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DIARY FOR NOVEMBER.

15. *Sun*.....*24th Sunday after Trinity.*
16. Mon.....Michaelmas Sittings, Ch. Div. H.C.J., begin. Wilson, J., Q.B., and Gwynne, J., C.P., 1868.
18. Wed.....Hagarty, C.J., Q.B.; Wilson, J., C.P., 1878.
19. Thur.....Princess Royal born, 1840.
22. *Sun*.....*25th Sunday after Trinity.*
25. Wed.....Lord Lorne, Gov.-General of Canada, 1878.
27. Fri.....Cameron, J., Q.B., 1878.
29. *Sun*.....*Advent Sunday.*
30. Mon.....Moss, J., appointed C.J. of Appeal, 1877.

TORONTO, NOVEMBER 15, 1885.

OUR attention has been drawn to some observations in a public journal taking exception to the speech of Mr. Senator Gowan on the Franchise Bill, and charging us, anent our comment thereon, with violating the principles on which a law periodical is generally conducted. We may remark *en passant* that the political press on both sides is always very indignant when the legal press finds occasion, in the discharge of its duty to the profession, to say anything which may incidentally tread on any of their pet political corns. The fact that we are quoted approvingly, or the reverse, turn about, by both parties, is the best proof that as to party politics we editorially know nothing and care less.

As to the case in point it was stated in certain newspapers, and either said or insinuated in Parliament, that members of the Bar would be found ready tools, willing to place honour, conscience and manhood in the background, and lend themselves to the Chief Minister of the Crown to carry out alleged nefarious designs on his part. This was the effect of what was animadverted upon in the speech of "the Senator from Barrie"—a barrister, by the way, of nearly fifty years standing, and one who for very many years graced the Bench of his country. In his place in Parliament he repudiated any such insinuations against the profession, and bore testimony to the honourable character of the Bar of his Province. What more natural and proper than that he should so speak, and that we, as an organ of the profession that was slandered, should reproduce his testimony? We see no inconsistency or violation of principles involved in upholding the honour of the profession. It would be a very inconsistent violation of our principles if we did not do so.

IN *Laird* v. *Briggs*, 19 Chy. D. 22, Fry, J., held that the word "reversioner" in the Imperial Prescription Act, 2 & 3 W. IV. c. 71, s. 8 (R. S. O. c. 108, s. 41), includes a "remainderman," and that consequently the latter, as well as a reversioner, is entitled to the additional period provided by that section within which to resist the claim of a person to an easement by prescription. This case was appealed and was disposed of on other grounds, all the Judges of Appeal, however, being careful to say that they did not desire to be understood as assenting to the construction Fry, J., had placed on the section above referred to. In the recent case of *Symons* v. *Leaker*, 53 L. T. N. S. 227, the point has come up again squarely for consideration. In that case (which was one for trespass) a right of way was claimed by the defendant over a certain field. This right had been exercised from 1828 to 1884, but during all this time the servient tenement had been in possession of a tenant for life, expectant on whose estate

the plaintiff had been entitled in remainder. On the plaintiff's estate falling into possession this action was brought within the time limited by section 8. A Divisional Court, composed of Field and Manisty, JJ., refused to follow the ruling of Fry, J., in *Laird* v. *Briggs*, and held that a remainderman is not a person entitled in reversion within the meaning of section 8, and consequently that the plaintiff was barred by the statute, and that the defendants had acquired an indefeasible right to the easement in question.

CITING CASES.

IT is an easy matter to cite cases. It is not always an easy matter to cite them effectively. If we might be allowed to make a suggestion we should say that the most effective way to cite authorities is to abstain from citing any case which the citer has not himself read. Furthermore, we should say that to throw a mass of citations at a Court without regard to order, is not a good method. If counsel desire to have the cases he cites read and weighed by the Court, some discrimination is necessary in the selection of the cases to be cited. Generally speaking, when a late case is cited which collects and discusses previous authorities, it is useless and a waste of time to cite the earlier authorities which are so collected. unless counsel desire to make some point by so doing, as, for example, to induce the Court to reconsider the later case, or to distinguish it from the case in hand.

