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DIARY FOR APRIL.

16. Sun... *1st Sunday after Easter.*
22. Sat.... Beaconsfield Ministry resigned.
23. Sun... *2nd Sunday after Easter.*
24. Mon.. Earl Cuthbert, Gov-General, 1846.
25. Tue... Second Intermediate Examination. Spragge, C., appointed C. Ont., 1881.
26. Wed... Second Intermediate Examination.
27. Thurs. First Intermediate Examination.
28. Fri.... First Intermediate Examination.
30. Sun... *3rd Sunday after Easter.*

TORONTO, APRIL 15, 1882.

MR. GIROUARD'S bill to legalize marriage between a man and the sister of his deceased wife, both as to past and future marriages, has at length passed through the House of Commons No one will be much surprise at seeing it become the law of the land.

WE see from the English papers, that a bill has been introduced into the Imperial House of Commons, to establish a Court of Criminal Appeal. The idea is said to be to allow a prisoner an appeal in all cases when within five days of his sentence he sends a petition to the Home Secretary, accompanied by a certificate from a Queen's Counsel that there are reasonable grounds for appeal. The Court is to be composed of five judges at least, and is to have the power, not only to reserve the sentence, but also to commute the punishment in any way. It is further proposed to give the Court of Appeal power to award compensation in cases of wrongful conviction. We are not advised as to whether the Crown is to be divested to any extent of the prerogative of pardon, but, at any rate, there can be little doubt that the Home Secretary in England, and the Minister of Justice out here, would be among the advocates of a bill intended to relieve them of what must be a most onerous responsibility

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THE presence among the principal performers of the sons of two of the Judges, Mr. J. D. Armour and Mr. W. H. Gwynne, as well as that of Mr. C. McCaul, all three of whom are law students, may be claimed as a sufficient excuse for a reference by us to the recent admirable rendering of Sophocles' "Antigone" at the University of Toronto. Mr. Armour's *Creon* will not soon be forgotten by those who had the pleasure of seeing it, and who were sufficiently familiar with the play to appreciate the merit of his performance and the accuracy with which he had mastered his difficult part. Indeed, though the music and the spectacle may have appealed more forcibly to the greater portion of the audience, not the least remarkable feature of the evening was the correctness with which the Greek text was rendered by the actors, thus showing that the play had been taken up as a matter for serious study, and not as a mere pastime. It may not be too much to say that the whole performance was calculated to give a stimulus of permanent value to scholarly pursuits, and to intellectual cultivation in this country.

WE read in the Revised Statutes of Manitoba cap. 8, sect. 97, the following interesting enactment:—

"Any person using *obscure* language, or being disorderly, or being drunk while on any of the public ferries, shall incur a penalty for each offence not exceeding five dollars, on the com-

plaint of any person within three months from the committing of the offence, and the penalty shall be paid to the use of the Crown."

It is, of course, impossible to anticipate a judicial decision as to what will be held to be the "obscure language" referred to. But we presume that if any gentlemen returning home on any of the public ferries, after dining with his friends, were to observe that the scenery about Winnipeg was "tooral looral," when he should have said "truly rural," he would bring himself within the penalties of the statute, even though the evidence might not suffice to show that he was "disorderly or drunk"; and if any person who had heard the observation should, very properly, lodge a complaint thereof within three months, the offender would be liable to be fined five dollars. The temperance party must be exceedingly strong in the Legislature of Manitoba, when they thus render even the "obscure language" stage penal. It is, however, a little difficult to understand why obscure language on a public ferry should be regarded as any more culpable than obscure language off a public ferry. However, this may be the result of a compromise. It is, of course, very gratifying to know that in a new country generally supposed to contain many characters of questionable respectability, there is no necessity to provide against the use of *obscene* language, so common, unhappily, under like circumstances in other countries.

OUR DIVISION COURTS.

Below we give a few particulars respecting these Courts which may prove interesting to our readers. They are collected from the Inspector's Report for 1880. Out of the forty-two counties and districts we select the only four in which the number of suits entered exceeded 3,000 (exclusive of districts) and the four lowest :—

COUNTY.	No. of Suits Entered.	Judgment Summonses.	Amount of Claims.	Money paid into Court.	Suits under increased jurisdict'n (to mons)	Jury trials.	Percentage of claims paid into Court.
YORK.....	5,751	1,300	237,900	70,402	463	18	nearly 30
WENTWORTH ..	4,821	127	109,023	44,016	177	2	over 40
WELLINGTON ..	3,421	208	116,303	45,534	148	6	over 39
SIMCOE	3,244	432	115,883	43,251	177	5	over 35
PRESCOTT & RUSSELL. ...	756	26	21,523	6,131	22	0	over 28
PEEL.....	745	107	24,746	8,971	47	2	over 36
HALTON	684	82	22,814	9,183	31	2	over 40
HALDIMAND....	646	49	22,399	9,377	34	1	over 42

It will be seen from the above that about 36 cents comes into the clerk's hands for every dollar of the claim entered. This, however, can hardly be considered an accurate estimate of the value of the Courts for recovery of claims; for we have not taken into consideration (having no means of doing so), on the one hand, the number of suits settled before trial, or satisfied after judgment without payment into Court; nor, on the other hand, the moneys collected on transcripts from one Court to another.

The disproportion of judgment summonses to the number of suits entered is very noticeable. For instance, in the County of York, their appears to be nearly 4 to 1; while in the County of Wentworth the proportion is 38 to 1. It would be interesting to know how many debtors have been ordered to be committed under the old "91st clause." Every County Judge is now required to make

an annual return of all such, but we have not noticed whether these returns have ever been ordered by the House to be printed.

THE *Legal News*, in speaking of proposed legislation in the Dominion Parliament, characterizes Mr. Charlton's Bill to provide for the punishment of adultery, seduction and such like offences as "Charlatanism." We are not prepared to say whether the details of the proposed measure are the best, but he must be either a very ignorant person or a very heartless libertine who could pooh-pooh in such an airy manner one of the crying evils of the day. The subject is, of course a most difficult one, but there is one monstrous wrong in the present state of things—the disproportion of punishment. Let us suppose for a moment a case of seduction, and that both parties are equally guilty, though not a fact in the immense majority of cases. The man practically goes unpunished; he is scarcely tabooed in society; in fact, his companions think him rather a fine fellow, instead of denouncing him as a cowardly blackguard; while the unfortunate woman bears the whole burden, becomes an outcast, is driven from home, disgraced and ruined, to bear her trial alone, over-whelmed by an agony of shame, that too often ends in some hideous crime or piteous suicide. We are not going to argue as to who is most to blame, but what we insist on is, that *if* seduction is an offence, there should be some equality of punishment, and for this simple reason, that without some fear of adequate or proportionate punishment there is with the majority of men no way of compelling them to pause before being parties to a terrible wrong. If some of our legislators and those who assume to direct public thought even from a legal stand-point, were to spend a few hours in some of our reformatories and havens for fallen women, infants' homes, Magdalen asylums, police cells, or city morgues, they would not talk or write as they do. Some of our judges, viewing the subject only from the stand point of seduction cases brought before them by those, who, as a rule, are *not* the class that require protection, have, by their remarks in Court, helped to lead astray public thought on this matter. Men who attempt to gain their ends by force are very properly given a dose of the "cat;" let some of those who succeed in gratifying their selfish passion by heartless lies and seductive arts (reduced by some to a system) be touched up by the same implement, and we venture to predict an enforced virtue which will vastly mitigate the present aggregate of human misery. Lust in the heart is said to be a transgression of the Divine law; lust put into action and the purpose accomplished by force is a crime. Fraud and deceit are, under certain circumstances, recognised by the law as criminal. Surely, therefore, lust put into action and the purpose accomplished by fraud or deceit, should also be a crime, and especially so when there is a consequent grievous personal injury to the injured party. There is of course difficulty in this matter, as in others, difficulties as to evidence and danger of black-mailing, nor are we advocates for the impossible task of making men good by Act of Parliament and others besides, but all this does not affect the principal involved. The present state of the law of seduction in England and Canada is not only a disgrace to humanity, but causes a financial burden to the country and to charitable citizens. We trust good may result from the move made by Mr. Charlton.

ADMINISTRATION OF JUSTICE IN BRITISH COLUMBIA.

(Continued from page 130.)

In our last article on this subject we referred to the points that arose in the *Thrasher Case*. After very full argument the Judges' on the 10th February, delivered three separate,

elaborate and voluminous judgments, the Judges arriving at the same conclusions though by different roads.

