DIARY FOR FEBRUARY.

1. Fri...Examinations for call. Last day for collector to return roll.
2. Sat...Examinations for call with honors.
4. Mon..Hilary Term begins. Law Society Convocation meets.
5. Tues.Law Society Convocation meets.
6. Wed..Hagarty, C. J., sworn in as C. J. of C. P., 1856.
9. Sat ..Law Society Convocation meets.
10. Sun..Queen Victoria married, 1840.
15. Fri ..Law Society Convocation meets. Last day for Assessors to begin to make their rolls.
18. Mon..Last day for moving against Municipal elections.
21. Thur.Rehearing term in Chancery begins.
24. Sun..*St. Matthias.*
27. Wed..Sir J. Colborne, Administrator, 1838.

CONTENTS.

Canada Law Journal.

Toronto, February, 1878.

We are glad to see that our efforts to increase the usefulness and interest of this Journal are being appreciated. In fact, it has come to this, and is generally recognized, as far as Ontario is concerned, that no practising lawyer with any pretensions to business, and no student with any ambition, can afford to be without it. And, as the decisions of our Courts are looked upon as high authority, not only in the other Provinces of the Dominion, but also in the United States, and are not unfrequently referred to in England, the "Notes of Cases," giving, as they do, all the decisions of our Superior Courts, will be of great value to professional men in those places. Our Sheet Almanac for 1878 is increased in size and information. The index for last volume is issued with this number. We regret that owing to printers' delays it is not already in the hands of our readers. The *Résumé* of proceedings of the Law Society for Michaelmas Term last was not received in time for insertion in this number.

We are pleased to see our sketch of the life of the late lamented Chief-Justice Draper copied in full in the English *Law Journal.* It is well that the many excellent qualities of that eminent judge should be better known than they could be through our pages. It would, however, have been more courteous to us, and have added to the information of the readers of our namesake, if the usual acknowledgment of the authorship of the article had been given. It was doubtless an oversight, but if our positions had been reversed, it is probable

that our contemporary would have had something to say about it.

The Council of Law Reporting in Ireland have communicated with Lord Justice Christian, and have asked him to assist in the preparation of his judgments by giving his manuscript, or by correcting the short-hand writer's transcript of his notes. To this he has replied in effect: "Do not report me at all." This of course, cannot be, and the Council will have to go on as heretofore, despite the animosity of the irate judge.

A curious question has recently been raised as to the right of official assignees to office room in the court-houses of the different counties. Section 359 of the Municipal Act enacts that County Councils shall "provide all necessary and proper accommodation, fuel, &c., for all Courts of Justice, other than the Division Court, and for all officers connected with such Courts." The Insolvent Act makes (sec. 28, *b.*) every official assignee an officer of the Court having jurisdiction in the county for which he is appointed, and subject to the summary jurisdiction of the Court or a Judge thereof. An enterprising assignee who thinks that his down-trodden class should have some of the good things that are going, and which have been so far denied them by a grasping and over-reaching public, has made a demand upon a County Council for an office, fuel, light, &c., in the court-house of his county. The question is not free from doubt; and, as the squabble is a very pretty one, we shall not try to spoil it by offering any opinion on the subject. We only remark that if all the County Councils are as mean in their economies as is that of the county in which we now write, and if all court-houses are as dirty and uncomfortable as that of the County of York, there is no fear of any official assignee claiming a right to encamp in the musty den that disgraces the metropolis of Ontario.

The idea of a quite satisfactory adjustment of disputes by any system of law has long been abandoned, even if any hopeful party ever dreamed of such an impossible, though much longed for, desideratum. It is, therefore, merely as an incident, that we note the present result of the litigation in *Samo et al.* v. *The Gore District Insurance Company*, reported in a recent number of the Appeal reports. The defendants had judgment in their favour by the unanimous decision of the Court of Common Pleas. When the case came up on appeal, this opinion was, on the main point, sustained by the Chief Justice of Ontario, but reversed by three Judges of the Court of Appeal. In fact, Patterson, Burton, and Moss, JJ.A., over-ruled Hagarty, C.J., Harrison, C.J., Gwynne, J. and Galt, J. As far as the facts of the suit were concerned, the case seemed a hard one on the plaintiffs, and the Court of Appeal may be right; the result, however, cannot be said to be very satisfactory in its legal aspect. The case, we understand, goes to the Supreme Court. In the last number of the reports of that Court, (of which more hereafter) is published the case of *Johnston* v. *St. Andrews Church*, on an appeal from the Court of Queen's Bench for Quebec. The first decision in the Superior Court was in favour of the defendants. The plaintiff appealed to the Queen's Bench, and that tribunal by a majority of one out of five judges, dismissed the appeal. The Supreme Court reversed this decision, the Chief Justice and Strong, J. dissenting. That is to say, of the twelve judges who at va-

rious times gave judgment, six were in favour of the plaintiff, and six were for the defendants.

RIGHTS OF COUNSEL.

A question involving the rights of counsel has lately come up in England, and has been ruled or advised upon by the judge at Nisi Prius. In an interpleader suit "an eminent serjeant" was retained for the plaintiff. When the case came on for trial, a brief was not given to the serjeant, but to another counsel. The serjeant thereupon dropped a note to the other counsel, informing him of the retainer, and insisting on his right to a brief. Upon reference to the judge presiding, he thought that the retainer should be followed by a brief, and adjourned the case so that an arrangement might be effected. The *Solicitors' Journal* puts it properly and forcibly thus: that the special retainer at the beginning of a suit is to be considered as equivalent to a pledge to deliver a brief in due course, if the case goes to trial.

In *Reg.* v. *Wilkinson, re Brown*, 41 U. C. R., 70, it is said that certain gentlemen appeared as counsel for Mr. Brown, but that he shewed cause in person. It appears not to be settled whether if a party appears in person he may be assisted in the discussion of legal points by counsel. In *Shuttleworth* v. *Nicholson*, 1 Moo. & R., 255, Tindal, C. J., allowed counsel to argue that there was no case for the jury against the defendant in person, but not to cross-examine. But much more reasonable is the view of Alderson, J. in *Mercati* v. *Lawson*, 7 C. & P., 39, where he said that counsel ought to appear as such, or not at all, and he further remarked that if every case were conducted by the party himself, no strength could get through the business. We understand that in the *Wilkinson* case the Court required the litigant shewing cause to elect whether he or his counsel would argue the case, and declined to sanction any division of labour.

DISSENTING JUDGMENTS.

In the Privy Council the practice has been pursued from ancient times of promulgating only the judgment of the majority of the members in cases where there was a difference of opinion among the Councillors. The Order of February 1627, provides that "when the business is to be carried according to the most voices, no publication is afterwards to be made by any man, how the particular voices and opinions went." When the Judicial Committee of the Privy Council was constituted by the Act of 1833, it was enacted that appeal causes and matters "shall be heard and a report made to His Majesty in Council for his decision thereon as heretofore, in the same manner and form as has been heretofore the custom with respect to matters referred by His Majesty to the Privy Council." And so it happens that reasons for the judgments of the Privy Council are delivered by one Judge, who speaks for and in the name of all. There is a different practice in the House of Lords, where each peer, can, if he pleases, enunciate his own views, and agree with or dissent from those of the others. The dissentient judgments in appeals to the Lords thus come to be reported—not so with regard to appeals to the Privy Council. In this Province it has always been usual for the members of the Court of Appeal to deliver separate judgments and dissentient judgments of the minority receive equal consideration at the hands of the reporter, with those of the majority who agree as to the result of the appeal. We perceive from the published numbers of the Reports of the Supreme Court of the

Dominion, that dissentient judgments are pronounced and are reported *in extenso*. It is because we think the adoption of such a practice of very questionable advantage that we now draw attention to this subject.

In the Supreme Court of the United States, it is not the custom to report any opinion given by the dissenting judges. The fact that such and such a judge dissents is mentioned and no more. In many of the separate States the same practice obtains as to the decisions of the Supreme Court of the particular State. The opinion of the Court is prepared and pronounced by one judge, appointed in conference by the others, and this limitation has a great influence on the care and precision with which the judgment of the Court is formulated. The principle underlying the whole matter is, as a contemporary expresses it, that a final tribunal should give forth no uncertain sound as to the law, and the publication of conflicting judgments can only tend to weaken the authority of the rule laid down, and so to perpetuate uncertainty and to increase litigation.

It is evident that one good end which would result from the suppression of dissentient opinions would be the reduction in bulk to that extent of the yearly volumes of the Reports. A very much over-ruled judge might then imitate the example of the Pennsylvania justice, who published at his own charges, in a volume by themselves, his own dissenting judgments, and so sought redress at the hands of posterity. It is further evident that if the reporters do their duty, and give a proper synopsis of the arguments of the opposing counsel, it is unnecessary to set forth the grounds of dissent on the part of any of the judges. Any attentive student of the case will see where doubts may arise. But when a judge has fully combatted his brethren in the conference room, and been voted down, it is better that his reasons for withholding assent, should not be reported, so as to cast disrespect on the considered judgment of Courts of last resort. We think we speak advisedly when we say that the little weight possessed by decisions of Lower Canada Courts is partly owing to the diverse views entertained and expressed by the different judges who take part in the disposition of the case. Much better to suppress the disagreement and not to give prominence to it by publishing *in extenso* all that can be said against the opinion of the majority. As in family matters, if there be disturbances, better not aggravate the trouble by taking the public into your confidence. When Mr. Justice Maule, according to the well-known story, gave judgment, after Judge A, and Judge B, had just delivered conflicting opinions, by saying that he agreed with his brother B, for the reasons given by his brother A, he never intended that the views of the Court should be published for the benefit of the profession, or the confusion of suitors.

The object of all decisions is to settle the law—to determine the just rule fitted to the existing state of things, and it is most important that the conclusion should be reached with such precision and unanimity, as not to provoke litigation. In the Court of final appeal for this Dominion, we think that the ancient customs of the Privy Council, and the well-considered practice of the Supreme Court of the United States, may well be recognised and adopted. The opinion of the Court should be composed and delivered by one member and no dissenting judgment should be pronounced or reported. When Chief-Justice Marshall presided in the Supreme Court, one finds the formula adopted in pronouncing the opinion of the Court thus, as in

Cranch's Reports: "The *majority* of the Court is of the opinion, &c." "The Court, with the exception of two judges, have come to the conclusion," &c. Dissent, which implies discord, was not allowed to mar the influence of the Court. Prominence was not given to the various opinions of the members of the Court, but emphasis was laid upon the judgment of the Court. The decision was given and the reasons for it, but not the reasons against it, and even the names of the dissentient judges were suppressed. By such a course, we are persuaded that the Court at Ottawa will gain in strength and dignity, and secure the respect and confidence of inferior tribunals.

FURNISHED APARTMENTS.

"I don't see that law rubbish is worse than any other sort. It is not so bad as the rubbishy literature that people choke their minds with. It doesn't make one so dull." This sapient remark of Mr. Rex Gascoigne (one of George Eliot's latest friends) is the excuse for the appearance, at this season of rubbishy magazine articles, of this *olla podrida* of cases.

Many a young bachelor, and many a young *feme sole*, is just now contemplating the advisability of taking a furnished house, or, at the least, furnished apartments. To such young people we would extend the following words of advice, warning and information, based upon the experience of bygone days.

Imprimis: to avoid all possibility of future disputations with the owner of the furnished lodgings or house (as the contract concerning them is one concerning an interest in lands, within the purview of the Statute of Frauds) it is well to follow Mr. Woodfall's advice, and have the agreement reduced to black and white. In it should be specified the amount of rent, the time of entry, the length of notice to quit required and any other necessary particulars; and do not neglect to have affixed a list of the goods and chattels in the apartments (Woodfall, Landlord and Tenant, 8th Ed., 173).

