff and the bailiff for illegal distress.

Held, on a motion to set aside the counter-claim as embarrassing, and as not so connected with the subject matter of the original action as to be a proper counter-claim within sec. 16 ss. 4, O. J. A., that the counter-claim was good. Motion dismissed with costs to the defendant in any event.

Hoyles, for motion.

Maclennan, Q.C., *contra*.

Osler, J.]

IN RE ELLIOT—(A SOLICITOR).

Solicitor—Taxation—Costs.

Where an order has been made referring a solicitor's bill for taxation, and directing the attorney to refund what, if anything, has been overpaid him, it is proper to obtain a subsequent express order for payment of the balance found due by the Master's report.

Aylesworth for the solicitor.

Shepley for the client.

Cameron, J.] [Jan. 18.

MACFIE v. HUNTER.

Interpleader—Division Courts—Execution—Chattel Mortgage.

An interpleader order had been made which directed the Sheriff to pay over to the claimants $1000 and interest, the proceeds of the sale of goods claimed by them under a chattel mortgage which was not impeached. The order directed an issue as to a second chattel mortgage held by the claimants, the execution creditors contending that it was fraudulent. A. & Co.

obtained execution in a Division Court against the execution debtors after the date of the order, and moved to vary it by directing that the amount of their execution debt should be retained by the Sheriff out of the $1000, until garnishee proceedings against the debtor in the Division Court, in which the Sheriff was garnishee, should be disposed of.

Held, that the moneys in the Sheriff's hands belonged to the claimants, the chattel mortgagees, as on a sale of the mortgaged chattels by them as mortgagees; that there being no want of *bona fides* in the mortgage, no want of formalities in the same would make it invalid as between the parties thereto, so as to entitle the debtor to claim the money secured thereby, or to entitle A. & Co thereto under their execution.

Held, that the terms "*fieri facias*" and "warrant of execution," used in the Division Court Act, are convertible terms.

Held, that the term "execution creditors," used in the 11th section of the Interpleader Act, includes parties holding executions in the Division Courts, who are therefore proper parties to, and should be called upon in, an interpleader application by a sheriff.

Aylesworth for the application.

Langton for the claimants.

Ogden for the sheriff.

Mr. Dalton;—Proudfoot, J.] [Feb. 6.

SEVEWRIGHT V. LEYS.

Appeal—Costs—Rule 427, O. J. A.

The defendant, supposing that the Christmas vacation did not count in the time for appealing from a report of the Master in Ordinary, did not bring on the appeal within the time required by Rule 427, O. J. A. Discovering the mistake before the whole time had expired, he offered to expedite matters in every way in his power.

The offer was declined. The Master in Chambers allowed the appeal on payment of costs. On appeal,

PROUDFOOT, J., affirmed the Master's judgment, but ordered the defendant to pay into Court the amount found due by the report, as a condition precedent to the appeal, and the payment by the defendant of the costs of this appeal.

Black for plaintiff.

Hoyles and *Kingsford* for defendant.

Wilson, C. J.] [Jan. 20.

NAPIER V. HUGHES.

Security for costs—Appeal—Foreign plaintiff.

Plaintiffs, who resided in England, obtained a verdict for the price of goods in defendants' possession. The defendants appealed to the Court of Appeal. Plaintiffs applied for payment out of the $300 paid in by them as security for costs on commencing the action.

Held, that as the plaintiffs were shown to have goods in the country and in the defendant's possession, the $300 should be paid out.

Howard, for plaintiffs.

Millar, for defendants.

Mr. Dalton.] [Feb. 2.

CORNISH V. MANNING.

Time, computation of—Execution—Summons.

A defendant was served on the 22nd December, and a *fi. fa.* was issued on the 10th January.

Held, that the *fi. fa.* was not isued too soon, and might have been issued on the 9th January.

Held, that in the computation of time in this case Sunday counts.

The ten days for appearance mentioned in writ of summons includes the first day.

Holman for plaintiff.

H. J. Scott for defendant.

Mr. Dalton; Boyd, C.] [Jan. 24, Feb. 1.

CASWELL V. MURRAY.

Security for costs- 29-30 Vict., cap. 42, O.

Motion for security for costs under 29-30 Vict., cap. 42, O. The statement of defence had been filed.

It was contended that a former bill had been filed and then dismissed with costs, and that this was another bill for the same cause of action.

The first bill set out that the plaintiff had been induced by the false and fraudulent representation of one Brown and his daughter, to marry the daughter, upon the supposition that her husband was dead, whereas her husband was not dead, and the plaintiff in consequence went through the form of marriage with her, and they lived together as man and wife: that the plaintiff, by the solicitation of Brown, made a

large expenditure upon property, which Brown was to convey to the plaintiff and his supposed wife: that afterwards the intended wife left the plaintiff, and the title to the property being in Brown, the plaintiff prayed that his expenditure so made upon the false and fraudulent representations of Brown, upon the said property might be declared a lien thereon, and the property sold to realize the money, etc., which should be paid to the plaintiff.