The points decided may be summed up as follows:—

The Provincial Legislature had by a Local Act, 1881, chapter 1, sections 28, 32, declared that the sittings of the Supreme Court for reviewing *nisi prius* decisions, motions for new trials, etc., should be held only once in each year, and on such day as should be fixed by rules of Court, and that the Lieutenant-Governor-in-Council should have power to make rules of Court.

Held, by Sir Matt. Baillie Begbie, C. J., and Crease and Gray, Justices, (McCreight, J., being absent,)

1. That the appointment of the days on which the Court should sit for such purposes is a matter of procedure, and of purely judicial cognizance, and is not within the power of the Local Legislature either to fix by positive enactment, or to hand over to be fixed by any other person or persons, but belongs to the Court itself; and that the above sections are in that respect unconstitutional and void.

2. The power conferred by section 92 of the British North America Act on Provincial Legislatures is a legislative power, enabling them to exercise legislative functions merely, and does not enable them to interfere with functions essentially belonging to the Judiciary or to the Executive.

3. The Judges of the Supreme Court of British Columbia are officers of Canada, and by sections 129, 130, their power and jurisdiction remain as before Confederation, subject only to the constitutional action of the Parliament of Canada under the British North America Act, 1867.

4. The authority given by section 92, subsection 14, to the Local Legislature to make laws in relation to civil procedure, is confined to civil procedure in the Courts described in that sub-section, and the Supreme Court of British Columbia does not come within the meaning of that sub section. The power to make laws in relation to criminal procedure in those Courts, *i. e.*, the Provincial Courts described in that sub-section, and as to all procedure in all other Courts is, either by the general or the particular words of section 91, reserved to the Parliament of Canada.

5. The Local Legislature has no power to diminish or repeal the powers, authorities or jurisdiction of the Supreme Court, nor to allot any jurisdiction to any particular Judge of the Supreme Court, nor to alter or add to any of the existing terms and conditions of the tenure of office by the Judges, whether as to residence or otherwise.

The Judges have, since giving the judgment above noted, under the B. C. Act of 1869, sect. 3, and their Common Law rights, made rules for practice and procedure the same as the Supreme Court Rules, 1880, which are working well and satisfactory. The judges, have also issued a general order establishing the same Judicature Rules, (the Supreme Court Rules, 1880), which they had already made their own, and as to these see *post* p. 168.

The local bar, it is said, concur in the result and uphold the above judgment; and legal matters in the Supreme Court are going along more smoothly and harmoniously than they have done for some time. The Judicature practice is resumed. A case can be tried to-day at Nisi Prius, and if the judges be disengaged, reviewed and corrected the next day.

Another set of constitutional questions have cropped up in B. C. in another case—that of *Reg.* v. *Vieux Violard*, and raised also in the *Thrasher Case* by Mr. Theodore Davie. The Province passed an Act called the "Judicial Districts Act, 1879," for districting their Supreme Court Judges and compelling them, or such of them as it chooses, to reside in remote districts as Cariboo or Kamloops, and also in New Westminster. Their Supreme Court Commissions, some signed by the

Queen hereself, run over the whole Province and in every branch of judicature, but this local Act affects to empower the Governor-General in Council to confine them to particular local districts, where (Act of 1878) they would be expected to preside over monthly County or Division Courts, in which there are no pleadings, and the proceedings are conducted by non-professional men, to hear appeals from magistrates courts, and to preside daily in gold Commissioners Courts, so that in criminal cases the Crown prosecutor would be able to select the particular judge he might desire to try any given case, whilst a prisoner could not.

In spite, it is said, of the repeated protests of the judges, an Order in Council has been issued directing a certain Supreme Court Judge to reside in the gold bearing mountain range of Cariboo, another in the bunch grass solitudes of Kamloops, another at New Westminster Judicial District, and the remaining two to confine themselves to Victoria.

It is satisfactory on a review of the whole matter to have our minds disabused of an impression that instead of obstructing the channels of justice, the B. C. Judges have been persistently throwing down the barriers and opening the gates of the Temple of Themis to all whose necessities compel them to pay homage at her shrine.

A letter from a correspondent in British Columbia, with some further explanations as to the matters above spoken of, appears in another place.

RECENT ENGLISH DECISIONS.

Proceeding with the March numbers of the Law Reports, and with 8 Q. B. D., from the point at which we left off on April 1st, the case of *ex parte Edwards*, p. 262, involves two points which may be briefly stated, viz.:

TOWN AGENT OF COUNTRY SOLICITOR.

(i.) A solicitor who, acting as town agent for a country solicitor, has recovered a sum of money on a judgment obtained in an action, cannot refuse to pay over the same merely because the country solicitor is in his debt, unless the country solicitor had a lien upon it for a greater amount; (ii.) if he does so refuse the Court can, on the application of the client of the country solicitor, exercise its summary jurisdiction over its own officers and order the town agent to pay over the amount, and this though no fraud be imputed to the town agent.

INDICTMENT—INFORMATION.

The next case, *Reg.* v. *Slator*, p. 267, interprets a statutory enactment which we have not got, and the judges were called upon to construe the word "indictment." Bowen, J., says—"The distinction between an indictment and an information is one founded in the history of the law and liberties of this country. There are two great ways of proceeding against and bringing to trial a person accused of a crime; one is by proceeding against him before a grand jury, and time out of mind that proceeding has been known as an "indictment;" the other mode is by proceeding without a grand jury upon an information, which is instituted by the law officers of the Crown or by private prosecutor with the leave of the Court."

CHEQUE—DELAY IN PRESENTMENT.

We can now proceed to *The London and County Banking Co.* v. *Groome*, p. 288. This was an action by the bearers against the drawer of a cheque payable to bearer, alleging due presentment, dishonor and notice of dishonor. The plaintiffs, it appeared, took the cheque eight days after its date, and the question before Field, J., was—in his own words—whether "the well-established rule of law, as applicable to overdue bills of exchange and promissory notes, that those who take them take them at their peril, and stand in no better position than those from whom they take them as to any equities between the latter and the acceptor or maker attaching to the instrument," applied also in the case of cheques. The learned Judge held, on the

authorities, that it did not. He says: "The reason of the rule is, that, inasmuch as these instruments (*i.e.* bills and notes) are usually current only during the period before they become payable, and their negotiation after that period is out of the usual and ordinary course of dealing, that circumstance is sufficient of itself to excite so much suspicion that, as a rule of law, the indorsee must take it on the credit of and stand in no better position than the indorser. But, with regard to cheques, no such rule has been laid down; and there is more than one case in which that proposition has been denied or doubted." He then reviews the cases, arriving at the conclusion that the real question was whether the cheque was taken by the plaintiffs under such circumstances as ought to have excited their suspicion, and the lapse of eight days was, although not conclusive, a circumstance to be taken into consideration in coming to a conclusion on that question.

STATUTE OF LIMITATIONS—FRAUD—JUDICATURE ACT.

The next case, *Gibbs* v. *Guild*, p. 296, raised an important question as to the operation of the Statute of Limitations, in bar of an action in which the plaintiff claimed damages for fraudulent representations made by the defendant more than six years before the commencement of the action, and also claimed to exclude the application of the statute by reason of the non-discovery by the plaintiff of the fraud within the period of limitation, such non-discovery having been induced, as he alleged, by the active concealment of the fraud by the defendant from the plaintiff, who could not by exercise of reasonable diligence have discovered it. Field, J., held that it was unnecessary to decide how the matter would have stood if his jurisdiction had been limited to that of a court of law; for by sect. 24 of Jud. Act, 1878, (Ont. Jud. Act, section 16,) he was in a case like that before him, bound to give the plaintiff the same relief as ought to have been given to him by the Court of Chancery in a suit instituted for the same or like purpose, and, in the Court of Chancery, the authorities in such a case had been uniform for nearly two hundred years, and the conclusion to be derived from them was, "that concealed fraud and absence of reasonable means of discovery, if pleaded, will prevent the application of the statute."

MARINE INSURANCE—"FREE FROM CAPTURE OR SEIZURE."