'Tis well to see that the taxes and the rent (unless the landlord owns the house) are paid up and are likely to be kept so, for one's own personal belongings will be liable for his rent and taxes; unless, indeed, the local habitation chance to be in New England, New York, or some one of the other States of the Union where the power of distress no longer exists (Parsons on Contracts, vol. ii., 517). Of course a man does not take much with him except his books, but his wife takes her clothes, her cat and her bird, and none of these are exempt from a landlord's warrant. Wearing apparel cannot be seized for debt, but it can be for rent, unless in actual use. Mr. Baynes helped to decide this point. In 1794 he was eight weeks in arrear for his furnished lodgings, so a bailiff appeared on the boards, and took his raiment and that of Mrs. B., although part of it was actually in the wash-tub at the time, and Lord Kenyon, before whom the matter came, said that it was all right (*Baynes* v. *Smith*, 1 Esp., 206). The same judge, in another case, decided that a landlord could take the clothes belonging to a man's wife and children, while they, the clothes screens (as Carlyle calls them), not the clothes, were in bed, and which the bipeds—thus left naked—were in the daily habit of wearing, on the ground that they were not in actual use (*Bisset* v. *Caldwell*, 1 Esp., 206 n). As for the cat, Coke said ages ago that pussies could not be distrained, because in them no man could have an absolute and valuable property; but that reason

is not applicable to costly Angoras, and *cessante ratione cessat et ipsa lex.* Wood fall says a bird may be taken (p. 284). Unfortunately the poor creature seized upon cannot make the other tenants or lodgers pay their share towards the debt (*Hunter* v. *Hunt*, 1 C. B., 300).

Because this right to distrain is a grievous remedy, in some places only the goods of the debtor himself are allowed to be taken, and not those of an under-tenant (Parsons, vol. i., 518: *Archer* v. *Wetherell*, 4 Hill (N. Y.), 112.)

If any new furniture is to be placed in the rooms by the landlord, and the intending lodger desires it done, the agreement had better be put into writing; for then no rent is payable until the promise is fulfilled (*Medielen* v. *Wallace*, 7 A. & E., 54; *Vaughan* v. *Hancock*, 3 C. B., 766).

Fortunately, when one gets settled in his abode, he need not care if the water-pipes in his rooms leak through the floors and injuriously affect the property of the tenant below, provided the defect was not known to him and could not have been detected without examination, and there has been no negligence on the tenant's part, for he is not bound at his peril to keep the water in the pipe (*Ross* v. *Fedden*, 7 Q. B., 661). The occupant of an adjoining apartment may, and probably will, if he has any æsthetic sensibilities, object to a stovepipe going from your room to the chimney in his; but if there had been one there before his arrival in the house, the strong arm of the law will nullify his opposition, for then he took his room subject to the easement of the black cylindrical smoke conductor and its necessary hole in the chimney, and he cannot cause your kettle to cease from singing or your pot from bubbling because his sense of the sublime and beautiful is offended (*Culverwell* v. *Lockington*, 24 C. P. 611).

Sometimes in these latter days of shoddy and of shams the boiler attached to the kitchen stove will explode with terrific uproar, doing considerable damage to the nerves of the inhabitants, and slight injury to the coarser portions of the human frame divine. If such a thing happen in a furnished house, even though caused by the want of a safety valve, the tenant need not, at least if in New York State, rush off to attack his landlord, unless he can prove that the latter knew of the defect, or had reason to apprehend a catastrophe if the boiler was used (*Taffe* v. *Harteau*, 56 N. Y., 398). Although on one occasion the Courts in the Empire State held the owner of the house liable for injuries caused by an explosion of gas arising from the pipes not being properly secured (*Kimmell* v. *Burfied*, 2 Daly, N. Y., 155).

If it happen that on a rainy day a drip, drip, drip, a patter, patter, patter, is heard in the room, and ugly splashes of water are seen descending upon a most costly carpet or valued book, 'tis useless to cry out that the landlord must pay for the mischief done by his leaky roof; for, as Baron Martin lately observed, one who takes a floor in a house, must be held to take the premises as they are, and cannot complain that the house was not constructed differently. The storm may have blown off some shingles, and then, even were he bound to use reasonable care in keeping the roof secure, he could not be held responsible for what no reasonable care or negligence could have provided against. He could not certainly be considered guilty of negligence, if he had the roof periodically examined, and it was all secure when last looked at (*Carstairs* v. *Taylor*, L. R. 6 Ex., 223). But, by the way, in New York, a landlord, who himself occupied the top flat, and allowed liquids to leak through into the rooms of his tenants

below, was held liable (*Stapenhurst* v. *Am. Man. Company*, 15 Abb. Pr. N. S., 355). A layman might imagine that a landlord must keep his house in good order so that the occupant be not damnified, but a cleric knows that the law says quite the reverse; that he is not bound to do any repairs, however necessary, except such as he expressly agrees to do; no promise is implied; nor need he do anything, even though the main walls gape and yawn threateningly, and the pumps have to be worked several hours daily, to keep the basement free from water (*Arden* v. *Pullen*, 10 M. & W., 321; *Keates* v. *Cadogan*, 10 C. B., 591; *Gott* v. *Gandy*, 2 E. & B., 845; *Wiltz* v. *Matthews*, 52 N.Y., 512; *Taffe* v. *Harteau*, 56 N. Y., 398). 'Tis true, that, in New Hampshire, a couple of years ago, it was held that a landlord is liable for injuries accruing to his tenants if he negligently builds his house, or carelessly suffers it to continue in disrepair (*Scott* v. *Simons*, 54 N. H., 426). But then, a very high American authority tells us that the decisions of the Courts of other States are entitled to more weight than those of New Hampshire (16 A. L. J., 419).

Unfortunately for the poor tenant he must continue to pay rent, however wretched his house becomes, unless there has been an error or fraudulent misdescription of the premises, or they are found to be uninhabitable through the wrongful act or default of the landlord himself (*Lyon* v. *Gorton*, 7 Scott, 537), and perhaps even then (*Surplice* v. *Farnsworth*, 7 M. & G., 576). Even if the fire fiend swallows up the building, the landlord is entitled to his rent, just as if all had gone on as merrily as marriage bells, until regular notice to quit has been given, and the required time has rolled round (*Packer* v. *Gibbons*, 1 Q. B., 421; *Fowler* v. *Payne*, 49 Miss. 32). Of course, the length of notice required, depends upon the nature of the tenancy, whether it be a yearly one, or from quarter to quarter, month to month, or week to week: a half-year's or a quarter's, or a month's, or a week's notice being requisite, as the case may be (*Parry* v. *Hazell*, 1 Esp., 94: Woodfall, L. & T. 8 Ed., 174). But even here Judges differ, and some say that in an ordinary weekly tenancy a week's notice to quit is not implied as a part of the contract, unless there is a special usage (*Huffel* v. *Armistead*, 7 C.P., 56); *People* v. *Geolet*, 14 Abb. Pr. U. S., 130). Yet those who hold to this latter view, think that a reasonable notice is needed (*Jones* v. *Mills*, 10 C. B., N.S. 788). Willes, J., on one occasion said, in a half frightened sort of way as if he knew that he was wrong, that because, in a tenancy from year to year, only six months' notice is required, therefore he could not see how it was possible that a tenant from week to week could be entitled to more than half a week's notice (*Ibid*). One cannot leave because the idea has possessed him that the landlord's goods and chattels are about to be seized for rent (*Ricket* v. *Tullerk*, 6 C.& P., 66), unless express stipulation has been made to that effect (*Bethell* v. *Blencome*, 3 M. & G., 119).

In the case of furnished lodgings all the rent is deemed to issue out of the land, none out of the tables and chairs, pots and pans (*Newman* v. *Anderton*, 2 Bos. & P. New R. 224; *Cadogan* v. *Kennet*, Cowp., 432).

The law will allow a landlord to make himself disagreeable in many ways, but he cannot insist upon locking-up the hall-door at an early hour in the evening; for when he rents his rooms he impliedly grants all that is necessary for their free use and full enjoyment (and that, in the case of most mortals, includes the use of the hall and stairs) whenever required, and not merely when he in his discretion

may deem best (*Maclennan* v. *Royal Insurance Company*, 39 U. C. R., 515). Nor can he object to the free use of the bell and knocker; in fact, an action will lie against him if he attempts to interfere with the reasonable use of all the necessary adjuncts of his furnished apartments (*Underwood* v. *Burrows*, 7 C & P., 26.) Though, if the tenants are of an undesirable class, the proprietor might, in mitigation of damages, shew that he acted in this surly way for the express purpose of getting rid of his lodgers (*Ibid*).

Occasionally newly arrived tenants of furnished rooms find that all the previous occupants have not moved out; that some—small, but aldermanic in shape—have no intention of leaving. Unwilling to test faithfully the truth of the scientific assertion that these creatures all retire to their nooks and crannies shortly after midnight, these fastidious individuals eagerly inquire if they can at once quit the haunted house. It seems that they can. Long since Baron Parke said that the authorities appeared fully to warrant the position that if the house is encumbered with a nuisance of so serious a nature that no one can reasonably be expected to live in it, the tenant can give it up; because there is an implied condition that the owner rents the place in an habitable state. Lord Abinger went even further, and stated that he thought that no authorities were wanted to establish the point, that common sense was enough to decide it. He thought that tenants were fully justified in leaving under such circumstances (*Smith* v. *Marrable*, 11 M. & W., 5: Addison on Contracts, 375).

Some gentlemen, learned in the law, have, however, thought that these Judges were mistaken in this, because, in some later cases, it has been held that there is no implied warrantry in the lease of a house, or of land, that it should be reasonably fit for habitation, occupation or cultivation, and that there is no contract (still less any condition) implied by law on the demise of real property, only that it is fit for the purpose for which it is let (*Hart* v. *Windsor*, 12 M. & W., 68; *Sutton* v. *Temple*, Ib., 57; *Searle* v. *Laverick*, L. R. 9 Q. B., 131). But then, in some of these latter decisions the case of a ready-furnished house is expressly distinguished, upon the ground that the letting of such a house is a contract of a mixed nature, being, in fact, a bargain for a house and furniture, which of necessity must be such as are fit for the purpose for which they are to be used. Lord Abinger was particularly strong upon the point; he said that "if a party contract for the lease of a house ready furnished, it is to be furnished in a proper manner and so as to be fit for immediate occupation. Suppose, said he, it turn out that there is not a bed in the house, surely the party is not bound to occupy it or continue in it. So, also, in the case of a house infested with vermin; if bugs be found in the beds, even after entering into possession, the lodger or occupier is not bound to stay in it. Suppose, again," his lordship continued, "the tenant discovers that there are not sufficient chairs in the house, or they are not of a sort fit for use (short of a leg, we presume), he may give up possession" (*Hart* v. *Windsor*, supra). And so late as April in the last year of grace, Lord C. B. Kelly said that it was his opinion, both on authority and on general principles of law, that there is an implied condition that a furnished house shall be in a good and tenantable state, and reasonably fit for human occupation, from the very day on which the tenancy is to begin, and that when the house is in such a condition that there is either great discomfort or danger to health in entering or dwelling in it, then the intending tenant is enti-

tled to repudiate the contract altogether (*Wilson* v. *Finch Hatton*, L. R., 2 Ex. Div., 343). Judge Shaw, of Massachusetts, says that when furnished rooms in a lodging-house are let for a particular season a warranty is implied that they are suitably fitted for such use (*Dutton* v. *Gerrish*, 63 Mass., 94), and Abinger thought that the proprietor was bound to supply whatever goods and chattels might be necessary for the use and occupation of a house such as the one let.