Brown died, and the second suit—this suit against his executors—contained all the same facts as to the expenditure by the plaintiff under the false representation of Brown, with the further statement that Brown agreed, after the supposed wife had left the plaintiff, that upon three years profits of the premises being left to him he would convey the land to the plaintiff, and the plaintiff claimed specific performance and prayed for an account as to the rents and profits from a specified date, of that agreement, and concluded with the general prayer for further or other relief.

The costs of the first suit had not been paid.

Arthur v. *Brown*, 3 C. C. R. 396; *Thompson* v. *Caledon*, 3 C. C. R. 15; *Smith* v. *Day*, 2 C. C. R. 456; *Lovell* v. *Wardroper*, 4 P. R. 265; *Robertson* v. *McMaster*, 8 P. R. 14; *Dean* v. *Lumprey*, 2 C. C. R. 202; Arch. P. 13 ed. p. 1153; *Pendry* v. *O'Neil*, 7 P. R. 52, were cited.

Mr. DALTON, Q.C.—Under the statute, when the same cause of action is spoken of, it means substantially the same, and it cannot make a difference that something further is added, or else the statute could always be defeated by a very simple contrivance. It seems to me that the cause of action in the second suit is substantially the same as the cause of action in the first suit. Any difference that exists I do not consider fatal. As to the time for applying I think, where the defendant has but eight days after the delivery of statement of claim from which he first learns the plaintiff's position, it is more convenient that the defendant should be at liberty to apply for security at any time before issue joined.

Order made.

On appeal.—BOYD, C.—In addition to the cases cited, referred to *Doolan* v. *Martin*, 6 P. R. 319; *Bell* v. *Cuff*, 4 P. R. 157, and *Hodgson* v. *Graham*, 26 U.C.R. 127. Without deciding as to the time for applying for security, he discharged the order made in Chambers, holding that the causes of action were distinct and different. He allowed the plaintiff the costs of the appeal and of the application below, if he undertook not to seek relief by way of lien on the land for improvements, if he fails in the main case presented by his statement of claim.

Hoyles, for defendants, (respondent).

Meek, for plaintiff, (appellant.)

REPORTS.

ONTARIO.

CHANCERY DIVISION.

(Reported for the LAW JOURNAL.)

FRANCIS V. FRANCIS.

Motion for judgment under Rule 324— Special circumstances to be shown — Conflicting affidavits.

Where there were cross actions, in one of which a sum had been reported due and a claim of set off had been disallowed, in a subsequent action brought to recover the sum disallowed, the plaintiff was *held* entitled to move for judgment under Rule 324.

But the affidavits filed on the motion being conflicting, *held*, the action must be entered for trial at the sittings for examination of witnesses, but the amount found due in the first action was ordered to be paid into Court to abide the result of the second action.

[February 7.—Proudfoot, J.

This was a cross action to recover a debt due from defendant. Another action to wind up a partnership was pending between the same parties. In taking the accounts in that action the claim now sought to be recovered had been proved and allowed at $668, in the Master's office, but disallowed on appeal from the report on the ground that it was not proper to be taken into consideration in that action, and the report was referred back; and in consequence of the disallowance of the set off, $889 was found due from the present plaintiff to the defendant as the result of the taking of the partnership accounts. The present action was then brought to recover the $668. The defendant was resident out of the jurisdiction, and the plaintiff swore that unless he was entitled to set off one

claim against the other *pro tanto* he would be in danger of losing his debt *in toto*, as the first action was shortly to be heard on further directions, and he was apprehensive he would be ordered to pay the amount found due in that action to the defendant. Affidavits were filed in support of, and in answer to the motion, but they were conflicting as to the question of the alleged indebtedness.

Hoyles, for plaintiff, moved for judgment under Rule 324, pursuant to leave obtained from Proudfoot, J.

Walter Cassels, for the defendant.

PROUDFOOT, J.—It has been decided that in motions for judgment under Rule 324 special circumstances necessitating a hearing of the cause out of the ordinary course must be shown, according to the former practice of the Court of Chancery under Chy. Ord. 271, (*Davidson* v. *McKillop*, 4 Gr. 146). In the present case I think the circumstances disclosed are sufficient to entitle the plaintiff to move. If the plaintiff has a just claim against the defendant he ought to have an opportunity of setting it off against the amount found due to him in the other suit. The affidavits, however, are conflicting, and it is therefore impossible for me to dispose of the matter on the present motion. The action must be entered for trial at the next sittings at Woodstock, and on the hearing of the other action on further directions the sum found due from the plaintiff will be ordered to be paid into Court to abide the result of this action. The costs of this motion must be costs in the cause.

FIRST DIVISION COURT OF THE COUNTY OF ELGIN.