Of the last case in this number, *Cory* v. *Burr*, p, 313, it is sufficient to say that the question raised was whether, where, during the continuance of a policy of marine insurance, the ship was seized and detained for smuggling, in consequence of the barratrous act of the master,—the loss was to be treated as a loss by barratry of the master, in which case it was within the assurance effected by the policy, and so recoverable, or whether it was a loss by capture and seizure, and so within the warranty contained in the policy, whereby the subject matter of insurance was warranted "free from capture and seizure." The Court held that although the case of loss by barratry does not fall within the general rule applicable to losses by perils assured against, viz., that when in the chain of causes the loss may be referred to more than one of these perils, it should be assigned to its proximate and not to its remote cause—yet the authorities in cases where, as in the one before the Court, there was a warranty against the proximate cause of loss, *i. e.* the capture and seizure, and the application of the well known principle that a contract of insurance is one of indemnity, and indemnity only, lead to the conclusion that the loss in the case before the Court was imputable to the excepted peril.

We can now proceed to the March number of L. R., 19 Ch. D., comprising p. 207-310.

EQUITABLE TITLES—LEGAL ESTATE—PRIORITY.

In the first case, *Harpham* v. *Shacklock*, the Court of Appeal decided that where S. had received money from the plaintiff for the purpose of being invested on a mortgage of a certain specified property, and misappro-

priated the money so received, but afterwards took a security on the said property in his own name. (i) S. was a trustee of that security for the plaintiff to the extent of the money received from him; (ii) this equitable title in favour of S. must prevail against a subsequent deposit of the said security made by S with B.; (iii) B. did not acquire priority over the plaintiff by having got in the legal estate after receiving notice of a prior incumbrance, for "nothing is better settled than that you cannot make use of the doctrine of *tabula in naufragio* by getting in a legal estate from a bare trustee after you have received notice of a prior equitable claim."

APPEAL FROM ORDER MADE ON DEFAULT IN APPEARING.

Of the next case, *ex parte Streeter*, p. 216, it seems only necessary to say that it was an interpleader matter and in it an objection was raised that a person against whom an order had been made on his default in appearing, could not appeal from the order, and *Walker* v. *Budden*, L. R. 5 Q. B. D. 267, was cited in support. Jessel, M. R., however, said that that case does not support the objection: and you are still entitled to appeal on the ground that the adverse claimant did not make out his title.

PRACTICE—EVIDENCE DE BENE ESSE IN OLD SUIT.

In *Llanover* v. *Homfray*, p. 224, the question arose whether evidence which had been taken de bene esse in an old suit, between persons privy in estate to the persons in the present action, and in which the question at issue was the same, was admissible. The Court of Appeal held that it was. Jessel, M. R., said: "If the witnesses were now alive, of course their evidence could not be read, but they must be called. There is, in my opinion, no more objection to reading this evidence than there is in any other case where the witnesses have been called and are dead. If a witness gave evidence at the trial of an action, and a new trial was ordered, then if he were dead at the time of the new trial, you could read his former evidence; but if he were alive you could not do so, but would have to call him again."

SPECIFIC PERFORMANCE—AGREEMENT TO LEASE.

The next case, *Marshall* v. *Berridge*, p. 233, contains the decision of the Court of Appeal on the point whether there can be specific performance of an agreement for a lease, when it does not appear within the four corners of the agreement at what period the lease is to commence. Fry, J., held that there could be, since such an agreement amounted to an agreement for a lease to commence *from the date of the agreement.* The Court of Appeal however, over-ruled this decision, holding that the parties, when they enter into an agreement not operating as a present demise, intend a lease to be prepared which *prima facie* will be dated on a subsequent day,—and, as Lush J. J. says, p. 244, "It is essential to the validity of a lease that it shall appear either in express terms or by reference to some writing which would make it certain, or by reasonable inference from the language used, on what day the term is to commence. There must be a certain beginning and a certain ending, otherwise it is not a perfect lease, and a contract for a lease must, in order to satisfy the Statute of Frauds, contain these elements. (ii). A subsidiary point arose in the case, which is alluded to by Jessel, M. R. The plaintiff succeeded in the Court below by inducing the Court to put upon the memorandum of agreement an interpretation which he had always repudiated, inasmuch as he induced the Court to treat the contract as a concluded one, whereas in his previous communications with the defendant, he had maintained it was conditional only, and had never signified to the defendant that this condition had been complied with. On appeal the M. R. says, p. 241,—"It would be a very singular thing that a man who had always insisted on one construction of the agreement, and had refused to take possession because that was its proper construction, should then come to a Court of Equity, insisting that the construction for which he had hitherto con-

tended was wrong, and that the agreement had a totally different meaning, and should ask the Court to attach that meaning to it, and grant on that footing specific performance, the granting of which is in the discretion of the Court."

COVENANT.

In *Nicoll* v. *Fenning*, p. 258, the vendors of a certain portion of an estate of twenty-five acres covenanted with the vendee, C., that they, "their heirs and assigns, should not thereafter sell or convey any portion of the estate without requiring the purchaser to enter into a covenant with them not to allow any building to be erected thereon to be used as a public house, tavern or beer shop." Afterwards further portions of the estate were sold, the various purchasers being required to covenant not to use, or permit to be used, any building on the premises assigned as a tavern, public house or beer shop. The action was brought by the assignee of the first vendee, C., to restrain one of the subsequent purchasers of a portion of the estate, and a yearly tenant of the said purchaser, from using a building on the estate as a beer shop. Bacon, V. C., granted an injunction and an enquiry as to damages. He said, referring to the first covenant: "Every person to whom they (the vendors) afterwards sold was entitled to the benefit of that covenant. * * * From that date the rest of the property was subject to that restriction; and from that date it was not competent for the vendors in equity to dispose of that property, unless they protected not only C. but all the rest of the owners of the property, from the inconvenience of having any other public house or beershop than that for which C. held a lease. * * * Was it capable of argument in a Court of Equity that the persons who claimed the benefit of that covenant were precluded from suing to prevent its breach by a person who knew when he bought that he bought subject to that restriction? * * * The functions of a Court of Equity are to prevent the commission of frauds of any sort, and it is the duty of the Court to suppress chiccanery or ingenious devices for the purpose of evading a plain distinct obligation. * * * All the plaintiff asks in this case is to be put in the same position as if the covenant had been made by the defendant directly with him. But whoever else might have sued at law, in enforcing the contract, he would be at best but a trustee of the covenant for the benefit of the plaintiff, who had a right to the benefit of it."

PATENT—PRIOR USE IN COLONY.

In *Rolls* v. *Isaacs*, p. 268, Bacon, V.C., had to decide whether the prior public use in Natal, a British Colony, having power to grant its own letters patent, invalidated letters patent granted in England licensing the use of a certain invention in the United Kingdom. He held that it did not. Counsel, impeaching the patent, argued that there was a proviso making void the patent if it should appear to the Crown that the petitioner "is not the first and true inventor thereof within this realm as aforesaid," and that therefore the petitioner shall be the first and true inventor in all parts of the realm. The learned V.C., however, held that "inasmuch as there are in Natal the means of granting patents within that realm (if it is to be called by that name) if the Queen of England grants a patent for the exercise of an invention in this realm," (the United Kingdom,) "and the thing be a new invention in this realm, the fact of its having been practised previously in Natal cannot affect the power of the Crown to grant to the petitioner the right to exercise the invention which he for the first time communicates to the people of this realm."

TRUSTS—RESTRAINT ON ANTICIPATION.

In the next case, *in re Benton*, p. 277, a testatrix left her real and personal estate to trustees on trust to sell, and the trustees were directed to invest and stand possessed of the proceeds upon trust for the sons and daughters in equal shares, those to the latter

to be for their sole and separate use without power of anticipation, with power to the trustees to revoke the trusts as regards any daughter on marriage as they should see fit. The question before the Court was whether the trustees could pay the married daughters, upon their separate receipt, their shares in the proceeds of the mixed residue, which at this time consisted of a sum of £700 and three leasehold houses. It was argued that the restraint upon anticipation did not apply to an uninvested sum of money. Bacon, V.C., however, held that they could not, for that "it was their duty in carrying out the trust to see that this fund bore interest, and therefore this was an income-producing fund and subject to the restraint upon anticipation just as much as any other part of the testatrix's estate."

RIGHT OF SUPPORT FROM BUILDING—PRINCIPAL AND AGENT.