Across the line it has been held that the existence of a noxious smell in a house does not afford the tenant a reasonable excuse for leaving (*Westlake* v. *De Grau*, 25 Wend., 669). But my lady, the Dowager Countess of Winchelsea, found otherwise. She agreed to rent a furnished house in Wilton Crescent, London, for three months of the season of 1875 for 450 guineas; but when she arrived, with her servants and personal baggage, an unpleasant smell saluted her aristocratic nostrils, so she declined to occupy the mansion, and, ordering round her horses, drove off. On investigation, the drains were found to be in a shocking state: it took three weeks to make the place fit for habitation, and then the Countess refused to go back or pay any rent. The lawyers then had to appear on the scene, and after them the judges. These latter bewigged gentlemen unanimously held that the state of the drain entitled her ladyship to rescind her bargain, and to refuse to pay the rent (*Wilson* v. *Finch Hatton*, L. R. 2 Ex. Div. 336).

Some people object to scarlet fever and small-pox (perhaps rightly so), and do not like to take up their quarters in houses where persons have lately departed this life through the assistance of these diseases. To such particular persons it may be a comforting reflection to know that Lord Abinger thought that if a new tenant found that the old one had left because some one had recently died in the lodgings of the plague or scarlet fever, the incomer might legally retire (*Smith* v. *Marrable*, 11 M. & W. 5); and that in Massachusetts a man who caught small-pox, through no fault of his own, but because the owner of the house wilfully neglected to inform him that the rooms were infected with that disease, might recover damages from the landlord (*Minor* v. *Sharon*, 112 Mass., 477), always provided, we suppose, that he recovered from the small-pox in the first place.

Chairs and tables in furnished apartments are oft times weak in the legs (owing to their long standing); it is well, therefore, to know that an occupier of such places is not responsible for deterioration by ordinary wear and tear in the reasonable use of the goods of the landlord (Add. on Contr. 377).

If a lodger sports a brass-plate, bearing his patronymic, on the front door, the landlord is not at liberty to take it off. A Dr. Lane hired certain rooms from one Johnson, with the privilege of putting up his plate on the door: Johnson shortly afterwards leased the whole premises to one Dixon for twenty-one years. The health of the community being good, the doctor got behind in his rent; so Dixon removed the plate and refused him access to his rooms; in fact, he actually fastened the outer door against the doctor. The medico sued for damages, and the jury gave him £10 for the breaking and entering his rooms, expelling him therefrom and seizing his *et ceteras*, and £20 for the removal of the plate. Dixon was dissatisfied with the verdict, and appealed to the Court, but the Judges sustained the finding, considering the removal of the plate a distinct and substantial trespass (*Lane* v. *Dixon*, 3 M. G. & S. 776).

A different decision was arrived at in *Hartley* v. *Bloxham* 3 Q. B., 701, where the defendant, claiming that money was due him by the plaintiff, his lodger, locked up the defaulter's goods in the room, pocketed the key, and refused poor Hartley access to them until the bill was paid; it was held that there was no trespass. But in this latter case the landlord never actually touched the goods, he only locked up the door and kept the key. Where a landlord, before his boarder's time was up, contrary to his wishes, entered his room, and removed therefrom books, maps and papers, placing them where they were damaged by the rain, the Court decided that he was a trespasser, and made him pay for all the injuries sustained, both that arising from the direct and immediate act, and that happening remotely from the act of God (*Nowlan* v. *Trevor*, 2 Sweeny, N. Y., 67).

And now we think that we have given the amiable persons mentioned in the beginning of this article as much advice as they can stand at present; if they need further information let them apply to some practitioner near at hand, and pay for it. All we would now say is, "Do not go to law with your landlord," for, as Mr. Owen Feltham wrote in 1670, "To go to law is for two to contrive the kindling of a fire to their own cost, to warm others, and sindge themselves to cynders."

R. Vashon Rogers, Jr.

SELECTIONS.

INTEREST UPON INTEREST.

There is a wide-spread impression among laymen that to receive interest upon interest is a violation of the laws against usury. It prevents the creditor from receiving compensation for his debtor's delay even when it is tendered, which the law permits him to take and retain, although it will not assist him to recover it from an unwilling hand.

To compound the interest piles up the debt with fearful rapidity, but on the other hand there appears to be no reason why the debtor should not suffer the usual penalty for his default, and be compelled to recompense his creditor for the damage the law assumes in similar cases that he has suffered.

The common law was averse to interest of any kind, simple or compound, and the prejudice against compound interest has survived to our own times, although the aversion is now justified on the broad ground of public policy.

In this State interest upon interest is only allowed under special circumstances, but the moral justice of the demand is acknowledged and the creditor's title is perfect when he has received the money.

In the case at least of instruments to secure the payment of debt after a long lapse of time, and providing that it shall bear interest payable at fixed times, it would seem that in the event of any such installment of interest remaining unpaid interest upon it should be recoverable.

As Judge Monell said in one case: "The moment interest becomes due it is a debt." Moreover the debtor is bound to seek his creditor and pay it (*Williams* v. *Hance*, 9 Paige, 211). Why should not interest be allowed upon failure to pay this debt as well as upon any other? Such an allowance of interest certainly would not conflict with the usury laws. They forbid "any greater sum or greater value for the loan or forbearance of any money, goods or things in action" to be taken, than seven dollars upon one hundred dollars for one year. This would hardly seem to forbid an award of interest as damages in such a case. It would not be a payment for the loan of the original sum, but a penalty for the debtor's delay in making payment of a distinct and separate debt.

That it cannot be recovered when voluntarily paid shows yet more distinctly that taking interest upon interest is not forbidden by the usury laws. Then again

it cannot be recovered if a demand has been made of it. This certainly precludes the idea of usury. In several cases it has been clearly stated that it is not because it is usurious that interest upon interest is not allowed, but that it is frowned upon because it is opposed to the policy of our law as tending to injury and oppression.

It seems too to be still under the ban of that mediæval prejudice which prohibited all taking of interest and stigmatized it in the English statute (21 James I, ch. 17), permitting it among sinful men as unlawful in point of religion and morals.

But whatever the analogy that pleads for interest upon interest in certain cases, the current of the decisious has been too strong against it in this State to permit the courts to grant it except under exceptional circumstances.

In *Townsend* v. *Corning*, 1 Barb. 627, Gridley, J., in the course of his opinion upon the validity of a note given partly for interest upon interest, says: "Yet I will assume, as the law of this case, that a reservatiou in a new security of compound interest that had accrued upon a sum previously due, against the will of the debtor, and as a condition of forbearance upon the new security, affects the security with usury and makes it void." He then says it becomes a question of fact whether it was extorted as a price for forbearance and against the will of the debtor, and there being no evidence to show either of these usurious ingredients, decides that the security is valid.

As appears from the foregoing his assumption of law was not necessary to the decision of the case, for there was no evidence of objection by the defendant, But whatever its necessity the assumption has foundation in either the statute or common law of the State.

In *Kellogg* v. *Hickock*, 1 Wend. 521, it had been decided that if parties accounted together concerning the amount due and by the consent of the debtor included compound interest, the new security for the amount including it was uot usurious. Although the conclusion arrived at was correct it was reached upon false grounds, for it was assumed, as in the former case, that interest upon interest included in a security might make it usurious and void, while, as we have said before, it is never on the ground of usury that compound interest is not permitted to be taken, but because it is regarded as unjust and oppressive.

The learned judges seems to have had in their minds the relief that equity gives to any contract forced upon a party by duress and oppression, not meaning that compound interest could avoid an instrument, but that if by an unconscientious misuse of his debtor's necessities the creditor exacts compound interest, a court of equity could relieve him as they would from any other contract he might be brought into by such means (*Thornhill* v. *Evans*, 2 Atk. 330). Finally this assumption has not been adopted in subsequent decisions, for we never again find the question of forbearance and willingness raised, while it has been expressly decided that a demand of interest is sufficient to turn it into principal which from thenceforth draws interest.

The cases of *Crippen* v. *Hermance*, and *Williams* v. *Hance*, in 7 and 9 Paige, are sometimes cited to sustain the proposition assumed by Judge Gridley. The most cursory examination will show that in each case the security was contaminated by a transaction which the chancellor declared a mere shift to cover usury.

In *The State of Connecticut* v. *Jackson*, 1 Johns. Ch. 13, Chancellor Kent examined the subject of compound interest as regarded in equity, and laid down the principles by which our courts have since been guided in their consideration of this subject. The question was upon the confirmation of the report of a master to whom it had been referred to compute the amount due upon a bond and mortgage; the report contained a computation and account allowing interest upon the installments of interest due and unpaid, He examines the principles and decisions bearing upon the subject in an opinion unusually lucid and learned even for our great chancellor, and delares that compound interest has never been allowed except under special circumstances.

It appears that the question of allowing compound interest was raised in Chancery as early as 4 Car. I. At that early period it was laid down as the rule that interest upon interest was not allowed. An exception was afterward (Car. II) allowed in favor of the assignee of a mortgage, and the amount of the principal and interest really and *bonâ fide* due and paid by him was allowed to carry interest. But this case was overruled by Lord Chancellor Shaftesbury, who allowed interest on the principal sum only. Afterward the Lord Keeper said such an allowance of interest upon interest to the assignee was reasonable and just, although he appears to have followed the precedent just mentioned. Subsequently, in *Gladman* v. *Henchman*, 2 Vernon, 135, such interest was allowed to the assignee. The cases on this point are loose and contradictory, and even on the general question of the allowance of compound interest the *dicta* up to 1688 are both ways. But since the revolution the general rule that interest upon interest is not allowed except under peculiar circumstances, has been well established, although the rights of an assignee of a mortgage may be still in doubt. In our own reports we are not without the least *dicta* upon this subject. The case of *Jackson* v. *Campbell*, 5 Wend. 572, although decided upon another point, touches this question. It is there laid down that "where a mortgage is assigned with the concurrence of the mortgagor, the assignee shall be entitled to interest upon the interest paid by him, as well as upon the principal of the mortgage; but if the assignment is made without the privity of the mortgagor it does not carry interest. This does not seem to go quite as far as the anonymous case in Banbury's Reports, 41, where it is said that if the mortgagee had applied to the mortgagor before the assignment and demanded his money and required him to join in the assignment, if the mortgagor refuses either to pay or join in the assignee shall recover interest both on the principal and interest. This case would seem to be sound on principle, for all the later cases hold that interest may be recovered upon interest from the time payment is demanded, and as the assignee stands in every respect in the shoes of his assignor he ought to be able to avail himself of the demand as his assignor might.

Lord Thurlow, although he expressed the opinion that there was nothing unjust in allowing interest upon interest, said that he would have to overturn all the proceedings of the Court of Chancery if he allowed it generally. In certain cases it has always been allowed, as where there is a settlement of an account between the parties after interest has become due where there is an agreement to allow it after it has become one, or where the master's report computing the sum due for principal interest has been confirmed, for it is then in the nature of a judgment.

While such special circumstances may turn interest already due into principal, and permit interest to accrue upon it, an agreement to pay interest upon the interest that may thereafter accrue, if it is not paid punctually at the stated times, will not be enforced. The first case upon this point found in the books, is *Sir Thomas Meers' Case*, cited by Lord Chancellor Talbot in *Bosanquett* v. *Dashwood*, Ca. Temp. Talb. 40, and followed in succeeding cases.

Sir Thomas Meers had inserted a covenant in some mortgages that if the interest was not paid punctually at the day, it should from that time, and so on from time to time to be turned into principal. Lord Chancellor Harcourt relieved the mortgagors from the covenant as unjust and oppressive. This established principle of English jurisprudence has never been questioned in this State. But it would appear that the rule, in its strictness, applied to landed security only, for, as appears from the observations of Lord Thurlow and Lords Commissioners Mather and Athurst, compound interest might be allowed between the parties to mere personal agreements, upon the ground of a contract to allow it, either express or to be inferred from circumstances. But while our judges have noticed this distinction, they seem to have inclined to extend the rule to debts on simple contract. While

such an agreement will not be enforced, it is not to be regarded as usurious, and will not contaminate and avoid the rest of the contract.