The great object of citing cases is to assist the Bench in coming to a right conclusion on the matter being argued; and, depend upon it, the judges very soon learn to appreciate at their proper value arguments marked by citations carefully and intelligently made, and those which are characterized by an undigested heap of cases from text-books or digests flung at the Court promiscuously.

We have sometimes heard counsel who were by no means inexperienced juniors, citing cases to the Court by the initial letters or abbreviations by which the reports are known, *e.g.*, "Drew." for "Drewry," and "D. M. & G." for "DeGex, McNaghten & Gordon." We need hardly say that counsel who thus cite cases inevitably create the impression that they have never looked at the case they thus cite.

We think no student will waste his time, if in his studentship he endeavours to make it a rule never to cite cases that he has not read; and to make it a rule never to cite cases merely for the purpose of multiplying authorities on the same point, unless there is some real reason for so doing. The advantage of this early training will soon be manifest when he enters into active practice on his own account. The gaining the ear and the confidence of the Court is what all counsel should aim at, and we know of no better means by which counsel may do this than by being known to the judges as one who never cites authorities unnecessarily, or which are not in point; and, above all, as one who never misstates the effect of a case that he does cite, or attempts to conceal any case from the attention of the Court which bears upon the case under consideration.

This brings us to another point, and that is how an advocate should cite cases adverse to the side for which he is arguing. Those who regard it to be the duty of the advocate to win his client's case by hook or by crook, honestly if he can, but any way to win it, will perhaps be inclined to think that an adverse decision should simply be ignored by him, unless brought to the attention of the Court by his opponent. We doubt very much, apart from any question of professional ethics, whether

this method really pays in the long run. A case may be overlooked by the opponent, but it may be discovered by the Court, and is considered and acted on very often without having been considered or discussed by counsel for the client to whose contention it is opposed. This, of itself, is a disadvantage; but there is the still greater disadvantage that the counsel who fail to bring all the material cases to the attention of the Court, leave the impression that their not doing so is due to a want of either industry, or perfect honesty. A friend who has perused what we have written, suggests that it would be well to add "that it must always be remembered that an advocate is not merely an advocate, but also *amicus curiæ*," a sentiment in which we concur.

RECENT ENGLISH DECISIONS.

LEGACY TO EXECUTOR—GIFT ANNEXED TO OFFICE.

Turning now to the cases in the Chancery Division, the first that calls for observation is *In re Appleton, Barber* v. *Tebbitt*, 29 Chy. D. 893, a decision of the Court of Appeal. The question in dispute was whether a legacy given to a legatee, who by a subsequent clause in the will was appointed executor, was annexed to the office, or whether the legatee could renounce the executorship, and at the same time claim the legacy. Chitty, J., the Judge of first instance, held the legacy was annexed to the office, and this opinion was confirmed by the appellate Court. The fact that there were other legacies of different amounts given to other persons, also named as executors, was held to make no difference, notwithstanding the contrary opinion expressed by James, V.C., in *Jarvis* v. *Lawrence*, 8 Eq. 345, 347.

BUILDING SOCIETY—BORROWING POWERS—ULTRA VIRES—MISTAKE OF LAW—SUBROGATION.