In *Lemaitre* v. *Davis*, p. 281, the celebrated case of *Dalton* v. *Angus*, L. R., 6 App. Cas. 740, noted at length in our number for Jan. 1st, ult., was a good deal referred to, and three points arose which require notice: (i.) The first was—whether support can be claimed in law from one building by the owner of another building—supposing that the two buildings adjoin each other—the one building being at the extremity of one owner's land, and the other building being at the extremity of the other owner's land, and supposing that either of them received support and that there was an alteration in the structure in any way? The learned Judge, Hall, V. C., held that, though there was nothing in *Dalton* v. *Angus* which conclusively settles the point, yet there was no reason why if there be a right of support against land, there should not be against a building; and he held, moreover, that it is a right within the scope and provisions of, and claimable under, sect. 2 of Imp. Prescription Act: (R. S. O. c. 108, sect. 25). (ii.) The second point arose from the contention of the defendants that any such right must be obtained openly, not under such circumstances of secrecy as they alleged existed here. Both tenements in this case were ancient, more than sixty years old, and the V. C. said, as to this point: "In a state of things, where the origin of these two buildings goes so far back, it is very difficult to deal with the case, it being almost impossible to prove anything, on the one hand or the other, affirmatively; therefore the conclusion which I come to is that the enjoyment would not be of right if it was *clam*, but I think the evidence shows that the right was open—that each proprietor of the two tenements knew of the existence of the neighbour's cellar; therefore, as a matter of fact, I hold, so far as it may be necessary, that the enjoyment of the right has not been *clam*, or otherwise than open; an open enjoyment within the meaning of the Act. (iii.) The third point was as to whether the employer was liable as well as the contractor, the damage having been done by the latter in carrying out a building contract? The learned V. C., applying the principles laid down in *Dalton* v. *Angus*, held both were liable. "It would be a strange thing," he said, "if principals should be allowed to escape from liability when altering their premises, and erecting new buildings, by saying that they employed contractors under the specifications which were drawn for their guidance, and that the contractors only were liable for any injury which might happen."

ANNUITIES—PERPETUITIES.

The next case, *Blight* v. *Hartnoll*, p. 294, involved two points, one being as to the construction of a bequest of annuities; the second relating to the application of the rule against perpetuities to the will in question; and the third to the exercise of a power of appointment. (i.) The testatrix bequeathed an annuity payable out of the rental and certain hereditaments to A. for life, and after A.'s decease to B. for life, and if B. should die before the end of the term during which the rental was payable, the executors were to

pay the annuity out of the rental "to the surviving children of B. in equal shares and proportions," and after payment of the annuity the surplus income was to be accumulated as therein mentioned. The question was whether B.'s children took the annuity for life or in perpetuity, or for the duration of the leases of the said hereditaments, which were still continuing. Fry, J., held (a) that notwithstanding *Evans* v. *Walker*, L. R. 3 Ch. D. 211, the mere want of limitation in the last gift of the annuity does not import that the annuitant is to take anything, for "the duration of the life of the first taker is expressed not for the purpose of limiting the gift to the first taker, but of limiting the commencement of the gift to the second or successive takers, and therefore the principle of *expressio unius est exclusio alterius* does not apply;" (b) the present case did not come within the rule of those in which the Court had come to the conclusion that the gift was not really that of an annuitant, but the gift to a person of the income arising from a particular fund without limit, and when the Court, therefore, held that the unlimited gift of the income was a gift of the *corpus* from which the income arose. For, said he, "What I understand by the appropriation of a fund for the purpose of the rule in question is the setting aside a sum of money or property to meet the particular gift, and to meet nothing more. *There being a complete application of the residue in this case*, it seems to me impossible to say that this is an appropriation of the fund." (c.) Although the testatrix spoke of "the said annuity," she spoke of it as a thing which it was necessary for her to direct to be continued after the life of each taker—words which rather imported that she considered the annuity only for life unless she expressed the contrary. (ii.) The point decided with reference to perpetuities was, in the words of the learned Judge, as follows: "The rule against perpetuities requires, in my view, the ascertainment within the period not only of the extreme limits of the class of persons who may take, but of the very persons who are to take, and that because the rule is aimed at the practical object of telling who can deal with the property, and if you cannot tell who are entitled to the property, but only who may become entitled to the property, the property is practically tied up." (iii.) The point decided with reference to appointments is an interesting one. A power of appointment was given in the will among certain persons living after the happening of a certain event. The donee of the power assumed to exercise the power before the happening of the event in question. Fry, J., held the appointment invalid. "I think," he says, "that where a power of appointment, amongst a class of people, is given, the appointor must know the class—must be able to ascertain the class amongst whom he or she is to divide the property. It is a discretionary power to be exercised with reference to the respective circumstances and merits of the persons who are to take, and that cannot be exercised where the pesrons are not known."

PARTITION ACTION—CONVERSION.

In *Mordaunt* v. *Benwell*, p. 303, the question arose whether one who suceeeds as heir-at-law to a share of the proceeds in Court of real estate sold under a decree in a partition action, takes it as money or real estate. Fry, J., held that, though by the Imperial Acts (cf. R. S. O. c. 40, sect. 82) the share of the proceeds in Court remained real estate for the purpose of succession, yet the heir-at-law took it as money, and as between *his* real and personal representatives it must go as money.

MAINTENANCE BEYOND PROVISION IN WILL.

Of the last case in this number, *in re Colgan*, p. 305, it seems only necessary to say that on somewhat the same principle as that followed in *Havelock* v. *Havelock*, L. R. 17 Ch. D. 807, noted 17 C.L.J. 425, Fry, J., ordered an allowance for the maintenance and education of certain infant beneficiaries under a will, in excess of the provision made therefor by

the will, the interest of third parties, however, being carefully protected.

This complete the March number of the Law Reports, and brings our review up to date, and we may hope shortly to be able to take up the LAW JOURNAL Reports for the current year, so as to notice such cases as have not been reported in the Law Reports.

CANADIAN CASES BEFORE PRIVY COUNCIL.

The English *Law Times* publishes the following short *resume* of the decisions which have been given by the Judicial Committee of the Privy Council, in cases where questions as to the powers of Provincial Legislatures under the British North America Act have come before it. The working out of our complex constitution, is undoubtedly full of instruction to students of politics everywhere. The article is published under the title of "Powers of Provincial Legislatures," and is as follows:—

"The case of *The Citizens' Insurance Company of Canada* v. *Parsons* (45 L. T. N. S. 721) raises again a question which has been several times discussed by the Judicial Committee—namely, the distribution of legislative power between the Parliament of Canada and the legislatures of the various provinces comprised in the Dominion; and at the present time the practical working of such a constitution as that of Canada is not without interest and instruction both for lawyers and politicians, in reference to possible proposals for the extension of the principle of local self-government in the United Kingdom.

The matter is provided for by sects. 91 to 95 of the British North America Act of 1867 (30 Vict., c. 3), by which the Dominion of Canada was created. The scheme of this legislation is to give to the Dominion Parliament authority to make laws for the good government of Canada in all matters not coming within such classes of subjects as are assigned exclusively to the Provincial Legislatures; but "for greater certainty but not so as to restrict the generality of the foregoing terms of this section," sect. 91 assigns to the Dominion Parliament exclusive authority in twenty-nine enumerated classes of subjects, and concludes as follows:—"Any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces." Similarly sect. 92 gives to the provincial Legislatures exclusive power to make laws in relation to sixteen enumerated classes of subjects.

It must, however, have been foreseen that no sharp and definite line had been or could be drawn, and the words of sect. 91 seem to endeavour to provide for the case of an apparent conflict. The fact, however, that the question has been raised in as many as six different appeals before the Judicial Committee, and that in two of them the decisions of the courts below were reversed, shows the matter is not left free from doubt. In the first case (*L' Union St. Jacques de Montreal* v. *Belisle*, L. Rep. 6 P. C. 31; 31 L. T. Rep. N. S. 111) it was held that an Act of a provincial Legislature, passed to relieve a benefit society which was in a state of financial embarrassment, related to "a matter merely of a local or private nature in the province," within sect. 92 of the Act, and not to "bankruptcy and insolvency," within sect. 91, and was therefore not *ultra vires*. Similarly in *Dow* v. *Black* (L. Rep. 6 P. C. 272; 32 L. T. Rep. N. S. 274) an Act empowering the majority of the inhabitants of a parish to raise, by local taxation, a subsidy for the promotion of the construction of a railway already authorised by statute, was held to relate to a local matter within the province, though the railway was intended to extend beyond the province, and "railways extending beyond the limits of the province" are expressly excepted from the control of the Provincial Legislatures. In both these cases the courts below had taken the opposite view.