In *Stewart* v. *Petrie*, 55 N. Y. 621, ten years' interest was due on a mortgage, and foreclosure proceedings were discontinued on a note being given for arrears and interest; suit was brought on the note, and the defence of usury was interposed. In the opinion of the court, per Allen, J., it is said: "The receiving of interest upon interest is not a violation of the Statute of usury, as no more than seven per cent. is in such cases taken or received. It is true that an agreement in advance for the payment of interest upon interest, as the same shall accrue, cannot be enforced, not because it is usurious, but for the reason that such an agreement is regarded in this State as against public policy as one that may be made oppressive to the debtor—but a prospective agreement after the interest has accrued, to pay interest thereon, is valid. So, too, a security for interest upon interest, given after it has accumulated, and in the absence of any prior undertaking to pay it, is valid, and supported by a good consideration." The learned judge does not say what this good consideration is, but it is undoubtedly the moral duty to recompense the creditor for the delay. For in equity a moral obligation is considered to be of sufficient consideration to uphold an express agreement to fulfill it.

And the case of *Mowry* v. *Bishop*, 5 Paige, 103, we find this moral obligation is the consideration assigned to support agreements. In the course of the same opinion, the learned judge refers to the case of *Van Benschoten* v. *Lawson*, 6 Johns. Ch. 313, wherein Chancellor Kent said that such an agreement must not only refer to interest then due, but must be prospective, and that if the contract be that interest shall be paid upon interest from some previous time when it became due, it will not be enforced. He does not examine the foundation for this opinion, but simply states that the doctrine that such contracts will be enforced, whether retrospective or prospective, is now too well settled by authority in this state to be questioned.

In the case of *Thornhill* v. *Evans*, *supra*, Lord Hardwicke directed the master to inquire what arrears of interest were agreed, from time to time in writing, to be turned into principal.

In *Van Benschoten* v. *Lawson*, Chancellor Kent adopted this rule, and said that the agreement to pay interest must be in writing. Later the rule requiring a writing was approved by Justice Balcom in the case of *Forman* v. *Forman*, 17 How. 257.

However, many cases take the view that a demand is all that is necessary to turn interest into principal, and make it bear interest from the date of that demand (*Connecticut* v. *Jackson*, 1 Johns. Ch. 16).

In the case of *Howard* v. *Farley*, 19 Abb. Pr. 129, Judge Monell says: "If the interest is demanded when due, it becomes principal from that time, and interest upon it should be recoverable."

These and the later cases, generally, are evidently inconsistent with the rule requiring a writing, which may probably be regarded as abandoned at least as to prospective contracts.

From the foregoing cases, and the principles that are a necessary deduction from them, it is evident that where interest is paid upon interest, the transaction is not usurious. It must be equally clear, and it is certainly quite as well settled, that money paid for compound interest cannot be recovered back (*Stewart* v. *Petrie*, 55 N. Y. 621). The case of *Boyer* v. *Pack*, 2 Denio, 107, seems to have been cited in some cases as sustaining the position that it can be recovered, but that case was expressly decided upon the ground of a mistake of fact.

The present law of the State upon the subject of compound interest, then seems to be:

I. As a general rule interest is not allowed upon interest.

II. That a provision in a contract for interest upon future instalments of interest which remain unpaid, will not be enforced, but it will not contaminate the rest of the contract so as to render it usurious or void.

III. That a contract to pay interest upon interest due at the time is upon a sufficient consideration and valid, and may be retrospective in its action, and provide for the payment of interest from a time then past.

IV. That from the time payment of it is demanded, interest bears interest.

V. That if interest is paid upon interest, it cannot be recovered back, although the law would not have compelled the debtor to pay it.—*Albany Law Journal.*

JUDGES BY DESCENT.

The appointment of the Hon. Alfred Thesiger, Q.C., to the vacant judgeship in the Court of Appeal will be received with some surprise by the public and the legal profession. Mr. Thesiger has for some time been favourably known to the world as a rising lawyer of competent ability and great industry, but not as possessing any of the extraordinary qualities which would give him a meteor-like rise. If he possessed any of these qualities there would be nothing remarkable in the case. Mr. Thesiger is only thirty-nine years of age, but the present Lord Cairns when he was made Solicitor-General was a year less. If, however Mr. Thesiger possessed any of the transcendent powers of Mr. Hugh Cairns he would not have been reserved for the present appointment, but would have been chosen Solicitor-General when Sir Hardinge Giffard was appointed. Both were Conservative lawyers of merit, and without a seat in Parliament; and of the two, Mr. Thesiger, from the traditions of his name, was a great deal more likely to obtain a seat than Sir H. Giffard. Moreover, Mr. Thesiger is but barely qualified by professional standing for the office of Judge of appeal. Being raised directly from the bar, and not having served as a judge of first instance, the Act of Parliament requires fifteen years' standing. Mr. Thesiger was called to the bar on June 11, 1862, so that he has been a little more than five months qualified to take his seat.

When Lord Bacon became Lord Chancellor, he is said, in inaugurating the office, to have made use of the following words from the woolsack: 'I have a fancy. It falleth out that there are three of us, the King's servants in great places, that are lawyers by descent — Mr. Attorney, son of a judge; Mr. Solicitor, likewise son of a judge; and myself, a Chancellor's son. Now, because the law roots so well in my time, I will water it at the root thus far. As, besides these great ones, I will hear any judge's son before a serjeant.' Lord Bacon's antipathy to the serjeants, to which body he had failed to belong, was the motive for his 'watering the root' in the way thus quaintly expressed. But 'the law roots well" in our time as it did in Bacon's. We have as 'lawyers by descent,' Lord Coleridge, Baron Pollock, and Mr. Justice Denman, to whom Lord Justice Thesiger's name must now be added. It may be added that a successful lawyer is frequently born. 'Lawyers by descent,' however, need not be ashamed of their birthright when they point to Lord Bacon as a conspicuous example of their class—the son of Sir Nicholas Bacon, and in his nursery Queen Elizabeth's 'little keeper.' But it must be remembered that Lord Bacon had little of the paternal 'watering at the root,' as his father died when he still had to make his way in the world. There have been other brilliant examples of illustrious sons of illustrious lawyers. Bacon accounts himself in the passage we have quoted as a Chancellor, the son of a Chancellor, although Sir Nicholas Bacon's designation was more properly Lord Keeper; but we have one undoubted example of two Chancellors in successive generations—the ill-fated Lord Chancellor Charles Yorke was the son of Lord Hardwicke, one of the most distinguished lawyers who sat on the woolsack. Charles Yorke was the three days' Lord Chancellor who, at the solicitation of George III., deserted his party and accepted office under the Duke of Grafton; and afterwards, stung by the reproaches of his brother and political friends, put an end to his own life. He was Lord Chancellor, having received the Great Seal, but was not a peer, as, at the time

of his death, the patent lay unsealed in his room; and it is said that some officious friends wished to apply the seal to it during his life, but were prevented by Lord Hardwicke, his brother. A closer analogy to the case of Mr. Thesiger will be found in that of Thomas Erskine, judge of the Common Pleas, who was the son of Lord Chancellor Erskine, the famous advocate. The instances of the son of a Lord Chancellor attaining the bench are, of course, not numerous; but cases of judges' sons becoming judges are common enough to warrant the foundation of general principles upon them. — *Law Journal.*

CANADA REPORTS.

ONTARIO.

COMMON LAW CHAMBERS.

(Reported for the *Law Journal* by H. T. BECK, M. A. Student-at-Law.)

MITCHELL v. MULHOLLAND.

Prohibition—Division Courts—New trial.

Held, that Con. Stat. U. C., cap. 19, sec. 107, giving the judge power to grant a new trial within fourteen days is imperative, and that the judge has no power to grant a new trial after the expiration of fourteen days,

[December 1, 1877—MORRISON, J.]

This case, which was an application for a writ of prohibition, to prohibit a Division Court judge from granting a new trial after the expiration of fourteen days, and which is reported *ante infra*, vol. xiii., p. 224, was reconsidered by the learned judge, no order having issued discharging the summons.

D. B. Read, Q.C., in support of the application for a writ of prohibition.

The judge may order a new trial upon the application of either party within fourteen days after the trial: Con. Stat U. C., cap. 19, sec. 107. By sec. 63 of same statute the Governor may appoint judges to frame rules, and by sec. 66 the rules and forms so approved of shall have the same force and effect as if they had been made and included in this Act. By Division Court Rule No. 52, an application for a new trial may be made, and the application and affidavits (if any), together with an affidavit of service thereof *shall* be delivered to the Clerk within fourteen days after the day of trial. see *Re Applebee* v. *Baker*, 27 U. C. R., 486. The word *shall*, in above Rule 52, having the same force as the Division Court Act itself, would seem to make the Act imperative that the application for new trial should be made within fourteen days: see *Davidson* v. *Gill*, 1 East, 64. As to the construction of the word "upon," see sec. 107 referred to, and *Reg.* v. *Humphrey*, 10 A. & E., 335. He also cited Dwarris on Statutes, 662, 611, and *Mossop* v. *Great Northern R. Co.* 16 C. B., 580. When an applicant is entitled to the writ, the Court will give it, notwithstanding the smallness of the claim, as a matter of right: see *Worthington* v. *Jeffries*, L. R. 10 C. P., 379, and *Elston* v. *Rose*, L. R. 4 Q. B., 4.

MORRISON, J. after taking time to consider, *held* that the judge had no power to grant a new trial after the expiration of the fourteen days from the first trial. He therefore granted an order for a writ of prohibition to issue.

Order accordingly.

QUEBEC.

COURT OF QUEEN'S BENCH—APPEAL SIDE.*

ANGERS, Appellant, v. THE QUEEN INSURANCE CO., Respondents.

Powers of Local Legislatures—Stamp duty on Insurance Policies—Quebec Statute, 39 Vict. c. 7.

Held, (affirming the judgment of the Superior Court, 21 L. C. J. 77) that the Quebec Statute, 39 Vict. c. 7, requiring insurance companies doing business in the Province of Quebec to take out a license, the price of which should be paid by stamps affixed to the policies issued, is unconstitutional.

[MONTREAL, Dec. 14, 1877.]

The Legislature of Quebec passed an Act, 39 Vict. c. 7, requiring insurance companies doing business in the Province of Quebec to take out a license, the price of which should consist in the payment to the Crown for the use of the Province of a percentage on premiums, and the percentage was made payable by stamps affixed to the policies issued. The right to impose this tax being denied by the companies, the present action was instituted as a test case by the Attorney General of the Province, on be-

* *Before*:—Chief Justice DORION, and Justices MONK, RAMSAY, TESSIER, and TASCHEREAU *ad hoc*.

half of the Crown, charging the respondents with infraction of the Statute.

The respondents pleaded the unconstitutionality of the Statute, inasmuch as it levied an indirect tax upon insurance business, and thereby encroached upon the exclusive jurisdiction of the Parliament of Canada.

The Court below (Torrance, J.) maintained the plea, and the action was dismissed.

Carter, Q. C., and *Lacoste*, Q. C., for appellant.

Abbott, Q. C., *Kerr*, Q. C., and *Doutre*, Q. C., for respondents.

Ramsay, J., differing from the majority, would be for reversing the judgment appealed from. The tax levied by requiring stamps to be placed on insurance policies, though not direct taxation within the meaning of section 92 of the B. N. A. Act, par. 2, yet fell within par. 9 of the same section, permitting Local Legislatures to issue licenses for the raising of revenue for Provincial purposes. The payment of the license fee by stamps was simply a mode of collection, and was the most equitable mode that could be adopted.

Dorion, C. J., held that the charge imposed on licenses by the Statute was clearly an indirect tax, and the attempt to put it in the form of a license was an evasion of the B. N. A. Act, from which the Local Legislature derives its powers. His Honor abstained from expressing any opinion upon the question, not raised here, whether the Local Legislature has not power to force insurance companies to take a license at a fixed sum.

Judgment confirmed.

—*Legal News.*

NOTES OF CASES.