(Reported for the LAW JOURNAL.)

MURRAY V. GILLETT, ET AL.

Promissory note — Endorsement — Guarantee — Joinder of causes of action — Ont. Jud. Act, sec. 77 — Rule 92.

A promissory note was endorsed as follows :—"I guarantee the payment of the within note, and I waive protest and notice." Action by payee against maker and endorser or guarantor.

Held, that the guarantor could not be treated as an endorser ; that although the causes of action, if any existed, might be joined, and the maker and guarantor sued in the same action, the Ont. Jud. Act did not interfere with the nature of the contract, and the plaintiff was as much bound to make out a substantial case since the Judicature Act came into force as he was before, and that it only affects the procedure and not the cause of action.

[Aylmer, Jan. 27, Hughes, Co. J.

Two actions by the same plaintiff, one against J. Gillett and B. E. Dancy, and the other against B. E. Dancy and A. Summers. The questions involved in these suits are identical. The plaintiff, as the holder of two promissory notes, sued the defendants as makers and guarantors in the same action ; the notes were payable to the order of the plaintiff, and not endorsed by him. On the back of each note was endorsed the words, "I guarantee the payment of the within note, and I waive protest and notice." The first was signed by B. E. Dancy, and the second by A. Summers. Both suits were brought against the maker and guarantor jointly. The Judge thought at the trial that the suits had no right to be brought in that way. The endorsements on the notes expressed no consideration on their face for the guanantee and none was proved. The defendants put in written defences disputing their liability but did not appear at the trial.

Crawford, for the plaintiff, urged that on the authority of *Walker* v. *O'Reilly*, 7 U. C. L. J. 300, the guarantors had a right to be treated as endorsers, and that on the authority of *Howell* v. *West*, W. N., 1879, p. 90, the causes of action should have been joined in one suit, and that the 77th section of Ont. Jud. Act justified this plaintiff in joining the defendants and the causes of action in one suit in this Court.

HUGHES, C. J. — These cases are not like *Walker* v. *O'Reilly*, cited in the argument, for in that case the defendant Shibley, who had signed a guarantee on the back of the note, was also the payee. It was made payable to "John A. Shibley or bearer," who it was avowed endorsed the note to the plaintiff. *West* v. *Bown*, 3 U. C. R. 290, shows that a party who endorses his name on the back of a note, whether it be negotiable or not, if it has not been endorsed by the payee, cannot be sued as endorsers. In *Thew* v. *Adams*, referred to in *West* v. *Bown*, which is not reported, but was decided in Hilary Term, 3 Vict., by the Court of Q. B. of U. C., it was held that a payee of a negotiable note

suing the endorser who had put his name on the back of it, though the payee himself had not endorsed it, and suing him as endorser, could not recover.

In these cases the defendants who signed the guarantees on the back of the notes, cannot be made responsible as endorsers to the payer, because it would be inconsistent. The statute which permitted the holder of a promissory note to include all or any of the parties thereto to be sued and included in one action, was confined to makers and endorsers—as if they were joint contractors—but it did not apply to a person who is only collaterally responsible as upon a guarantee. A guarantor could not be sued upon a note whose name was not written thereon, as party to the instrument, and whilst I fully agree in the judgment of *Walker* v. *O'Reilly*, I think this case is distinguishable, and that if the parties who signed the guarantee are to be held at all, it must be upon the strength of the instruments they signed and as guarantors only.

The provisions of the Judicature Act (sec. 77) confer power on and require this Court to grant in any proceeding before it such relief, redress or remedy, or combination of remedies, either absolute or conditional, in as full and ample a manner as might and ought to be done in the like case by the High Court of Justice.

By Rule 93 of the Judicature Act, the plaintiff may, at his option, join as parties to the same action all or any of the persons severally, or jointly and severally, liable on any one contract, including parties to bills of exchange and promissory notes, which is a repetition only, in this respect, of the R. S. O., cap. 50, sec. 134. By Order xiii., Rule 113, O. J. A., the plaintiff may unite in the same action, and in the same statement of claim several causes of action.

In *Howell* v. *West*, W. N., 1879, p. 90, an action was held to be rightly brought against two defendants on totally distinct causes of action, so that upon the authority of that case this plaintiff, under the remedies afforded by the Judicature Act, was justified in joining these defendants and the causes of action as he has done. But the Judicature Act does not make that a contract which had not validity as such before the Act came into force, it only extends and simplifies the procedure and remedy where a cause of action exists. The defendants in these cases have put in defences which oblige the plaintiff, whether they appear at the trial or not, to make out a valid claim against each of them, otherwise the Court cannot give judgment, or it can only give judgment against those who are made to appear as liable to such judgment.