The case of *The Attorney-General for Quebec* v. *The Queen Insurance Company* (3 App. Cas. 1090; 38 L. T. Rep. N. S. 897) decided that the imposition of a stamp duty on policies of assurance, renewals and receipts, was not "direct taxation within the province," and was *ultra vires*.

In *Valin* v. *Langlois* (5 App. Cas. 115; 41 L. T. Rep. N. S. 662) leave to appeal was refused on petition, on the ground that "the administration of justice in the province, including the constitution, maintenance and organization of provincial courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those courts," which was reserved to the Provincial Legislature, did not relate to election petitions.

In *Cushing* v. *Dupuy* (5 App. Cas. 409; 42 L. T. Rep. N. S. 445) it was decided that sect. 91, by reserving to the Dominion Parliament questions of "bankruptcy and insolvency," give power to interfere to that extent with "property and civil rights in the province," though sect. 92 assigned them to the Provincial Legislature. But in the last case (*The Citizens' Insurance Company* v. *Parsons*) referred to above, the Judicial Committee held that those words covered a provincial statute "to secure uniform con-

ditions in policies of fire insurance," notwithstanding that the Dominion Parliament has exclusive powers for "the regulation of trade and commerce," and that such a power did not include the regulation of the contracts of a particular business in a single province.

The above series of decisions are sufficient to show the many difficulties and pitfalls which must in practice attend the working out of any such scheme of divided legislation."

REPORTS.

RECENT ENGLISH PRACTICE CASES.

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

DARRANT V. RICKETTS.

Imp. O. 14, *r.* 1--*Ont. Rule No.* 80.

An order cannot be obtained under the above rule against a married woman in an action for the price of goods supplied to her during coverture, inasmuch as there can be no judgment against a married woman personally in respect of such a claim.

[Jan. 12.—Q.B.D., L. R. 8 Q.B.D. 177.

Lumley Smith, Q.C., for defendant:—There was never in equity, nor is there now at law, any judgment against the married woman personally in respect of a liability contracted during coverture. The practice is to order an inquiry as to the existence of separate estate chargeable with the sum claimed, and to declare that such separate estate, if any, is chargeable therewith; *Picard* v. *Hine*, L. R. 5 Ch. 274; *Pike* v. *Fitzgibbon*, L. R. 17 Ch. D. 454.

FIELD, J.:—It is clear that the order as at present framed cannot stand; there must have been some misapprehension on the part of the Judge at Chambers as to the form of the order applied for.

We will give the plaintiff an order in the form in accordance with the decision in *Pike* v. *Fitzgibbon*, as we understand that there is no real dispute between the parties as to the claim, but the plaintiff must pay the costs of the application in this Court and at Chambers.

[NOTE.—*Counsel for the defendant said nothing in opposition to the variation of the order as suggested. The Imp. and Ont. rules are not identical, though apparently virtually so.*

HARPHAM V. SHACKLOCK.

Imp. Jud. Act, 1873, s. 49—*Ont. Jud. Act*, *s.* 32—*Appeal—Costs only.*

[Nov. 18.—C. of A., L. R. 19 Ch. D. 215.

This was a suit to settle priorities between incumbrancers. In the Court below Malins, V.C., after settling the priorities, ordered B., one of the defendants, to pay the costs of the plaintiff and of his co-defendant. B. appealed from the decision as to priorities, but the decision of Malins, V.C., was confirmed. B. then asked the Court to vary the order as to costs, as being without precedent in a priority suit, where no misconduct was alleged.

JESSEL, M.R.:—I look upon the order with some surprise. It is certainly the general rule that in a priority suit the costs follow the mortgages, but the Court has a discretion, and can order one or other of the claimants to pay the costs if a case is made for it. If we were to vary the order of the Court below as to costs when an appeal on the merits fails, we should practically be allowing an appeal for costs only, and appeals would be brought nominally on the merits, but really only for the purpose of varying the order as to costs. I do not think that such is the case here, for I believe this to be a *bona fide* appeal on the merits; but we ought not to depart from the general rule.

BAGGALLAY, L.J.:—I also have no doubt about the *bona fide* character of this appeal, but we must follow the rule that there shall be no appeal upon the question of costs only.

[NOTE.—*The Imp. and Ont. sections are identical.*]

COOPER V. VESEY.

Imp. Jud. Act, 1873, *sect.* 16—*Ont. Jud. Act*, *sect.* 9.

[Nov. 30.—Ch. D., 51 L. J. N. S. 149

Where a person, fraudulently personating a deceased testator, had forged instruments purporting to be legal mortgages of property of the said testator in favour of mortgagees, without notice, KAY, J., *held* that in an action brought for the purpose of obtaining a declaration that the mortgages were void against the persons claiming under the will, and to have the title deeds delivered up, he was bound by the above section to order the title deeds to be given up by the mortgagees, and could not leave the plaintiffs to their legal remedy as to the deeds.

He had first held that under the circumstances, the mortgages must be declared void as between the persons claiming under the will and the mortgagees.

As to the second point he said :—"For these reasons I think the mortgagees could have no claim to the deeds, even in equity, but I am rightly reminded that I am not administering equity only. The third paragraph of the prayer asks for delivery up of these deeds. If there could be any ground for the defendants urging a Court of Equity to leave the plaintiffs to their legal remedy as to the deeds, I am to give that legal remedy also. I must, therefore, order that the title deeds be delivered up."

[NOTE.—*The Imp. and Ont. enactments appear mut. mut. virtually identical.*]

THE HELENSLEA.

Imp. O. 11. *r.* 3—*Ont. Rule No.* 7—*Writ of Summons.*

A writ of summons will not be set aside, merely because the defendant has been falsely described therein as resident within the jurisdiction, whereas, in fact, he resided out of it.

[Jan. 24.—Adm. 51 L. J. N. S. 16.

The application was to set aside a writ *in personam* in an action for collision.

SIR R. J. PHILLIMORE.—I cannot acceed to this motion. The writ was not, it appears, issued with any intention of serving it out of the jurisdiction of the High Court; and when I look at the form of the writ, I find there is nothing on the face of it which can be said to make it invalid. There is no reason why the plaintiffs should not wait until the defendant comes within the territorial jurisdiction of the Court, though at the time when the writ was issued he was not resident in the city of London, and though he has been erroneously so described. The motion must be dismissed with costs.

[NOTE.—*The Imp. and Ont. rules appear virtually identical.*]

NOTES OF CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

SUPREME COURT.

From P. E. Island.] [March 28.

HOLMAN v. GREEN.

Letters Patent under Great Seal, P. E. I., of foreshore in Summerside Harbour—B. N. A. Act, sec. 108—*Public Harbours*—25 *Vict., ch.* 19, *P. E. I.*

This was appeal from a judgment of the Supreme Court of Prince Edward Island, making absolute a rule for a non-suit, in an action of ejectment brought to recover a portion of the foreshore of Summerside Harbour The plaintiff's title consisted of Letters Patent, under the Great Seal of Prince Edward Island, dated 30th August, 1877, by which the Crown, in right of the Island and assuming to act in exercise of authority conferred by a Provincial Statute, 25 Vict., ch. 19, purported to grant to the plaintiff, in fee simple, the land sought to be recovered in this action.

Held, that under section 108, B. N. A. Act, the solid bed of the foreshore in the Harbour of Summerside belongs to the Crown as representing the Dominion of Canada, and therefore the grant, under the Great Seal of Prince Edward Island, to plaintiff, is void and inoperative.

Davies, Q.C., for appellant.

Peters, for respondent.

Appeal dismissed with costs

From Nova Scotia.] [March 28.

CREIGHTON v. CHITTICK ET AL.

Insolvent Act of 1877, *sec.* 144—*Trader—Pleadings.*

This was an appeal from a judgment of the Supreme Court of Nova Scotia, making the rule nisi, taken out by the respondents, absolute to set aside the verdict for plaintiff, and enter judgment for the defendants. This action was brought by the plaintiff, as assignee of L. P. Fairbanks, under the Insolvent Act of 1875, for several trespases alleged to have been committed on the property known as the Shubernacadie Canal property, and for conversion,

by the defendants, to their own use of ice taken off the lakes through which the canal was intended to run.

The declaration contained six counts, the plaintiff claiming as assignee of Fairbanks. Among the pleas were denials of committing the alleged wrongs, of the property being that of the plaintiff, and of his possession of it, the last plea being that "the said Creighton was not nor is such assignee as alleged."