IN THE ONTARIO COURTS, PUBLISHED IN ADVANCE, BY ORDER OF THE LAW SOCIETY.

COURT OF APPEAL.

From C. C. Ontario.] [January 9.

Thomas v. American Express Company.

Carriers—Contract to carry there and back—One rate.

The plaintiff, who was a poultry fancier, being desirous of sending some fowls and pigeons to the Hamilton Exhibition, made inquiries of the agent of the Canadian Express Company, at Whitby, as to the cost of their carriage to Hamilton and back. The Canadian Express Company's line did not run further in that direction than Toronto, from which point to Hamilton goods were carried by the defendant's Company. Both Companies were carrying goods to the Exhibition at special rates, and the plaintiff asked the agent to ascertain the defendant's rates. The agent communicated with the defendant's agent, who was also the agent of the Canadian Express Company, at Toronto, but the correspondence was not produced. Subsequently the plaintiff delivered the birds to the agent of the Canadian Express Company, at Whitby, to whom he paid the freight for their carriage to Hamilton and back. The birds, on arrival at Hamilton, were received by the plaintiff. After the Exhibition was over the plaintiff requested the defendant's agent at Hamilton to send them back by a certain train, which he agreed to do, and gave him labels to address and attach to the crates, promising to send some one to receive them. The plaintiff afterwards pointed out his birds to a man sent by the Company, who promised to take charge of them, but allowed a number of the pigeons to fly away. This action was brought to recover their value.

Held, reversing the judgment of the County Court, that the evidence showed that the contract was with the Canadian Express Company to carry to Hamilton and back for one rate, and that the defendants, therefore, were not liable.

Monkman for the appellant.

McMichael, Q.C., for the respondent.

Appeal allowed.

From Q. B.] [January 15.

Allen v. McTavish.

Statute of limitations—Covenant—Mortgage.

The declaration charged that the defendant, by deed dated 24th November, 1856, covenanted to pay one J. H., or his assigns, a certain sum of money, with interest, in four equal annual instalments, the first of which became due on the 24th November, 1856, and that the said J. H. assigned the said mortgage to the plaintiff, yet the defendant did not pay the principal moneys or interest, or any part thereof.

The defendant pleaded that the plaintiff's

claim was a sum of money secured by way of of mortgage upon certain lands in this Province, and that the suit was brought to recover the same, and that the alleged cause of action did not arise within ten years before this suit.

Held, (Moss, C. J. A., Burton, Patterson, JJ.A., and Blake, V. C.), reversing the judgment of Morrison, J., overruling a demurrer to the plea, that the limitation, under 38 Vict. cap. 16, sec. 11, of ten years within which an action must be brought to recover money secured by a mortgage, does not extend to a covenant contained in the mortgage for payment of the amount.

Bethune, Q.C., (with him *A. Galt*) for the appellants.

Ferguson, Q.C., for the respondent.

Appeal allowed.

From C. P.] [January 15.

LA BANQUE NATIONALE v. SPARKS.

Application to re-stamp under 37 Vict. cap. 47, s. 2.

Upon the announcement of an intended decision in this case differing from that of the Court of Common Pleas, in which they held that the curative sections of 31 Vict. cap. 13, sec. 12, as amended by 37 Vict. cap. 47, sec. 2, did not apply to bankers and brokers, the counsel for the plaintiffs applied to stay the certificate until he could make an application to take the note out of Court for the purpose of stamping it. The Court granted the application, and after the note had been stamped, a motion was made for an order granting a new trial, or for a nonsuit, or for such other relief as it was competent for the Court to give. It appeared that the particular objection to the stamping of the note was called to the attention of the plaintiffs' counsel during the argument in the Court below; but it was not shown that any application had been made to that Court, at the time, for the note to re-stamp it.

Held, (Burton, Patterson, JJ.A., Harrison, C.J., and Blake, V. C.) that the plaintiffs were not entitled to the relief asked, as they had not availed themselves of the privilege of stamping the note under 37 Vict. cap. 47, sec. 2, as soon as they acquired a knowledge of the defect.

Snelling, for the plaintiffs.

M. C. Cameron, Q.C., and *McMichael*, Q.C. for the defendant.

Motion refused.

From C. C. Hastings] [January 15.

DONNELLY v. CROSBY.

Verdict rendered by mistake.—Changing of same by Judge.

In this case, the jury, after being out for some time, came into court with their verdict, which was taken down by the judge as verdict for defendant and so read over to the jury and recorded. The jury were discharged, and about half-an-hour afterwards, one of the jurymen told the judge that the verdict given was for the plaintiff, whereupon the judge called back the jury, some of whom had left the court room, put them into the box, and polled them, when they all said that the verdict was for the plaintiff. The judge did not then alter the verdict, but two days afterwards, and after hearing counsel, he struck out the verdict for the defendant, and entered it for the plaintiff, and afterwards refused in term to disturb such verdict.

Held (Moss, C. J. A., Burton, Patterson, and Morrison, JJ.A.) that the judge had no power so to change the verdict; and the appeal was allowed with costs, and a new trial without costs in court below granted.

H. J. Scott, for appellant.

G. E. Henderson, Q.C., and *G. D. Dickson*, for respondent.

Appeal allowed.

From C. C. Wentworth.] [January 16.

NORDHEIMER v. ROBINSON.

Contract—Construction of—Hire Receipt.

The defendant, wishing to purchase an organ from the plaintiff on credit, gave him a conditional hire receipt, which acknowledged the receipt of the organ on hire at $4 a month, but gave him the right to purchase it for $129, payable as follows: a cash payment of $50, and the balance with interest in one year from date; and it was stipulated that the organ should remain the plaintiff's property, on hire, until payment was fully made. The defendant paid the $50 and obtained the instrument. At the expiration of the year, the defendant was granted an extension of time—which was followed by similar indulgences, until at last being pressed for payment by the plaintiff's agent, he offered to pay $50 cash, and balance in four months. Their agent communicated this offer to the plaintiffs, who replied, "As we require this matter *closed-up* you can accept

the $50, provided he gives you a note for the balance at four months." The defendant paid the $50 and gave the note as required, and the agent handed him a receipt for *balance* on account of organ. The note was not paid at maturity, and an action of replevin for the organ was brought.

The judge left it to the jury to say whether the note was taken conditionally or on account, or was a settlement of the balance due, and that from thenceforth the organ was to be the defendant's. The jury found a verdict for the defendant.

Held (Moss, C.J.A., Burton, Patterson and Morrison, JJ.A.) reversing the judgment of the County Court, that the construction of the contract was for the court; and that there was no evidence that the note was given in satisfaction of the unpaid residue of purchase money, and accepted by the plaintiffs upon the understanding that their rights under the hire receipt were terminated.

Held, also, that interpretation of a mercantile contract is not necessarily for the jury.

H. Cameron, Q.C., for the appellants.

Rose, for the respondent.

Appeal allowed.

From C. P.] [January 16.

Anderson v. Muskoka Mill and Lumber Company.

License to cut timber—Right to timber after issue of patent—31 Vict. cap. 8 (O.).

Held, affirming the judgment of the Common Pleas, that a license to cut timber on lands comprised in the Free Grant territory, under the Free Grant and Homestead Act of 1868, 31 Vict. cap. 8 (Ont.), and located under that Act, does not enable the licensee to cut timber after the issue of the patent, although during the currency of the license year.

McCarthy, Q. C. (with him *Pepler*), for the appellants.

Lount, Q.C., for the respondent.

Appeal dismissed.

From C. C. Kent.] [January. 16.

Welch v. Ouilette.

Puis darrein continuance—Set-off.

The plaintiff declared on a promissory note, and the defendant pleaded non fecit, payment and set-off, upon which pleas issue was joined. After joinder the defendant pleaded that after the last pleading the plaintiff became and was, and still is, indebted to the defendant in an amount greater than the plaintiff's claim upon the joint and several promissory note of the plaintiff and one John Welch, which had become due since the last pleading, and which the defendant was willing to set off against the plaintiff's claim.

Held, (Moss, C.J.A., Burton, Patterson and Morrison, JJ.A.) reversing the judgment of the County Court, that the plea was clearly bad.

McMichael, Q.C., for the appellant.

Atkinson, for the respondent.

Appeal dismissed.

From C. C. York.] [January 16.

Abell v. Kronkhite.

Patented machine—Implied warranty—Misdirection.

This was an action brought to recover the price of a well-known patented machine with which the plaintiff had supplied the defendant in accordance with a written order to deliver to him "your six-horse power separator." Under the contract the property had vested in the defendant, but he sought to prove a rescission with the consent of plaintiff's agent. Evidence was given to shew that the agent had warranted it to do good work when properly used. The judge told the jury that there was either an implied or an express warranty, and directed them to find a verdict for the defendant if the breach of warranty was established to their satisfaction.

Held, (Moss, C.J.A., Burton, Patterson and Morrison, JJ.A.) reversing the decision of the County Court, that the direction was clearly wrong, as there is no implied warranty in the case of a well-known patented article; and even if there were a breach of an express warranty the property having passed, the defendant could not rescind the contract, but was only entitled to shew how much less valuable the machine was by reason of the defect.

Maclennan, Q. C., (*Ewart* with him) for the appellant.

Machar, for the respondent.

Appeal allowed.

From C. C. York] [January 16.

Mason v. Bickle et al.

Agreement for hire and sale of organ—Property passing—Estoppel.

The plaintiffs sold one R an organ on

credit, and in accordance with their custom in such cases, prepared a document called a hire receipt, which acknowledged the receipt of the organ on hire. It contained a stipulation that the signer might purchase the organ at the price of $130, payable in two equal instalments, on the 1st February, 1875, and the 1st February, 1876, but with the condition that until the whole of the purchase money should be paid, the organ should remain the property of the plaintiffs on hire, and in default of punctual payment of either instalment, or the monthly rental in advance, the plaintiffs might resume possession of the instrument without any previous demand, although a part of the purchase money might have been paid, or a note or notes given on account thereof.

This receipt and a note dated 17th February, 1874, payable four months after date, were signed by R, but it was afterwards observed that the receipt bore no date, whereupon the book-keeper filled in the 25th February, 1874. The plaintiffs discounted the note with their bankers, and shortly after maturity obtained a renewal, and returned it to R. The first instalment was paid, and renewals of the note were given until September, 1875. In May, 1876, R transferred the organ to Ouillette & Bickle, as security for a debt he owed them. He represented to them that he had paid the purchase money, and produced as evidence the promissory note of February 17th, 1874, which had been returned to him by the plaintiffs upon renewing. The note bore marks of having been discounted, but there was nothing to connect it with the organ. The organ was brought to the house of J. W. Bickle, one of the defendants, where it remained until it was seized by the plaintiffs' agents, and removed to the express office. The defendant, George Bickle, by the direction of J. W. Bickle, retook it and brought it back to the house in which they both resided. Subsequently J. W. B. sold the instrument to George.

Held, (Moss, C. J. A., Burton, Patterson, and Morrison, JJ. A.) reversing the judgment of the County Court, that the plaintiffs were not estopped from proving their ownership of the property.

Held, also, that there was ample evidence of a joint conversion.

Held, also, that the insertion of the date in the hire receipt was an immaterial alteration.

Held, also, that discounting the note was not a waiver of their right of property.

H. Cameron, Q. C., for the appellants.
S. Richards, Q. C., for the respondents.

Appeal allowed.

From Chy.] [January 16.

ONTARIO BANK v. SIRR.

Priority of claims.