There are various cases in the books which show that a guarantee such as that endorsed on these notes is not valid or binding upon the guarantor, because it does not express any consideration for such an undertaking; the consideration must either appear on the face of the instrument, or it must be proved. In the absence of both I must decline to give judgment against Benjamin E. Dancy in the suit first named, and against Alexander Summers in the second suit named. There will be judgment against James Gillett only in the first named suit, and against Benjamin E. Dancy only in the second suit.

RECENT ENGLISH PRACTICE CASES.

(Collected and prepared by A. H. F. LEFROY, ESQ.)

RICHARDS V. CULLERNE.

Imp. J. Act, 1873, s. 89, O. 42, r. 5—Ont. J. Act s. 77, O. 38, r. 5 (No. 343.)

The power of a County Court under the above section of the Act, in actions within its jurisdiction, to enforce obedience to its orders by committal, extends to interlocutory as well as to final orders.

[C. of A., July 27—L. R. 7 Q. B. D. 623.

JESSEL, M. R.—The only point on which we ought to give an opinion in this case is whether the rule of *Martin* v. *Bannister*, 4 Q. B. D. 491, is to be confined to the enforcing of final judgments. Looking at the language of the J. Act, 1873, s. 89, I can see no reason for so confining it, the words "any proceeding" being applicable to any stage of an action. *Martin* v. *Bannister* decides that the language of s. 89 covers a breach of an injunction, and, in my opinion, it applies to every case where, if the action were in the High Court, a party could be committed for disobedience.

BRETT, L. J.—In *Martin* v. *Bannister* it was decided that the County Court had power to commit for breach of final order. Does this power extend to the breach of an order made in the course of an action? The words of s. 89 of the J. Act, 1873, appears to me clearly to import that the County Court has the same power as

the High Court in regard to every step in this action. * * *

COTTON, L. J. :—I am of opinion that the case is governed by *Martin* v. *Bannister*. * * * The decision in that case did not turn at all upon the fact that the order was a final one, but upon this, that "remedy" included not only the power to make orders, but the power to enforce them, and that reason applies just as much to interlocutory as to final orders.

[NOTE.—*Imp. J. Act, 1873, s. 89, and Ont. J. Act, s. 77 are, so far as this case is concerned, identical. Imp. O. 42, s. 5, and Ont. O. 343 are identical.*

GATHERCOLE V. SMITH.

Imp. J. Act, 1873, s. 16, subs. 8, O. 19, r. 3; O. 19, r. 8; O. 20.—Ont. J. Act, s. 16, subs. 8, O. 15, r. 3 (No. 127); O. 15, r. 9 (No. 133); O. 16—Pleading—Counter-claim—Set-off.

Held, where defendant pleads by way of set-off and counter-claim to a claim of the plaintiff of such a kind that no set-off is permissible—as for example, a claim for arrears of a pension—the defendant's claim fails altogether, and his set-off and counter-claim must be dismissed.

[C. of A., April 11—L. R. 7 Q. B. D. 626.

We purpose to extract those portions of the judgments which discuss the above point.

LUSH, L. J.—The defence is a set-off of an unsatisfied judgment to a larger amount than the sum claimed. Calling it a counter-claim does not make it different from what it is. It is a claim which might have been set off under statute, 2 Geo. II. c. 22. That Act relieved a party who owed another debt from the obligation to pay and seek his remedy by a cross-action, by enacting that where there are mutual debts one may be set off against the other. If the debt due to the defendant exceeded that due from him to the plaintiff, that Act gave him no remedy for the excess. He must have sued for that in a separate action. The Judicature Act alters this so far as to authorize the Court to give judgment for the excess. But that is all. The set-off is not an independent action. It is still a defence and nothing more. If the plaintiff before the Judicature Act chose to discontinue his action the defendant could not claim to have his set-off tried. It fell with the action to which it was and still is adjunct. According the M. R. decided in *Isaacson* v. *Krupp*, L. R. 15 Ch. D. 474, that a counter-claim could not be preceded with after the plaintiff had discontinued his action. The principle is, that if there is nothing against which the matter pleaded can be set up by way of relief, the set-off falls to the ground.

BAGGALLAY, L. J., said :—"I do not feel satisfied that a set-off and a counter-claim are the same. I do not think that the rules of Court intended that they should be so regarded in every instance. I think that in some instances a set-off may fail, whilst a counter-claim may succeed ; but what we have to consider is whether judgment can be given in favour of the defendant upon a counter-claim when it has been already decided that the same facts pleaded by way of set-off do not create a valid defence. Upon consideration, I think that in this case the defendant relies upon a counter-claim by way of set-off, and the alleged counter-claim is in fact nothing more than a set-off. Now it was held by this Court upon appeal from the Chancery Division (in another action by the same plaintiff for certain other arrears of the same pension) "that the judgment obtained against the plaintiff could not be pleaded by way of set-off and must be rejected. * * * I think we are bound by the judgment of this Court upon the appeal from the Chancery Division."