After the trial both counsel declined addressing the Judge, and it was agreed that a verdict should be entered for the plaintiff with $10 damages, subject to the opinion of the Court, that the parties should be entitled to take all objections arising out of the evidence and minutes, and that the Court should have power to enter judgment for or against the defendant without costs, a rule nisi for a new trial to be granted accordingly and filed.

The following rule was taken out: "On reading the minutes of the learned Judge who tried this cause, and the papers on file herein, and on motion, it is ordered that the verdict entered herein formally by consent, subject to, etc., be set aside with costs, and a new trial granted, etc."

This rule was made absolute in the following terms: "On argument, etc., it is ordered that the said rule nisi be made absolute with costs, and judgment be entered for the defendants against the plaintiff with costs." Thereupon the plaintiff appealed to the Supreme Court of Canada, and it was

Held, that by traversing, the plaintiff, as assignee the defendants, put in issue the fact implied in the averment that the plaintiff was assignee in insolvency, that Fairbanks was a trader within the meaning of the Insolvent Act of 1869, and as the evidence did not establish that Fairbanks bought or sold in the course of any trade or business, or got his livelihood from buying or selling, that the plaintiff failed to prove this issue.

Appeal dismissed with costs, but the rule appealed from varied and made absolute for a new trial.

Per GWYNNE, J.:—That assuming Fairbanks to be a trader still, the defendants were entitled to judgment upon the merits, which had been argued at length. That the agreement at *nisi prius* authorized the Court to render a verdict plaintiff or defendants, accordingly as they should consider either party successful upon the law and the facts; that the Court having exercised the jurisdiction conferred upon them by this agreement, and rendered judgment for the defendants, this Court was also bound to give judgment on the merits, and, as the judgment of the Court below, in favor of the defendants, was substantially correct, to sustain it; and it having been objected that as the rule nisi asked for a new trial, the rule absolute in favor of the defendants was erroneous, that such an objection is too technical to be allowed to prevail, and that the rule nisi having, as it did, recited the agreement at *nisi prius*, and the Court below having rendered a verdict for the defendants, it should not be varied, as to order a new trial would be but to protract a useless litigation at great expense.

Thompson, Q.C., for appellant.

Rigby, Q.C., for respondent.

Appeal dismissed with costs.

ROSS v. HUNTER.

Trespass — Easement — Registration — Notice — Rev. Stat. N. S., 4th series, c. 79, secs. 9 and 19.

This was an action brought by appellant against the respondent for having erected a brick wall over and upon the upper part of the south wall or cornice of plaintiff's store, pierced holes, &c. To that respondent pleaded, besides not guilty and not possessed, special pleas to the effect that he had done the acts complained of for a valuable consideration. In the Supreme Court, by permission of the Court, an added replication was filed setting up the provisions of the Registry Act, and the defendant pleaded an equitable rejoinder, alleging that plaintiff and those through whom he claimed, had notice of the defendant's title to the easement at the time they obtained their conveyance. In 1859, one Caldwell, who then owned appellant's property, granted by deed to respondent the privilege of piercing the south wall, carrying his stove pipes into the flues, and erecting a wall above the south wall of the building to form at that height the north wall of respondent's building which was higher than plaintiff's (appellant). The appellant in 1872, purchased the property from the Bank of Nova Scotia, who got it from one Forman, to whom Caldwell had conveyed it. All these conveyances being for valuable considera-

tion. The deed from Caldwell to respondent was not recorded until 1871, and appellant's solicitor, in searching the title, did not search under Caldwell's name after the registry of the deed by which the title passed out of Caldwell in 1862, and did not therefore observe the deed creating the easement in favour of plaintiff. There was evidence, when one's attention was called to it, that respondent had no separate wall, and the northern wall above appellant's building could be seen.

Held, (GWYNNE, J., dissenting), that the continuance of illegal burdens on the plaintiff's property since the fee had been acquired by him, were in law fresh and distinct trespasses against the plaintiff for which he was entitled to recover damages unless he was bound by the license or grant of Caldwell.

2. That the deed creating the easement was an instrument requiring registration under the provisions of the Nova Scotia Registry Act, 4 Series Rev. Stat. N. S., ch. 79, secs. 9 and 19, and was defeated by the prior registration of the subsequent purchaser's conveyance from Caldwell for valuable consideration, and therefore from the date of the registration of the conveyance to Forman, the deed of grant to respondent became void at law against Forman and all those claiming title through him.

3. That there was no actual notice given to the appellant such as to disentitle him to insist in equity on his legal priority acquired under the statute.

Thomson, Q.C., for appellants.

Rigby, Q.C., for respondent.

Appeal allowed with costs.

GUILFORD V. ANGLO FRENCH S. S. CO.

Master of ship, dismissal of—Shareholder in ship—Damages—Misdirection—New trial.

This was an appeal from a judgment of the Supreme Court of Nova Scotia, making absolute a rule *nisi* to set aside a verdict of $2,000 damages.

The action was brought by appellant against respondents to recover damages for an alleged breach of contract. The plaintiff was Master of S. S. George Shaltuck, trading between Halifax and St. Pierre. She was owned by defendant Company, the plaintiff being one of the largest shareholders of the Company. Plaintiff's contract was that he was to supply the ship with men and provisions for the passengers for $900 a month, afterwards increased to $950. The ship had been originally accustomed to remain at St. Pierre 48 hours, but the time was afterwards lengthened to 60 hours by the Company, yet the plaintiff insisted on remaining only 48 hours against the express directions of the Company's agent at St. Pierre, and was otherwise disobedient to the agents, in consequence of which he was on the 22nd May, without prior notice, dismissed from the service of the Company.

The case was tried before Sir W. YOUNG, C.J., without a jury, who gave judgment in favour of appellant for $2,000, and in estimating damages the learned Judge considered the appellant to be a part owner in the steamer, and that he was not a master in the ordinary sense. The verdict was set aside by the Supreme Court of Nova Scotia.

Held, that appellant, although a shareholder, had no title whatever to any share of the ship, and that damages were allowed upon an erroneous principle; that a new trial was properly ordered in order to determine whether irrespective of the appellant being a shareholder, the causes of dismissal relied upon and the evidence given thereof were sufficient to justify dismissal without notice.

Thompson, Q.C., for appellant.

Rigby, Q.C., for respondent.

Appeal dismissed with costs.

TROOP ET AL. V. HART.

Trover—Sale—Lien—Insolvent Act, 1875 *Proving on estate—Effect of*

This was an action of trover, charging the appellants with converting 250 barrels of mackerel, which were the property of W. M. Richardson, the respondent's assignor. One of the branches of the appellants' business, was the supplying of merchants who were connected with the fishing business in the country, and who in return sent them fish, which was sold, and the proceeds placed by appellants to the credit of their customers. One Shaw, who so dealt with appellants, in October, 1877, sent 77 barrels of herrings and 236 barrels of mackerel; and, on the 3rd November same year, while these fish were in the store of appellants, sold the 236 barrels of

mackerel, along with a quantity of other fish to W. M. Richardson at $8 a barrel. Richardson paid half in cash and gave Shaw a note for the balance at four months. This note was given to appellants by Shaw on account of his general indebtedness. On the 4th of March, 1878, Richardson became insolvent, and the respondent was subsequently appointed assignee, and demanded and brought an action to recover the 236 barrels of mackerel. After issue was joined, the appellants proved against the estate of Richardson on the note, and received a dividend on it. The Chief Justice at the trial gave judgment for $1,888, less $46.19 for one month's insurance and six months storage, and found that the defendants had knowledge that the fish sued for were included by insolvent in the statement of his assets, and made no objection thereto known to the assignee or creditors at the meeting.

Held, (affirming the judgment of the court below, STRONG, J., dissenting) that the defendants failed to prove the right of property in themselves upon which they relied at the trial; that the property was in the respondent, who had, as against the appellants (no claim for lien having been set up) a right to the intermediate possession of the fish.

2. That as the fish had not been stored with appellants by way of security for a debt due by insolvent, appellants would at the same time make a claim on the estate for the whole amount of insolvents note, receive a dividend thereon and retain possession of the fish.

Thompson, Q.C., for appellants.

Rigby, Q.C., for respondent.

Appeal dismissed with costs

DOMINION TELEGRAPH CO. v. SILVER ET AL.

Libel—Slander—Telegraphic message—Liability of telegraph companies—Special damage—Evidence—Excessive damages—43 Vict., ch. 37., sec. 5—New trial.