The plaintiffs, who were execution creditors of William Sirr, filed a bill to set aside a conveyance of an equity of redemption from him to his son, Alexander Sirr, as fraudulent and void. The conveyance was set aside, and the decree referred it to the master to take the accounts and declared the lien of Alexander Sirr, *in priority to the plaintiff's claim*, for whatever he paid to redeem the mortgage and for improvements. In default of payment a sale was ordered, the proceeds to be applied in payment of the amounts found due to Alexander Sirr and the plaintiffs and other incumbrancers in the order of their priority. But in the event of the purchase money being found insufficient to pay the amount found due to the plaintiffs, it was ordered that William Sirr should pay the deficiency; and it was further ordered that the amount of such deficiency, to the extent of the costs taxed to the plaintiffs, should be paid by both the defendants, William Sirr and Alexander Sirr. The land was sold under the decree. Alexander Sirr bought it for $1,850, but he failed to carry out the purchase. It was afterwards sold a second time, when it produced only $1,350. The master, by his subsequent report, found due to the plaintiffs for principal, interest and costs, $1,143.12, of which the sum of $808.79 was for costs.

Held, (Moss, C. J. A., Burton, Patterson, and Morrison, JJ. A.) reversing the judgment of the Court of Chancery, that under the circumstances the plaintiffs were entitled to priority over Alexander Sirr for their whole debt and costs, inasmuch as the decree rendered Alexander Sirr liable to pay any part of the amount found due to the plaintiffs, which the purchase money, after paying charges prior to the plaintiffs, was insufficient to cover, provided that said part did not exceed the taxed costs, in which event he was only liable to pay the amount of the costs.

Guthrie, Q.C., and *Foster*, for the appellants,
Hamilton, for the respondents.

Appeal allowed.

QUEEN'S BENCH.

VACATION COURT.

Harrison, C. J.] [January 15.

NASMITH v. DICKEY ET AL.

Demurrer—Sci. fa.—R. W. Co.—Shareholders.

Demurrer—*Sci. fa.* on a judgment recovered by the plaintiff against the T. G. & B. Ry. Co., on the 15th August, 1877, for $5,582, which was unpaid, and alleging that defendants (J. J. D., N. D., and J. W.) held 30 shares in said Company, on which $1,800 remained due.

Third plea: That no sum remains due on said 30 shares, inasmuch as one G. H. had recovered a judgment against the R. W. Co., on the 17th February, 1876, for $1,800, and a *fi. fa.* had been issued and returned *nulla bona*, and thereupon G. H. sued defendants as shareholders of the said Company, and recovered judgment against them for $1,800, and thereupon defendants paid said G. H. the sum of $1,800 in full of said judgment, and the amount remaining due on said shares, and that the said 30 shares are wholly paid up.

Replication that G. H. in said action was only trustee for defendant N. D., and had no beneficial interest in said action, of which defendant had notice.

Held, that the replication was good; that the claim of N. D. as a creditor of the Company, he being also a shareholder of the Company, could not be set up to defeat the claim of an outside creditor.

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

Richards, Q. C., *contra*.

Harrison, C. J.] [January 15.

RE COLLINS & WATER COMMISSIONERS OF OTTAWA.

35 Vict., cap. 80. O. Award—Excessive damages—Extra vires.

Two arbitrators (out of three, the third dissenting), appointed under 35 Vict., cap. 80. O., by the County Court Judge, awarded the plaintiff, for land taken for the purposes of the Commissioners, and for damages caused by such taking and otherwise, $2,000, and interest on that sum at 6 per cent from the date of a by-law of the Commissioners appropriating the land.

Held, that under the statute named, the arbitrators had power to award damages beyond the value of the land.

Held, also, that the value of the land found by the arbitrators could not be interfered with by the Court, where the sum was not so excessive as to cause an inference of legal misconduct.

Held, also, that interest was properly charged as stated above.

And, *held*, that the award of two out of three arbitrators was valid.

J. K. Kerr, Q.C., for the applicants, the Water Commissioners.

T. Langton, for Collins.

COMMON PLEAS.

VACATION COURT.

Harrison, C. J.] [January 11.

BANK OF TORONTO v. MCDOUGALL.

Bill of exchange—Consideration—Foreign law.

Action against defendant as acceptor of a a bill of exchange drawn on him by McC. and McK., and payable with plaintiffs.

Plea, in substance, that the bill was drawn, accepted, &c., to raise money for the purpose of carrying on gambling contracts and speculations on the rise and fall of pork in Chicago, in the State of Illinois, which said contracts, by the law of the said State, are illegal and void; and that there never was any other consideration for the said bill than the said illegal consideration as aforesaid, of all of which, McC. and McK., at the time they drew, and the plaintiffs, at the time they became the holders, had notice. There was another plea similar to the fifth, except that it alleged that McC. and McK. paid the bill at maturity, and that the plaintiffs are suing for and on behalf of the said McC. and McK.

HARRISON, C. J., *held* both pleas bad, as the alleged gambling contract was not illegal by the law of this country; and it was no defence that it was illegal by the law of a foreign country.

ENGLISH REPORTS.

DIGEST OF THE ENGLISH LAW REPORTS FOR FEBRUARY, MARCH AND APRIL, 1877.

ADMINISTRATION.—See EXECUTORS AND ADMINISTRATORS.

ANTENUPTIAL AGREEMENT.—See MARRIAGE SETTLEMENT, 2.

APPOINTMENT.

K. gave a life estate to his daughter M., with power of appointment in M. among her "children," and in default of appointment to all her children equally. M. appointed to two daughters, one of whom was illegitimate and could not take. *Held*, that the other took one half, and the other half went to her and the other legitimate children of M. equally.—*In re Kerr's Trusts*. 4 Ch. D. 600.

ASSETS.—See BANKRUPTCY.

ATTESTATION.—See WILL, 1.

ATTORNEY AND CLIENT.—See LIEN.

BANKRUPTCY.

1. B., a wine-merchant, in 1857, undertook to marry W., his deceased wife's sister, and they lived together from that time. In 1876 B. went into liquidation, and W. filed her proof for £3,000 "for money lent, advanced, and paid" by her to B. in 1858. The evidence was, that it was agreed that B. should use the money in his business, but that for £2,000 thereof he should be a trustee for W., and that a settlement should be executed. This was, however, never done. *Held*, that W. could not prove her claim as against other creditors. They must first be paid in full.—*In re Beale. Ex parte Corbridge*, 4 Ch. D. 246.

2. M. informed B. that he had forged his name on a note for £100; that the note was just due, and he could not pay it; that if B. would pay it, and thus save M.'s family from disgrace, he would give B. a bill of sale for all his effects for this £100, and another like sum, which he owed B. before this transaction. B. accepted the bill of sale, and paid the note on which M. had forged his name. Subsequently M. became bankrupt, and in a suit by the trustee in bankruptcy against B. for the proceeds of the goods sold him by M., *held*, reversing the decision of the Chief Judge, that there had been no offence against the bankrupt law, however the transaction might have affected B. in a suit where he was plaintiff, and that the trustee could not recover.—*In re Mapleback. Ex parte Caldocott*, 4 C. H. D. 150.

See COMPOSITION; FRAUDULENT PREFERENCE; PARTNERSHIP.

BEQUEST.

1. Will in the following words: "I . . . bequeath to G. all that I have power over, namely, plate, linen, china, pictures, jewellery, lace, the half of all valued to be given to H. . . . The servants . . . to have £10 and clothes divided among them. Also all kitchen utensils." The testatrix had money and much other personal property besides that specified in the will. *Held*, that the will covered all the personal property of the testatrix.—*King* v. *George*, 4 Ch. D. 435.

2. Testator bequeathed all his remaining property after bequests, to his wife, "for" her "to do justice to those relations on my side such as she think worthy of remuneration, but under no restriction to any stated property, but quite at liberty to give and distribute what and to who my dear wife may please." *Held*, that there was no precatory trust created thereby.—*In re Bond. Cole* v. *Hawes*, 4 Ch. D. 238.

BILL OF LADING.

A bill of lading recited that a cargo of feathers and down was shipped on board at St. Petersburg, "in good order and condition, . . . to be delivered in the like good order and well-conditioned" in London. There was the usual list of excepted perils, and in the margin the words, "Weight, contents, and value unknown." The goods coming out damaged in London, the consignees sued the ship, and it was proved that the damage was recent, and that it appeared to come from without and not from within. *Held*, that in spite of the marginal note the bill of lading was evidence that the goods were externally in good order when taken on board; that thus a *prima facie* case was made out, which it was for the defendants to upset by positive evidence of inherent defects in the goods.—*The Peter der Grosse*, 1 P. D. 414.

BILLS AND NOTES.—See EMBEZZLEMENT, 2; NEGOTIABLE INSTRUMENT.

BOND.—See COLLISION, 3.

BOTTOMRY BOND.

A master has no authority to give a bottomry bond on the ship, or hypothecate the cargo, without sending word to the owners of the necessity therefor, if communication is possible.—*Kleinwort, Cohen & Co.*, v. *The Cassa Marittima of Genoa*, 2 App. Cas. 156.

BROKER.

P., a broker, in a contract for butter, delivered bought and sold notes to the plaintiff and to the defendant. He signed the first, but not the second; and he made a note of the transaction in his note-book,

and signed it. The defendant kept the broker's note till called upon to accept the goods, when he objected, on the ground that the note was not signed. *Held*, that the defendant was bound by the sold note, that he virtually admitted that the broker had authority to act for him, by his giving no reason for repudiating the bargain but the fact that the broker did not sign the note, and that the memorandum in the broker's book was sufficient to take the sale out of the Statute of Frauds.—*Thompson* v. *Gardiner*, 1 C. P. D. 777.

See Fraudulent Preference; Principal and Agent, 1.

Burden of Proof.—See Bill of Lading.

Cargo.—See Contract, 4.

Carrier.—See Common Carrier.

Charter-party.

Charter-party by plaintiff for the ship C for twelve months from the completion of her present voyage. When the C. got in she was declared unseaworthy, and it took two months to repair her. *Held*, that the charter-party could be thrown up by the plaintiff, time being of the essence of the contract.—*Tully* v. *Howling*, 2 Q. B. D. 182.

See Damages, 2.

Check.—See Embezzlement, 2.

Class.

S. by will gave estate in trust for all his children, "who being a son or sons have attained or shall attain twenty-one years, or being a daughter or daughter or daughters have attained that age or been married, or shall attain that age or be married," the sons' shares to be for their own absolute use and benefit. The daughters' shares were to be held for their separate use during their lifetime, and after for their children. In case a son died in testator's lifetime leaving children, the children, the children took in place of the father. There was no such provision in case of a daughter's predecease. A daughter died in the testator's lifetime leaving children. *Held*, that these children were entitled to their mother's share under the will.—*In re Speakman. Unsworth* v. *Speakman*, 4 Ch. D. 620.

See Construction, 2; Devise.

Codicil.—See Will, 1.

Collision.

1. Action by skiff E. against steamer C. for injury to the E., caused by alleged negligence of the C. in colliding with the E., while the C. was coming into the dock and the E was lying inside. On the evidence, *held*, that the C. was to blame.—The *Cynthia*, 2 P. D. 52.

2. Collision between the bark O. and the steamer P. in the Tyne. The P. was properly moored, but was run into during a gale by a brig adrift in the river. In consequence one of the rings of the buoys gave way, and the P. drifted, and struck and damaged the O. as she was lying moored. No lookout was posted on the P., though the weather was growing boisterous, and it was shown that her chain cables were unbent. *Held*, on the evidence, that the steamer was alone to blame.—The *Pladda*, 2 P. D. 34.

3. In a suit for wages and disbursements between a master and a mortgagee of a ship, the court refused to retain in court a sum of money sufficient to satisfy a certain bond (in case it should ever be presented), which the master had given to release the ship after a collision happening from his neglect.—*The Limerick*, 1 P. D. 111.

See Damages, 2.

Comity.—See Jurisdiction, 1.

Common Carrier.