BRAMWELL, L. J., dissented upon the point of its not being permissible to give the defendant judgment upon its set-off or counter-claim. He said :—"I have a difficulty in understanding the argument ; but I wish to speak of it with respect, because great stress has been laid upon it by Lush, L. J. The argument is, that the counter-claim of the defendant is in truth a set-off. It is, in effect, contended that a set-off supposes that there is something against which the defendant's claim can be set-off ; and that when there is nothing against which it can be set-off, the defendant's claim fails altogether. * * * As I understand this argument I cannot agree with it. I will refer to the words of the Jud. Act 1873, s. 24, sub.-sec. 7. [reads it : Ont. J. Act s. 16, subs. 8.] So far as the point before us is concerned, I think that the legislature has made no difference between a set off and a counter-claim. Then by O. 19, r. 3 [reads it : Ont. O. 15, r. 3]. To my mind that provision has the following meaning : a defendant may set up in the action any claim which he may have against the plaintiff, and obtain the aggregate judgment

upon it. If the character of the claims is such that one cannot set off against the other, i. e. if a balance cannot be struck between them, and if judgment cannot be given for the balance, nevertheless a final and appropriate judgment may be given upon each claim; so that in the present case, if the defendant had relied upon a promissory note by way of counter-claim, the plaintiff would have been entitled to judgment and execution for so much of the pension as is due to him, and the defendant would have been entitled to judgment upon the promissory note. Then by O. 19 r, 8, (reads it, Ont. O. 15, r. 9). Surely this rule must apply to a set-off as well as to a counter-claim, and it is a strong argument to show that a set-off and a counter-claim are the same. In O. 20 (Ont. O. 16) such language is used in the words of the rules as to make it manifest that the terms "set-off" and "counter claim" are used indifferently. It follows that if a balance cannot be struck between the conflicting claims, separate judgments may be given, and judgment must be pronounced in both the original and the cross claims.

NOTE.—*It will be observed, two of the three Judges regard a set-off and a counter-claim as the same thing. Imp. J. Act, 1873, s. 16, subs. 8, O. 19, r. 3, and O. 19, r. 8, are identical respectively with Ont. J. Act, s. 16, subs. 8, O. 15, r. 3, and O. 15, r. 9. The rules of Imp. O. 20, and Ont. O. 16 are almost, but not completely, identical.*]

DIGEST OF RECENT DECISIONS IN UNITED STATES COURTS.

BILLS AND NOTES—FICTITIOUS PAYEE.

1. Where a draft or bill of exchange is made payable to a real person, known at the time to exist and present to the mind of the drawer when he makes it, as the party to whose order it is to be paid, such draft or bill must bear the genuine indorsement of such payee, in order for a *bona fide* holder to recover thereon, although the bill is drawn without the knowledge or consent of the payee, through the false representations of the party obtaining it from the drawer by fraud.

2. Where a drawer of a bill of exchange is induced by the false representations of a correspondent seeking to defraud him, to make a bill payable to a fictitious person, not knowing the payee to be fictitious when he makes the bill, and intending that such bill shall be payable to a real person, and thereafter transmits such bill to his correspondent with instructions to obtain a note and mortgage therefor from the payee therein named, and then to deliver over to such payee the bill, and the correspondent negotitates the bill to an innocent holder for value, and before dishonour, it will be no defence against such *bona fide* holder for the drawer to set up that he did not know the payee to be fictitious, and as such bill runs to a fictitious payee, it is as if drawn payable to bearer. *Kohn* v. *Watkins.*—Central L. J., Jan. 27.

MASTER AND SERVANT—NEGLIGENCE.

1. Although machinery, or that part of it complained of as specially dangerous, is visible, yet if, by reason of the youth or inexperience of the servant, he is not aware of the danger to which he is exposed in operating it, or in approaching near to it, it is the duty of the master to apprise him of the danger, if known to the former.

2. A foreman, in charge of a separate department of the work, whose directions an employee is directed to obey by the foreman of the establishment, is not a fellow-servant of such employee. *Dowling* v. *The Girard B. Allen Co.*—Ib., Feb. 3.

ATTORNEY—SUSPENSION FROM PRACTICE.

An attorney, with knowledge of the facts, who advises and takes steps to assist in a violation of the bankrupt law of the United States, whereby, in violation of such law, one creditor secures a preference over other creditors, is subject to suspension as an attorney and counsellor of the law. *In re Naphtaly*, S. C. Cal.—Ib.

CONTRACT—COMPOUNDING CRIMINAL PROCEEDINGS.

A mortgage given by a mother for the purpose of stopping a prosecution against her son, who was indicted, is void. *Riddle* v. *Hall*, S. C. Pa.—Ib.

REPLEVIN—CUSTODIA LEGIS.

Goods seized under a writ against another party than the owner are not in *custodia legis*, and replevin will lie against the officer. *Davis* v. *Gambert*, S. C. Iowa.—Ib.