This was an action brought by the respondents as partners in trade for defamation of the respondents in their trade. In the declaration it was alleged: 1. That respondents were wholesale and retail merchants at Halifax, and that appellants wrongfully, falsely, and maliciously, by means of their telegraphic lines, transmitted, sent and published from their office at Halifax to their office in St. John, and there caused to be printed, copied, circulated, and published the false and defamatory message following: "John Silver & Co., wholesale clothiers of Greenville Street, have failed, liabilities heavy." 2. That same message was published elsewhere. 3. That the appellants promised and agreed with the proprietor or publisher of the St. John *Daily Telegraph* newspaper, and entered into an arrangement with him whereby the defendants agreed to collect and transmit by means of their telegrapic lines, news despatches to said newspaper from time to time, and that such publisher should pay for all such messages and should publish them in his newspaper, and that in pursuance of said agreement the appellant wrongfully, maliciously, and by means of said telegraph, transmitted, sent and published from their office, &c., &c., the said message, whereby many customers who had heretofore dealt with them ceased to do so, and their credit, business, &c., were thereby greatly damaged.

The appellants denied the several publications charged, and also denied the entering into the agreement mentioned in the 3rd count, and the forwarding of the message as alleged. At the trial it was proved that the telegram which was published in the morning paper was contradicted in the evening edition, and that the publisher's agreement was with one Snyder, an officer of the company, to furnish him news at so much for every hundred words, but that he only paid for such as he used. The original despatches were not produced. The only evidence as to damage was the evidence of two witnesses, who proved that by reason of the publication they ceased to do business with respondents, as they had previously been accustomed to do. This evidence was objected to as inadmissible, but was received. The dealings of these witnesses with the plaintiffs consisted in selling their exchange, and sometimes discounting their notes. The counsel for the defendants moved for a non-suit, which was refused, and the case was submitted to the jury, who, upon the evidence, rendered a verdict for the plaintiff, with $7,000 damages.

On appeal to the Supreme Court of Canada it was

Held, 1. (Sir W. J. RITCHIE, C.J., *dubitante*, and HENRY, J., dissenting), that the damages were excessive, and that under the Act further to amend the Supreme and Exchequer Court Act, 43 Vic., ch. 37, sect. 5, this Court in the exer-

cise of its discretionary power, can order a new trial on that ground.

2. (Per STRONG, TASCHEREAU and GWYNNE, J J.,) that no special damages having been alleged in the declaration, the evidence as to special damages, which had been objected to, was inadmissible, and therefore a new trial should be granted.

3. (Per GWYNNE and TASCHEREAU, J J..) that assuming the agreement between Snyder and publisher to be one within the scope of the purposes for which the defendants were incorporated, and that Snyder had sufficient authority to enter into it on behalf of the defendant Company, the evidence established that the defendants collected the news, &c., for the proprietor of the newspaper as his confidential agents and at his request, and that they were not responsible for the publication by the publisher of said news for which the damages were awarded.

McCarthy, Q. C., and *Rigby*, Q. C., for appellants.

Thompson, Q.C., for respondent.

Appeal allowed with costs.

COURT OF APPEAL.

From Chy.] [March 24.

PIERCE v. CANAVAN.

Mortgage—Equity of redemption—Indemnity.

B. owned lots D and E, and mortgaged them. The mortgagee (J.) assigned the security and afterwards bought up the equity of redemption. The plaintiff subsequently purchased from J. lot D, for which he paid the full value and obtained a conveyance containing statutory covenants for title and possession. J. subsequently sold lot E to a *bona fide* purchaser who conveyed to the defendant, he having notice of the mortgage :

Held, (affirming the judgment of the Court below, reported in 28 Gr. 325), that the plaintiff was entitled to be indemnified out of lot E to the full extent of the value thereof against the amount due on the mortgage.

Osler, Q.C., and *F. Hodgins*, for the appeal *Ewart* and *W. Roaf*, contra.

From Chy.] [March 24

NORRIS v. MEADOWS.

Mortgage—Purchase of part of mortgaged estate—Purchaser.

M., who was the owner of Whiteacre and Blackacre, subject respectively to incumbrances of $1,600 and $500, sold Whiteacre to C. subject to the $1,600 mortgage, with covenants for title, the mortgage debt in reality being the consideration or purchase money therefor. M. afterwards sold Blackacre to N., subject to the $500 mortgage; the conveyance, however, contained absolute covenants for title, the payment of the $500 being taken as part of the consideration. Default having been made in payment, the mortgagee proceeded to a sale under the power, and N. became the purchaser of both parcels with a view of protecting himself, and thereupon took proceedings to compel M. and the representatives of C. to pay the amount due on the $1,600 mortgage.

Held, affirming the judgment of the Court below (reported in 28 Gr. 334), that there was not any privity between the plaintiff and C.'s representatives, and that the demand remained with M., the original vendor, against C.'s estate.

Bethune, Q.C., and *McLean*, for appellant.

E. Blake, Q.C., contra.

From Q. B.] [March 24.

BARBER v. MORTON.

Principal and surety—Varying contract.

By agreement entered into between the plaintiff, the defendant, and one P., the defendant undertook to guarantee the payment of whatever goods P. should order of the plaintiff, and who in consequence sent to P. a quantity of goods ordered by P. in writing, and in addition consigned others not ordered, which were invoiced at prices higher than were quoted by the plaintiff and those at which P. had ordered some of the goods. Without disclosing these facts to the defendant, the plaintiff presented to the defendant for signature a bill of exchange upon P., which the defendant signed, thinking that it was to cover the price of the goods as ordered.

Held, reversing the judgment of the Court below, that, as all that had been done by the plaintiff had been done in the strictest good faith, the defendant was liable for the price of such of

the goods as had been ordered; but as to the remainder, that the consideration had failed.

Bethune, Q.C., for appeal.

E. D. Armour, contra.

From Chy.] [March 24.

INGRAM v. TAYLOR.

Married woman—Interpleader.

The plaintiff, who had been married since 1864, cultivated land, one half of which had, in 1874, been devised to her by the father of her husband, the other half of which had been in like manner devised to her son. In an interpleader action between her and an execution creditor of her husband,

Held, (affirming the judgment of the Court below, 46 U. C. R. 52), that the plaintiff was entitled to the crops on the whole farm as against the execution creditor.

Bethune, Q.C., and *J. K. Kerr*, Q.C., for appeal.

M'Carthy, Q.C., contra.

From C. P.] [March 24.

CARLISLE v. TAIT.

Chattel mortgage.

Held, (reversing the judgment of the Court below, in 32 C. P. 43), that the affidavit of the *bona fides* of a chattel mortgage, when made by the agent of the mortgagee, need not state that he is aware of the circumstances connected therewith. *The Freehold Loan and Savings Society* v. *Bank of Commerce*, 44 U. C. R., commented on and explained.

Held also, (Patterson, J. A., dissenting,) that when a chattel mortgagee, on default, proceeds to a sale under the powers in his mortgage, the purchaser is not in a position to re-file the mortgage which is satisfied as to the goods; nor need he (the mortgagor remaining in possession) file a bill of sale from the vendor in order to preserve his rights as against creditors of the mortgagor.

Moss, Q.C., for appeal.

McClive, contra.

From Chy.] [March 24

LEAMING v. WOOD.

Garnishing equitable claim—Receiver—Judicature Act, (O.) rule 370.

Where moneys were payable to G. as rents of real estate of which a Receiver had been appointed, the Court, on the application of execution creditors of G., *held*, that they had a right to garnish these moneys in the hands of the Receiver, and that, whether he is, under the words of Rule 370 of the Judicature Act, to be considered as a debtor of G. or not; although it would be necessary to obtain permission of the Court of Equity to proceed against G.'s interest in such lands before proceeding to a seizure and sale thereof.

In re Cowan's Estate, 14 Ch. D. 638, considered, approved of and followed.

R. M. Wells and *G. T. Blackstock*, for appellant.

W. Cassels and *J. Roaf*, for respondents.

CHAMBERS.

Boyd, C.] [Dec. 17, 1881.

SUTHERLAND v. MCDONALD.

Security for costs — Wilful mis-statement of plaintiff's residence.

Where plaintiff, resident without the jurisdiction, wilfully stated in his bill that he resided within it, security for costs was ordered.

A subsequent application to rescind the order, on the ground that the plaintiff had returned within the jurisdiction and intended to remain there was granted, but an appeal was allowed and the order for security directed to stand.

Mr. Dalton, Q. C.] [April 1, 1882.