Plaintiff took a ticket from Boulogne to London over defendants' steamboat line and railway. On the ticket it was stated that each passenger was allowed 120 pounds of luggage free, and that the company was responsible for no more than £6 value. Plaintiff's box was damaged through negligence of defendants' servants to the amount of £73. By the Railway and Canal Traffic Act of 1854, § 7, it is provided that railway companies shall be liable for loss arising from their negligence in the carriage of goods, notwitstanding any notice of nonliability they have given—and the passengers' luggage taken free of charge is included in the statute. *Held*, that the plaintiff could recover.—*Cohen* v. *The South Eastern Railway Co.*, 2 Ex. D. 253.

Compounding Felony.—See Bankruptcy.

Conditions at Sale.—See Conveyance.

Consideration.—See Bankruptcy.

Conspiracy.

Second count in an indictment for conspiracy to defraud: That defendants, promoters of the E. Company, Limited, applied to the Stock Exchange Committee for leave to have the E. Company put on the list of quotations of the Stock Exchange, under two rules of the Stock Exchange, Nos. 128, 129. These rules provide that a new company would be quoted when two-thirds of the whole nominal capital had been applied for and unconditionally allotted to the public; and a member of the Stock Exchange was authorized by the company to give information con-

cerning it, and was able to satisfy all the requirements of the committee. That defendants employed brokers to give the information required, and to make application to the committee to quote the shares; that the defendants employed the brokers to sell on behalf of certain pretended vendors of patents 5,000 shares of the stock, and conspired unlawfully to injure and deceive the committee by inducing them to order said quotation, and thereby to persuade Her Majesty's liege subjects to purchase said shares, by making them think that the company had complied with the rules of the Stock Exchange. That they falsely pretended to Z. and other members of the committee that 34,365 shares had been applied for by the public, and the amount received therefor was £17,282; that 15,000 shares had been allotted to the patentee, and none allotted conditionally; and that by means of the premises they induced the committee to order the quotation. *Held*, that a verdict of guilty of conspiracy under this count must be sustained, though the allegations were very inaccurately stated.—*The Queen* v. *Aspinall*, 2 Q. B. D. 48.

Construction.

1. H. E. died in 1819, leaving a will dated in 1814. In it he devised real estate to R. S., second son of Sir T. S., for life, remainder to R. S.'s first and other sons in tail male, remainder to J. S. and C. S. younger sons of Sir T. S., in tail male. In case the said R. S., J. S., or C. S. "shall become the eldest son of the said Sir T. S., then and in such case, and so often as the same shall happen," the estate so devised to cease and determine as though "the person so becoming the eldest son of said Sir T. S. was then dead without issue male." C. S. died, childless, in 1834. Sir T. S. died in 1841, and his eldest son succeeded to his titles. He died, childless, in 1863, and the second son, R. S., succeeded. He died in 1875, without issue male. In an action by the testator's right heirs for the estate as against J. S., *held*, that J. S. had become "the eldest son of Sir T. S.," within the meaning of the will, and was thereby disentitled.—*Hervey-Bathurst* v. *Stanley*. *Craven* v. *same*, 4 Ch. D. 251.

2. Testator gave to trustees a fund of £66,666 13s. 4d. upon trust to pay £1,000 a year, being the interest of one-half, to his daughter A. B., and the like to his daughter E. B., during their lives; and, after the decease of either daughter, "I give . . . the said £33,333 6s. 8d., . . . being such daughter's share, unto and among all and every such child or children she may happen to leave at her decease, to be equally divided between them when and as they shall respectively attain the age of twenty-one years, and if but one child, then to such child; and in case either of my said daughters shall die without issue, then I direct that" her share shall be transferred by the trustees as said daughter should by will appoint. A. B. had a daughter who married, and died in 1869, leaving five children, who are all now living, and are all over twenty-one. A. B. died in 1876, having made a will, in which she exercised the power of appointment given in her father's will in case she should "die without issue." *Held*, that the power was properly exercised, "issue" meaning children of the tenant for life.—*In re Merceron's Trusts*. *Davis* v. *Merceron*, 4 Ch. D. 182.

See Bequest, 1, 2; Class; Contract, 4; Distribution; Lease; Marriage Settlement, 1, 2; Trustee, 1, 2.

Contract.

1. Contract by defendants to buy from plaintiffs 600 tons of rice, to be "shipped" at Madras in the months of March (*and or*) April, 1874, per ship *Rajah*. 7,120 bags of rice were put on board the *Rajah* between the 23rd and 25th of February, and the three bills of lading therefor were signed in February. Of the 1,080 remaining bags, 1,030 were put on board Feb. 28, and the rest March 3, and the bill of lading for the 1,080 bags bore the latter date. There was evidence that rice put on board in February was as good as that put on board in February was as that put on board in March or April. *Held*, that the defendants was bound to take the rice. The word "ship" construed.—*Shand* v. *Bowes*, 2 Q. B. D. 112.

2. By 8 & 9 Vict. c. 109, § 18, "agreements by way of gaming or wagering" are void. Plaintiff was a "tipster" (*i.e.* one who gave advice on the probable winning horse), and the defendant agreed that plaintiff should lay out £2 in betting on a horse R. in a steeple-chase, at odds of 25 to 1. If R. won, plaintiff was to have £50 from defendant out of his winnings if he backed R. If R. lost, plaintiff was to pay defendant £2. Defendant backed R., R. won, and defendant made on his bets £250. Of this, plaintiff claimed £50. *Held*, that this arrangement came within the statute.—*Higginson* v. *Simpson*, 2 C. P. D. 76.

3. Oct. 31, 1874, the C. company made a contract with the P. company to sell the P. company 2,500 tons iron, to be delivered in monthly instalments over ten months, "payments by four months' bill net, or cash less 2½ per cent. discount, on the 10th of the month next following each delivery," Nov. 4, 1874, a second contract was made for 2,500 tons during the next ten months, for cash on the 10th of the month following delivery, with the same discount. Jan. 11,

1875, another similar contract was made. Feb. 24, 1875, after deliveries had been made under the first and second, but none under the third, contract, the P. company called a meeting of its chief creditors, including the C. company, and asked for an extension, saying the business was going on at a loss. It was refused; and the C. company refused to deliver more iron except for cash; whereupon the P. company wrote to rescind the contracts; but there was no evidence that the C. company got the notice. The P. company managed to get along until May, 1875, when its affairs became so bad that, June 9 following, voluntary winding-up proceedings were begun. The C. company claimed to prove as creditors for £2,738 for breach of the three contracts. *Held*, that the claim should be disallowed, on the ground that there was no such insolvency, or declaration of insolvency, on and after Feb. 24, as to authorize the C. company to refuse to deliver the iron except for cash.—*In re Phœnix Bessemer Steel Company. Ex parte Cornforth Hæmatite Iron Company*, 4 Ch. D. 108.

4. Defendants bought of plaintiffs "a cargo of from 2,500 to 3,000 barrels (seller's option) American petroleum, . . . to be shipped from New York during the last half of February next, and vessel to call for orders off coast for any safe floating port in the United Kingdom, or on the Continent between Havre and Hamburg, both inclusive (buyer's option)." Plaintiff's shipped 3,000 barrels, consigned by bill of lading to defendants. To fill up the ship they put on board 300 barrels more, marked in a different way and under another bill of lading. Plaintiffs gave notice of the shipment, offering to conform to the contract as to calling for orders and port of landing, and to deliver either 3,000 or 2,750 barrels to defendants there, and take the balance themselves. Defendants refused to accept any. *Held*, that defendants were not bound to accept any, the contract having been for a "cargo," and cargo signifying all a ship carries.—*Borrowman* v. *Drayton*, 2 Ex. D. 15.

See Infant; Principal and Surety; Sale; Telegraph; Vendor and Purchaser, 1.

Conveyance.

Plaintiffs were trustees, and put up the trust estate at auction under this condition, *inter alia*: "The property is sold, and will be conveyed subject to all free rents, quit-rents, and incidents of tenure, and to all rights of way, water, and other easements (if any)." Defendant was the purchaser, and objected to the insertion of the above words in the conveyance. *Held*, on claim for specific performance, that defendant was bound to accept the conveyance in the above form.—*Gale* v. *Squier*, 4 Ch. D. 226.

Copyright.

Defendant wrote a play, in which it was found as a fact that he took two "unimportant" "scenes or points" from a play of the same name belonging to plaintiff. *Held*, that, under the Dramatic Copyright Act, 3 & 4 Wm. 4, c. 15, § 2, the defendant was not liable.—*Chatterton* v. *Cave*, 2 C. P. D. 42.

Covenant.

A covenant not to carry on a trade within certain limits is broken by the covenantor's selling goods as a journeyman within the prescribed limits, for a third party carrying on the trade in question.—*Jones* v. *Heavens*, 4 Ch. D. 636.

Custody of Child.

Custody of a boy three years old given to the mother, who had been deserted by her husband, father of the child. 36 & 37 Vict., c. 12.—*In re Taylor, an Infant*, 4 Ch. D. 157.

Damages.

1. Action under sect. 6 of the Admiralty Court Act. 1861 (24 Vict., c. 10), by the assignee of a bill of lading, to recover damages for delay in the delivery of the cargo. The liability was admitted, and the question of damages was referred to the registrar. He reported that interest at five per cent. on the value of the invoice from the time when the cargo should have been delivered, and the time of its actual delivery, was the proper measure of damages; but he found as a fact that the market value of the goods had fallen during that time. *Held*, that he should have included in the damages the difference in market value.—*The Parana*, 1 P. D. 452.

2. In a suit for damages resulting from collision, the ship in fault acknowledged the liability, and the question of damages was referred to the registrar. He refused to allow as an item of damage the loss of a charter-party by the vessel injured, resulting from the delay caused by the collision. *Held*, that the loss of the charter-party must be taken into the account in estimating the damages.—*The Star of India*, 1 P. D. 469.

Deed.

The manager of a bank, which had already made advances to and taken mortgage securities therefor from one B., agreed to make further advances on further security being tendered; and B. thereupon pointed out to him three houses on C. road, which he would give as security subject to a prior mortgage. In pursuance of this ar-

rangement, an instrument was executed by B. to the bank, in which the three houses were described as conveyed in leasehold to B. by one L., "by indenture dated the 25th of September, 1874." In fact, only one of the three was comprised in that lease, the other two having been conveyed by lease to B. by L., Dec. 31, 1874. B. went into liquidation; the three houses were sold by the first mortgagee, and a sufficient sum remained out of the proceeds of the sale to pay the whole claim at the bank. *Held*, that the bank was entitled to the amount of its claim out of the proceeds of the three houses.—*In re Boulter. Ex parte National Provincial Bank of England*, 4 Ch. D. 241.

Devise.

C. devised five houses to "all and every the children of my late brother J. C. who shall be living at my decease, or who shall have died in my lifetime leaving issue living at my death, in equal shares as tenants in common." Subsequently by codicil it was recited that some of the children of J. C. had lately died without issue; the previous devise of the five houses was revoked, one of the houses was given to another devisee, and the remaining four devised to J. C.'s children in the precise words previously used in the will. J. C. had four children living at thd testator's death, and one had died during the life of the testator leaving children. *Held*, that the four children of J. C. living at the testator's death took the whole of the four houses, as members of a class.—*In re Coleman & Jarrom*, 4 Ch. D. 165.

Distribution.

Testator gave £10,000 in stocks to trustees, to pay £7,500 to certain of his grandchildren named, and the interest on the £2,500 to be paid to M. B. for life, and after his death the sum itself to be paid to the children of J. B., daughter of the testator, deceased, or their descendants; but should there be none of them surviving, "then it should be divided amongst such other grandchildren as I may then have living, or in default thereof to my legal representative." J. B. had seven children, three died unmarried in the lifetime of the testator. One of the four survivors survived the tenant for life, and one only of the three, so dying before the tenant for life, left issue. *Held*, that the children of J. B. who survived the testator, or their representatives, were the persons entitled to take.—*In re Dawe's Trusts*, 4 Ch. D. 210.

Domestic Relations.—See Custody of Child; Dower; Marriage Settlement, 1, 2.

Dower.