LIFE INSURANCE—FORFEITURE.

A life policy will be forfeited unless the premium is paid on the day stipulated, and the failure to pay by reason of illness and insanity will not avoid the forfeiture. *Klein* v. *New York Life Ins. Co.*—The Reporter, Dec. 14.

BANK ACCOUNT OF INSURANCE AGENT—LIEN OF BANK.

When a bank account is opened in the name of a depositor, as general agent, and it is known to the bank that he is the agent of an insurance company; that conducting its agency is his chief business; that the account was opened to facilitate that business, and used as a means of

accumulating the premiums on policies collected by him for it, and of making payment to it by checks,—the bank is chargeable with notice of the equitable rights of the insurance company, although the depositor deposited other moneys in the same account and drew checks upon it for his private use. And the insurance company may enforce by bill in equity its beneficial ownership therein, against the bank, claiming a lien upon the balance thereof for a debt due to it from the depositor, contracted for his individual use. *Central National Bank* v. *Connecticut Mutual Life Ins. Co.*—Ib., Dec. 7.

PARTNERSHIP—REAL ESTATE.

Real estate purchased with partnership funds, for partnership purposes, though the title be taken in the individual name of one or both partners, is in equity treated as personal property, so far as is necessary to pay the debts of the partnership and to adjust the equities of the copartners.

For this purpose, in case of the death of one of the partners, the survivor can sell real estate so situated, and, though he cannot convey the legal title which passed to the heir or devisee of the deceased partner, his sale invests the purchaser with the equitable ownership of the real estate, and the right to compel a conveyance of the title from the heir or devisee in a court of equity. *Shank* v. *Klein.*—Ib.

MASTER & SERVANT—EXTRAORDINARY RISKS.

A servant assumes all risks naturally incident to his employment. If he finds that in the course of his duty he becomes exposed to extraordinary danger, but makes no complaint or objection, he assumes that risk also. *Green, etc., R. W. Co.* v. *Bresmer.*—Legal Intelligencer, Dec. 2, 1881.

VENDOR AND VENDEE—AGENT.

An innocent vendor cannot be sued in *tort* for the fraud of his agent in effecting a sale. In such a case the vendee may rescind the contract and reclaim the money paid, and if not repaid may sue the vendor in *assumpsit* for it, or he may sue the agent for the deceit. *Kennedy* v. *McKay.*—Albany L. J., Jan 28.

ACCRETION.

If solid land be washed away and afterwards restored by alluvial deposit, such restored land belongs to the original owner of the land, as also any increase thereof. *Morris* v. *Brooke.*—Ib.

CRIMINAL LAW—ATTORNEY AND CLIENT.

A client placed in the hands of his attorney in a suit, as a paper in such suit, a lease. In a criminal prosecution against the client for forgery of the lease, *held*, that the attorney could not be compelled to produce the lease. *Pennsylvania* v. *Moyer.*—Ib.

CORRESPONDENCE.

Professional Charges.

To the Editor of the LAW JOURNAL.

DEAR SIR,—Some years ago a scale of professional charges in conveyancing and other matters out of the Court, or for which no tariff is fixed by rules of Court, was, I have been informed, drawn up, settled, and adopted by the legal profession or a majority of them. If it is accessible to you, could you do me—as well as a number of other enquirers—the favour of publishing it in the columns of the LAW JOURNAL. If it were made generally known it would, I think, be of great assistance to practitioners and what is very important, tend to keep up uniformity of charges among them—a principle acted upon recently by the medical profession.

Yours truly, A SUBSCRIBER.

Toronto, February, 1882.

[We believe there was some such tariff prepared and more or less acted upon. It seems, however, to have been lost sight of, and we cannot at present lay our hands upon it. As it was not binding on any one, and as conveyancing is open to the public, it would not perhaps be of much use to unearth it, even could its place of sepulture be found. No matter what tariff might be settled, charges would be made "to suit customers."—EDS. L. J.]

OSGOODE HALL.

OPENING OF THE NEW CONVOCATION HALL.

The full reports of the proceedings at Osgoode Hall, on the evening of the 7th instant, which have appeared in the City papers render it unnecessary to do more than to record the address presented to the Treasurer, Hon. Edward Blake, Q.C., by Dr. Smith, the Chairman of the Building Committee, and a condensed report of Mr. Blake's reply, which we take from one of the reports referred to. The following is the address of Dr. Smith:—

"Before the evening's programme is proceeded with, the duty has devolved upon me, as Chairman of the Building Committee, to hand over to you, Mr. Treasurer, as representing the Law Society of Upper Canada, this very handsome and commodious building in its complete condition.

The want of a suitable examination hall is one that has been long felt by the Benchers, though, I may say, it has been mainly due to you, sir, and to your wisdom

and energy, that this want has been supplied, and that we are privileged to be present here to-night at the formal opening of this building.