DAVIS v. WICKSON.

Examination of parties.

Held, that in actions in the Chancery Division the defendant may be examined at any time after his defence is filed, or after the time for filing the same has expired.

D. E. Thomson, for defendant moving.

Wardrop, contra.

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

KEEFE v. WARD.

Master in Chancery—Jurisdiction to commit for non-production of documents—Rule 420, O.J.A.

Held, that the power, formerly exercised by the Referee in Chambers, to commit parties for non-production of documents, is not vested in the Master in Chambers.

Symons, for the motion, *ex parte*.

CORRESPONDENCE.

Administration of Justice in British Columbia.

To the Editor of the LAW JOURNAL.

SIR,—There is one passage in your interesting article on this subject which seems likely to mislead those who rely on it for information—a result which I am sure you would sincerely regret. It appears on page 28.

"In 1872 a Royal Commission by Letters Patent under the Great Seal appears to have been issued in the same ample terms and with all and singular the same jurisdiction, power and privileges in every respect as those of the other two judges (who had been appointed by Imperial Order and Royal Sign Manual) to the Honorable Mr. Justice Gray, as a puisne Judge of the same Court; and a B. C. Act, passed for the occasion, added, as far as it could, local sanction to the appointment and its terms. It is therefore, according to these authorities, no mushroom tribunal but an old and honoured Court of imperial statutory, creation and descent."

Now the facts in regard to Mr. Gray's appointment are as follows:—In April, 1872, the Legislature of British Columbia passed an Act (Cons. Stats. c. 56) which, after reciting among other matters, that by s. 92 of the B. N. A. Act it is provided that in each Province the Legislature may exclusively make laws in relation to * * * the administration of justice in the Province, including the constitution, maintenance and organization of the Provincial Courts both of civil and criminal jurisdiction, and including procedure in civil matters in those Courts, enacts that it shall be lawful for the Governor-General to appoint a judge of the Supreme Court of British Columbia in addition to the number of judges authorized by the "Supreme Court's Ordinance, 1869," and that after the passing of this Act the said Court may be held before any one or more of the judges already appointed or to be appointed under this Act; and another section gives (or at least purports to give) the additional judge the same powers as the other Puisne Judge. Two months later the Dominion Parliament (35 Vict. c. 20) provided for the salary of the additional judge, and subsequently the Governor-General appointed Mr. Justice Gray to the office

One other passage in your article puzzles me—the statement that "*by statutes framed directly under the eye and order of the Imperial Government*" all the powers of the two original Courts were concentrated in the present Court, &c. Does that mean anything more than that the statutes referred to were passed by the Legislature of the Colony of British Columbia before the union with Canada?

It is to be hoped that the elaborate judgments rendered by the three judges on the constitutional questions raised in the *Thrasher Case* will be published, for, though very lengthy, they are of unusual interest and importance, not only to British Columbia but to the whole of Canada.

Yours truly,

Victoria, B. C. EDWIN JOHNSON.

[We are glad to hear from our correspondent on a matter which is of much interest from a constitutional point of view, and of special interest of course in British Columbia. A careful perusal of the judgment in the *Thrasher Case*, now published, will probably clear away some of his difficulties, and we think substantially confirm the views expressed in the article on the subject referred to.

The B. C. Supreme Court spoken of by us as having been of Imperial creation and descent, is so exhibited in the Orders of the Queen in Council of the 6th April, 1856, and the Imperial Act, the 12 & 13 Vict., (1849), while Vancouver Island was a direct dependency of the Crown governed by Order in Council. We would also refer our correspondent to the Imperial Act to provide for the Government of British Columbia, (April 2, 1868), and the Orders of the Queen in Council thereunder in relation to B. C. as a colony, and all the subsequent legislation of the colony, and another Act specially prepared in and sent out for adoption from the Colonial Office—"The Supreme Court's Ordinance, 1869," and the "Court's Merger Ordinance, 1870,"—which (in confirmation of the Union Act of the Colonial Legislature) merged, or, as the article in question expresses it, —concentrated all the powers, rights, privileges and jurisdiction of all the pre-existing chief Courts and Judges of the formerly separate Colonies of Vancouver Island and British Columbia, in the present Supreme Court of British Columbia. It will also be seen that in s. 7

of the "B. C. Supreme Courts Ordinance, 1869," there is a saving and confirmation of the tenure, jurisdiction and authority of the Judges of these various Courts as concentered in the said single Court and its judges. The same powers, authority and jurisdiction were conveyed by Royal Commission to the Hon. Mr. Justice Gray, extending over all British Columbia, the same as the other Judges ; and the same thing happened on the appointing of the Hon. Mr. Justice McCreight, and their late lamented colleague the Hon. Mr. Justice Robertson.

The judgment in the case our correspondent speaks of, if we understand it aright, sets forth the Superior Judges as appointed and paid by the Dominion, and that on their appointment all their rights and privileges are at once attached and vested in them. The Local Legislature asked for their appointments under the Act of 1872, and so were concurring, and as they gave all they could, whatever their exact powers were, they certainly appear to have by B. C. Statute added a local sanction to the judicial appointment and its terms—a chief one of which was, of course, the pay they were to receive from the Dominion.

It might be well, now that we are again alluding to this subject, to supply what might seem to be an omission in reference to our remarks as to the *Thrasher Case*, *ante* p. 129, and as to the complaint therein of injustice done to the complainants.

The Administration of Justice Act, 1881, section 28, had not only purported to enact "that the Judges of the Supreme Court of British Columbia, should have power to sit together in the City of Victoria as a full Court and any three of them should constitute a quorum," but had added, "and such full Court shall be held only once in each year, at such time as might be fixed by Rules of Court," Now the Act came into force by proclamation, on the 28th June, 1881, and on the day before, the 27th June, 1881, (that year), the full Court had already sat. Previously to the passing of this section 20, and of the Rule 401 A, the full Court had sat, and could sit every day, or any day that business required it, just as since that change they do now. The Thrasher people had therefore a double injury to complain of: (i.) That this Rule and section suddenly deprived them, after the commencement of their proceedings, of a right they had previously enjoyed, of having the judgment of a single Judge reviewed by the whole Court, and (ii.) also confined the possibility of such review to once a year, and, perhaps, that once had already expired.

SUPREME COURT OF BRITISH COLUMBIA.

GENERAL ORDER.

Whereas—By the Supreme Court Ordinance, 1869, section 13, the Chief Justice of British Columbia is authorized and empowered from time to make all such orders, rules and regulations, as he shall think fit for the proper administration of justice in the Supreme Court of British Columbia ;

And whereas, by the Court Merger Act, 1870, section 1, it was declared that the Supreme Court of British Columbia should be deemed to have come into existence on the 29th March, 1870, and it was by section 4 declared that nothing therein contained should affect any of the provisions of the said recited Ordinance of 1869 ;

And whereas, the Judges of Superior Courts have as of right and as part of their judicial authority power to make rules of practice and procedure in such cases, subject to the provisions of statutes made by a competent legislature ;

And whereas, it is considered that the Supreme Court of British Columbia and the Judges thereof, are by divers sections of the British North America Act, 1870, viz., in particular, ss. 96, 99, 100, 129 and 130, placed under the authority of the Parliament of Canada ;

And whereas, the Parliament of Canada has not made any law affecting the power of the Chief Justice or of the Judges of the said Supreme Court to make such rules of Court as in the said first recited Ordinance are mentioned ;

Now, therefore, Sir Matthew Baillie Begbie, Chief Justice of the said Court, does by virtue of the power expressed and contained in the said first recited Ordinance, and we, the said Matthew B. Begbie, and also H. P. P. Crease and J. H. Gray, Justices of the said Court, do by virtue of every power and authority, as in this behalf in any wise enabling, and so far as we lawfully can or may, and not further or otherwise, order as follows, viz :

Until further order herein, the body or code of rules known as "The Supreme Court Rules, 1880," as the same are referred to and more particularly described in the Order of His Honor the Lieutenant-Governor in Council, of the 16th day of October, 1880, and published in the British Columbia *Gazette*, (no. 4th of volume xx) on the said 16th of October, 1880, and so far as the same do not contradict nor are repugnant to any statute made and passed by a competent legislature, shall be the rules of practice and procedure to be observed in all suits, applications and proceedings, had or taken, with respect to any matters within the cognizance of the Supreme Court.

Matthew B. Begbie, C.J.
Henry P. Pellew Crease, J.
J. H. Gray, J.