Mortgage in the ordinary form, with power of sale by D., with release of dower by wife, made Dec. 24, 1846. Nov. 3, 1854, D. made a second mortgage in similar form, but conveying "freed and discharged of and from all right and title to dower" on the part of his wife, and subject to the mortgage of Dec. 24, 1846. Dec. 4, 1858, the second mortgagees paid the first mortgagee, and took a conveyance of the premises from the latter, subject to the equity of redemption in the first mortgage. In October, 1860, default was made on the second mortgage, and the mortgagees sold the property. Nov. 24, 1874, D. died, and Oct. 14, 1875, his wife filed her bill against the mortgagees for the value of her dower in the equity of redemption sold by them. D. and his wife were married before the Dower Act. *Held*, that she was entitled.—*Dawson* v. *Bank of Whitehaven*, 4 Ch. D. 639.

Easement.—See Way.

Embezzlement.

1. Indictment under 24 & 25 Vict., c. 96, § 75. Prisoner was an insurance broker, and received in the latter part of December the amount of two policies sent to him for collection by the prosecutor. The amounts were sent him by checks to his own order, and he placed the checks to his own credit in his own bank. He was pressed for the money by the prosecutor, and made excuses for not paying it over at once. January 27 following he filed a petition in bankruptcy, and his balance at his bank turned out to be much less than the amount of the said checks. *Held*, that on these facts a conviction, "for that he being a broker, attorney, or agent, was intrusted with securities for a particular purpose, without authority to sell, negotiate, transfer, or pledge them, and that he unlawfully, and contrary to the purpose for which said securities were intrusted, converted a part of the proceeds thereof to his own use," could not be maintained.—*The Queen* v. *Tatlock*, 2 Q. B. D. 157.

2. The prisoner was clerk of the L. Insurance Company, and was in the habit of opening letters and receiving remittances, which he handed to the cashier, an officer under himself. If checks were sent, it was his duty to endorse them as though payable to his own order, and hand them to the cashier, who deposited them to the credit of the company, and accounted for them in his own books. Prisoner received two checks in payment of dues to the company, payable to his own order. Instead of indorsing these in the usual way, and passing them to the cashier, he got the money on them from

private friends, and turned it over to the cashier in payment of an overdraft of his salary, which he had made, and for which he had given his I. O. U's. The cashier supposed the money was the prisoner's and gave him back the I. O. U's. *Held*, on an indictment for embezzling the "proceeds" of the checks, that the transaction constituted a case of embezzlement, and that the conviction must stand.—*The Queen* v. *Gale*, 2 Q. B. D. 141.

Estoppel.—See Negotiable Instrument.

Evidence.—See Deed; Embezzlement, 1; Negligence, 1, 2.

Executors and Administrators.

1. Letters of administration *ad colligenda bona* were granted to a creditor on the estate of a schoolmaster, whose next of kin were unknown, and the school interest was likely to suffer and decrease in value from the delay to happen in the appointment of a regular administrator.—*In the goods of Schwerdtfeger*, 1 P. D. 424.

2. The business of a trader was carried on by his executrix, who was residuary legatee, after his death, as her own. *Held*, that she could not be considered a trustee for her husband's creditors with respect to the assets of the business, and that they passed on her marriage to her second husband.—*In re Fells. Ex parte Andrews*, 4 Ch. D. 509.

Fixtures.

Leasehold property was demised to E., a timber merchant. Lessee covenanted that he would build a steam saw-mill or dwelling-houses; that he would keep the same in repair, and at the end of the demise deliver to the lessor the ground and buildings, and all fixtures and other things whatsoever which should be fixed to the freehold, in good repair, &c., except the steam saw-mill, apparatus, machinery, fixtures, and things connected therewith, which the lessee had liberty to remove. E. subsequently mortgaged his interest, including the ground and premises named in the lease, "together with the steam saw-mill, offices, erections, and buildings, and which have been erected . . . upon the said . . . ground; and the steam-engines, boilers, fixed and movable machinery, plant, implements, and utensils now or hereafter fixed to or placed upon or used in or about the said grounds. . . . To have and to hold the said hereditaments, and such of the machinery, plant, utensils, and premises . . . as are in the nature of landlord's fixtures, and cannot lawfully be removed by the lessee," to the mortgagee for the balance of the term, "and as to the rest of the said machinery and premises as are in the nature of the tenant's or trade fixtures, and can lawfully be removed by the lessee thereof," to the mortgagee absolutely. The deed was not registered. E. went into liquidation, and the mortgagee had not entered. *Held*, that the deed gave the mortgagee the right to remove the trade fixtures, specified, and as the mortgage had not been registered under the Bills of Sale Act, the official liquidator was entitled to the severable property.—*In re Eslick. Ex parte Alexander.*

Foreclosure.—See Mortgagor and Mortgagee, 3.

Foreign Judgment.

The Italian bark E. F. brought suit against the French steamship D., in Marseilles, for collision. The D. began a cross-suit there for the same cause. The D. got judgment in both suits by default. In a suit in England by the E. against the D. for the same cause, the D. pleaded the foreign judgments by default, in bar.—*Held*, that the defence was not good.—*The Delta. The Erminia Foscolo*, 1 P. D. 393.

Frauds, Statute of.—See Statute of Frauds.

(*To be continued.*)

LAW STUDENTS' DEPARTMENT.

EXAMINATION QUESTIONS.

FOR CALL, MICHAELMAS TERM, 1877.

Dart's Vendors and Purchasers—Walkem on Wills—the Statutes.

1. A trustee purchases the trust estate, consisting of lands, under such circumstances that the purchase is voidable by the *cestui que trust*, and makes some permanent improvements. State fully the alternative rights of the *cestui que trust*.

2. What (if any) distinction is there between natural and artificial watercourses, as to rights which may be acquired by user? Give an illustration.

3. Under what different circumstances will time be held to be of the essence of a contract for sale and purchase: (1) at law; (2) in equity?

4. What are and what are not sufficient acts of part-performance to take an agreement out of the Statute of Frauds: (1) in case of an agreement for sale of lands: (2) in case of an agreement for a new lease to a tenant in possession?

5. A in some way injures the real estate of B. Shortly afterwards B dies. Can any action be brought against A, if so, under what circumstances and by whom? To whom would the damages belong?

6. What was the reason for, and the effect of, the statute declaring that corporations should be deemed to be capable of taking and conveying land by a deed of bargain and sale?

7. What is the provision in the statute relating to the assurance of estates tail for the meeting in one person of a base fee and the reversion? Show the necessity for such a provision. Why did the statute not extend to the case of an actual tenant in tail acquiring the reversion?

8. A contracts to sell lands to B. Before the conveyance A dies intestate, leaving a widow and some infant children. How would you advise B to proceed to complete his purchase?

9. A by his will devises certain mortgaged lands to B, and directs that all his debts should be paid out of his personal estate. The mortgagee obtains payment by action on the covenant out of the personalty. On the executors consulting you with reference to the estate generally, to what statutory provisions would you direct their attention?

Taylor on Evidence.

1. State the distinction between disputable presumptions of law and of fact.

2. What is meant by a "direct" and a "collateral" issue; and how far may the answers of a witness be contradicted in each case?

3. What are the exceptions to the rejection of hearsay evidence?

4. Is the discretion of a Judge in refusing amendments at the trial final? and what are the provisions of the late Ontario Acts respecting such amendments?

5. What is the rule as to the admissibility of dying declarations, and to what cases are they limited?

Leake on Contracts.

1. What is merger, and upon what does it operate?

2. What are contracts by agents arising from necessity?

3. Give a sketch of the Ontario law respecting written promises as to actions (1) of debt for arrearages of rent, (2) against joint contractors, and (3) respecting representations concerning the character or credit of third parties.

4. What is the effect in law and in equity where a written contract is waived or varied by parol?

5. Give examples of contracts illegal by statute.

Blackstone, Vol. I.

1. What is the right of personal security for life, and when does the right begin?

2. Illustrate what is meant by the maxim "The King can do no wrong," and state in what way has the constitution allowed a latitude of supposing the contrary.

3. Illustrate the distinction between persons natural and persons artificial.

4. Give the rules for interpretation of statutes.

5. What are the absolute rights of individuals, and by what means are these rights protected?

6. How may corporations be dissolved?

Stephens on Pleading—Byles on Bills—Common Law Pleading and Practice, and the Statute Law.

1. Define what is meant by "*an action of trespass upon the case*," and trace the history and origin of this action in English jurisprudence.

2. Where it is alleged, as a breach of a covenant sued on, that a ship was not tight, &c., and fitted for the voyage pursuant to the covenant in that behalf, whereby she was obliged to put back, and by reason thereof was detained. Would a plea, limited to "*so much of the declaration as relates to the detaining*" be good? If so, why? If not, why not? Discuss fully, giving the rules of pleading relating to the matter in question.

3. What is meant by a plea of "*liberum tenementum*," and to what cases is it applicable?

4. What is a *departure* in pleading, and how can a party take advantage of it?

5. An order is drawn by the owner of a ship to pay £100 on "account of freight," duly stamped as a bill of exchange. What would be the effect of such instrument? Give reason for answer.

6. What course should a holder of a bill of exchange pursue in case the drawee offer a qualified acceptance?

7. In how far is the production of a bill of exchange from the custody of the acceptor evidence of his having paid it.

8. Where, by the law of a foreign country, the Statute of Limitations concludes a person from recovering on a note when five years overdue, and a note made in that country is sued on in Canada five years and six months after maturity, can any, and, if so, what, advantage be taken of the foreign Statute? Explain fully, giving reasons for your answer.

9. In case of a demurrer to a replication where you are acting for the plaintiff, what matters would you deem important to consider before taking the next step in the suit? State the different courses which might be pursued, and the considerations which would govern in adopting any of them, giving grounds statutory or otherwise for what you would do?

10. What is the effect of pleading a defence arising after the commencement of an action with other pleas of defences arising before action? State fully the authority for your answer.

Fourth Year Scholarship. Michaelmas Term, 1877.

Benjamin on Sales.

1. Where an agent contracts in his own name, is it competent for either (1) agent or (2) party with whom he contracts to shew that the contract was really made with the principal? Give the reasons for your answer.

2. Explain the distinction between "bargain" and "agreement."

3. What are the rules for determining whether the property in goods has passed from the vendor to the purchaser?

4. Explain what is meant by mistake; and state in what cases can contracts, carried into effect under a continuance of mistake, be set aside.

5. What concurrent conditions, in the nature of mutual conditions precedent, must be shewn by a party seeking to enforce a contract?

6. What is meant by a *del credere* commission!

7. Define shortly what is meant by the term "a contract for the sale of a chattel."

Lectures of the Law Society.

To the Editor of the Law Journal:

Dear Sir.—Allow me a space in the "Students' Department" to say a few words in favour of the country students. Those who are fortunate enough to be in a Toronto office, have the full benefit of these Lectures, which we, as country students, have not. They have the advantage over us. Is there not some way by which we can have the same benefit? For instance, could not these lectures be published in pamphlet form by the Law Society? Almost every student in the Dominion would subscribe. Barristers would do the same. Or, if the Law Society cannot arrange the foregoing, let them publish these Lectures in the Law Journal, and thereby give us a better chance to compete for Honours and Scholarships as well as a better knowledge of Law. Perhaps the Editor of the Law Journal will enquire about it.

Country Student.

REVIEWS.

The Legal News. Montreal: T. & R White.

We welcome to the field of legal journalism *The Legal News*, published in Montreal, it rises apparently on the ashes of the defunct *Lower Canada Law Journal*. It is to be issued weekly, the publishers being Messrs. T. & R. White. It seems devoted as much to the commercial as to the legal world of the Province of Quebec. We wish it every success.

CORRIGENDA.

Vol. XIII, p. 358, in Judgment of Morrison. J.

Line 2—for "motion" read "motive."

Ib. for the comma insert a period.

Ib. omit from the word "and" to the fourth word in the next line, inclusive.