The Law Society of to-day stands in a very different position to what it did when I entered it, as a student, forty-four years ago. A very small room would then suffice for the examination of the students, and although as time has rolled on, increased facilities have periodically been provided, yet it has of late so outgrown itself that it has become an imperative necessity to secure larger and more suitable accommodation in order that the candidates might have a fairer examination than they were having in the old building, and I maintain, sir, that the Benchers, with ample means at their disposal, would have been highly censurably had they failed to carry out these improvements so necessary towards the promotion and advancement of higher legal education.

In every direction around us we see noble seats of learning springing up, costly structures, whereon all that art and high artistic skill can achieve have been lavishly expended; and should the Law Society of Upper Canada, which can count among it members men who have adorned and still adorn some of the highest positions in public life, prove laggards in the race, or fail to obtain a fitting abode for its members whilst those of other schools of learning are so sumptuously provided for?

Again, if the young men of Ontario who are looking to the law for their profession are accustomed to be associated and brought into everyday contact with such surroundings as these, will they not necessarily tend to exert a beneficial influence over them and to raise their thoughts and aspirations to nobler aims and higher purposes?

What do we witness if weturn to the Motherland in this respect? Fabulous sums expended to raise pile upon pile of the grandest and noblest design, and all done to give dignity and stability to their seats of law —as the palatial buildings recently erected in the heart of the great city of London will abundantly testify to-day.

Until very recently, Mr. Treasurer, the very name of the distinguished individual, after whom these buildings have been called, was but little known, and to many it was a matter of doubt if such a being ever existed; but through the liberality which has characterized your administration, as Treasurer, the name of Chief Justice Osgoode has been rescued from oblivion, and his likeness (for which we are indebted to the courtesy of the Rev. Dr. Scadding) has been painted by Berthon, and now looks down from our walls upon our deliberations every time we assemble in convocation, so that without adverting to the numerous other schemes for the promotion of legal education which have been carried into effect under your administration, the Law Society under your auspices is daily making fresh departures in the field of progress and advancement.

But I feel that I am digressing, and as I have been warned to "cut it short" I shall be very brief, for I am aware that there is much to be done to-night; but I feel, in justice to our architect, Mr. Storm, I should say something in approval of the masterly manner in which he has carried out this work entrusted to him, and I think, Mr. Treasurer, if you and those who have kindly favoured us with their presence here to-night will only judge for yourselves, you can come to no other conclusion than that for breadth of design and for beauty of detail his whole work has been most harmonious and complete. Of his "ancient skill" you have only to survey the graceful proportions of the library, main hall, and corridors of the central building to pronounce him to be a thorough and accomplished architect.

Neither should I omit to say a good word for the contractors, all of whom (and I say it "without prejudice" to our claims for delays) have acquitted themselves to our satisfaction in carrying out their several contracts under the supervision of the architect, and of Mr. John Smith, the Society's careful clerk of works.

I shall no longer take up your time, Mr. Treasurer, but conclude by formally handing over to you, on behalf of the committee which I have the honour to represent, the hall of "Osgoode Hall."

The Treasurer replied in his usual eloquent manner, and we regret not to have a verbatim report of his speech His remarks were in substance as follows:—

On behalf of the Law Society he accepted at the hands of the chairman of the Building Committee the new structure in its present complete state, but at the same time he could not individually claim that large amount of merit which had been assigned him as regards the undertaking. He referred to the feeling of unanamity which prevailed regarding the success of the builders' handiwork, and said that the profession had some reason to congratulate themselves upon this addition to their estate. The last occasion, the hon. gentleman said, on which this society had entertained anyone was 22 years ago, when they had the honour of receiving the heir to the English throne. Looking at the society to-day, what was its position as compared with that of former times? Then there were 600 or 700 barristers upon the rolls, now there were 1,700 or 1,800, and that single statement would show how totally inadequate the accomodation which then existed was for the present day. The profession was in some respects a close one and necessarily so. In the seven provinces which constituted the Dominion of Canada the legal profession would be found pretty well represented. In the provinces of British Columbia, Manitoba, Ontario, Nova Scotia and Prince Edward Island the Lieutenant-Governor in each case was a lawyer. All persons know that there is one individual in evey country constitutionally governed who is even more powerful than a Lieutenant-Governor, namely his First Minister and adviser. The First Minister of Ontario is a lawyer, the First Minister of British Columbia is a lawyer, and so on with the provinces of Quebec, New Brunswick, Nova Scotia and Prince Edward Island. The First Minister of Canada is also a lawyer, and he believed that if the cold realms of the Opposition were invaded the profession would be found to be fairly represented. With reference to the saying that the profession had been made a close one, if such were the case it was for the public good. It is important that those who desire to resort to law as a profession should be submitted to a test, and upon the Law Society of this Province has devolved the duty of applying these tests in the shape of examinations, and these were what tended to make the profession a restricted one. In order that this duty might be discharged conscientiously, it was found necessary from time to time to promote a better system of examination. The Society had found some difficulty in their way owing to the increasing numbers of candidates. The learned gentleman here made an amusing reference to the fact that considerable cribbing and copying had been in vogue among students in by-gone years, owing to the fact that the seats had been placed

too near each other in the examination hall. The Society had now arranged, by having built this new hall, to leave a distance of five feet between each desk, so that the evil would be remedied. The new hall had already been utilized for examination, examinations having been conducted there during the present term. At these two gentlemen had acquitted themselves in a very creditable manner, one having taken the gold and the other a silver medal. It would be his pleasant duty to present these gentlemen with these marks of merit if they would come forward.

Mr. E. T. English and Mr. Adam Johnston, the two gentlemen referred to, then came up to the platform and received each his medal. Mr. Blake speaking a few words of praise for their past efforts, and hope for their future success in the profession which they had begun in so brilliant a manner. A round of applause greeted the recipients of the medals, and with a few additional remarks the Treasurer concluded his speech.

A short speech by Mr. Isaac Campbell, president of the Osgoode Legal and Literary Society, concluded this part of the evening's entertainment.

It is supposed that over two thousand persons were present at the Converzasione, and all seemed to enjoy themselves. The arrangements were simply admirable and reflect the greatest credit upon those entrusted with them.

FLOTSAM AND JETSAM.

The following gentlemen, in the Province of Quebec, have been Gazetted as Queen's Counsel: Messieurs, P. C. Duranceau, Edmund Barnard, James Oliva, F. W. Andrews, D. J. Montambault, B. A. Globensky, J. J. Curran, M. M. Tait, C. C. de'Lorimier, L. O. Taillon, J. E. Larue, J. T. Wotherspoon, Louis Tellier, Ernest Cimon and Donald MacMaster.

THE HON. JAMES O'BRIEN, second justice of the Queen's Bench in Ireland, died on the 29th ult. at his residence, St. Stephen's Green, at the age of seventy-five years, having been born on February 27, 1806. His loss will be sincerely regretted by the legal profession and the public. He was a sound and an able constitutional lawyer, whose judgments were held in the highest respect, while his uniform courtesy and consideration to every practitioner and suitor in his court were gratefully appreciated. He was a mild and merciful judge in criminal cases, and prisoners often found their best defence in his keen and conscientious examination of every point in their favour, and every possible flaw in the case for the Crown. He was called to the bar in 1830, was made Queen's Counsel in 1841, a serjeant-at-law in 1848, and was elevated to the bench January 25, 1858.—*Irish Law Times.*

ARTICLES OF INTEREST IN COTEMPORARY JOURNALS.

Solicitor acting for Mortgagor and Mortgagee.—*London L. J.*, Jan. 14.

Government Loans to occupying tenants for agricultural improvements.—*Irish Law Times*, Jan. 14.

Liability for Dogs.—*Ib.*

Slander of a person in his calling.—*Ib.*

Malicious Prosecution—Probable cause.—*Central L. J., et seq.*

Promissory Note—Does stipulation for attorney's fee render it non-negotiable.—*Ib.*, Feb. 3.

Retention of judgment debts by Town Agent for debts due from Country Solicitor.—*Irish L. T.*, Jan. 21.

Larceny of dead game and the doctrine of possession.—*Ib.*

Implied contracts as to chattels.—*London L. J.*, Jan. 7.

Presence of officer in jury-room.—*Albany L. J.*, Jan. 28.

Is it negligent to ride on a street car platform.—*Ib.*, Feb. 4.

The responsibility of Guiteau,—*American Law Review*, Feb.

Liability of subscribers as affected by amendments to charters of incorporation.—*Ib.*

Issues involving the fact of insanity—The burden of proof.—*Ib.*

Can damages for causing death be recovered independent of any statute.—*Ib.*

Right of a mortgagee to a personal order against purchaser of mortgaged property.—*Canadian L. T.*, Feb.

LAW STUDENTS' DEPARTMENT.

EXAMINATION QUESTIONS.

SCHOLARSHIP.

Leith's Blackstone—Greenwood on Conveyancing.

1. Give shortly the first four sections of the Statute of Frauds.

2. Distinguish between a bar of dower by jointure and by ante-nuptial settlement.

3. Explain why it is that powers cannot be engrafted upon a deed operating by way of Bargain and Sale?

4. What is a way of necessity? Give an example.

5. What was formerly the necessity for attornment upon a sale of real estate? Why is it not now necessary?

6. A tenant-in-tail purchases the reversion and dies intestate. Who takes the property?

7. (1.) What is a sufficient *interruption* in order to stay the course of the Statute of Limitations in the case of easements? (2.) B. has enjoined an easement for 19 years and 6 months. During the next 13 months he does not enjoy it. Is he entitled to enforce his right to it?