The case of *Blackburn* v. *Cunliffe*, 29 Chy. D. 902, is deserving of notice, notwithstanding that it turns to some extent on the effect of statutes of merely local operation. This action was brought by the liquidators of a building society to recover moneys which had been paid by the society to the defendants in settlement of certain overdrafts in a banking account, kept by the society with the defendants. The society had no power to borrow money; but the defendants had from time to time allowed the society to make large overdrafts—and the directors signed a memorandum, giving the defendants a lien upon all the society's deeds to secure the floating balance due to the defendants. Annual balance sheets, showing the amounts due to the defendants, were sent to all the members of the society, and adopted at the annual meetings—and moneys were from time to time applied on account of the indebtedness. It was argued that the liquidators were estopped from recovering the moneys so applied on the ground that the moneys had been paid in mistake of law, and also on the ground of acquiescence by the members of the society. But the Court of Appeal, affirming the Vice-Chancellor of the County Palatine of Lancaster, held that neither ground afforded any defence to the action—but the Court varied the judgment appealed from, to the extent of allowing the defendants to stand in the position of parties whose claims had been paid out of the overdrafts, and also declared the defendants entitled to a lien on all mortgage securities taken by the society, in respect of loans made out of the moneys overdrawn from the defendants, in priority to any claim of the society for moneys advanced thereon, out of its own proper funds.

INFANT MAINTENANCE—DISCRETION OF TRUSTEES—JURISDICTION.

The Court of Appeal in *Re Lofthouse*, 29 Chy. D. 921, reversed an order of Bacon, V.C., made upon the application of an infant by her next friend for maintenance. The application was made on motion in a summary way. The will under which the infant was interested empowered the trustees for the time being to apply all, or any part of the yearly income of the share of the infant, in or towards the maintenance and education, or otherwise for the benefit, of the infant. The income amounted to £538 5s. 3d. The trustees opposed the application, claiming that the Court had no jurisdiction to interfere with this discretion. Bacon, V.C., however, made an order for an allowance of £400 a year. The trustees ap-

pealed to the Court of Appeal, which reversed the order of Bacon, V.C., as being made without jurisdiction. Cotton, L.J., says on this point:

"Such an order could not be made on such a summons as this, which was merely a summons in the matter of an infant. It is quite right for the Court on such a summons to appoint guardians, or to advise trustees what sums can properly be allowed for the maintenance of the infant, but the Court has no jurisdiction as against trustees, or as against any one else, on such a summons, except when there is a contempt of Court. This order was one that could only be made in a suit, constituted either by an originating summons, or by a writ, so as to make it an ordinary action."

The point as to whether the Court could, in any case, have interfered with the trustees' discretion exercised *bona fide*, however, was not determined. This case is also useful for the principles laid down by Cotton, L.J., for the guidance of trustees in making allowances for the maintenance of an infant, whose father is unable to maintain her suitably. He says:

"In exercising their discretion, they must consider what is most for the benefit of the infant. In considering that, they should take into account that the father is not of sufficient ability properly to maintain his child, and that it is for her benefit, not merely to allow him enough to pay her actual expenses, but to enable him to give her a better education and a better home. They must not be deterred from doing what is for her benefit, because it is also a benefit to the father, though, on the other hand, they must not act with a view to his benefit, apart from hers."

MORTMAIN—MONEY SECURED ON LANDS.

In re Watts, Cornford v. *Elliott*, 29 Chy. D. 947, the Court of Appeal was called on to determine how far, if at all, a bequest to charity made under the following circumstances could take effect: The testator was entitled to a mortgage debt of £800, which was secured by a mortgage upon the interest of the mortgagors in certain trust funds. At the date of the mortgage, and of the testator's death, part of these funds was invested on mortgage of real estate, and part was pure personalty. The testator bequeathed to charities such part of his residuary estate as could by law be so bequeathed. The mortgage was part of the residuary estate. Pearson, J., held that no part of the mortgage debt could go to the charities, and this decision was affirmed by the Court of Appeal, and it was held that there could be no apportionment, so as to give the charity the benefit of a portion ot the debt equivalent to that portion of the trust fund which consisted of pure personalty, because every part of the mortgage debt must be taken to be secured on the whole of the mortgaged property, and therefore charged on land.

MORTGAGE—SALE—MISAPPLICATION.

West London Commercial Bank v. *Reliance Permanent Building Society*, 29 Chy. D. 954, is a decision of the Court of Appeal, which is said by the Court to determine a nice point upon which no authority was to be found. The mortgagor, with the concurrence of the first mortgagees, who had notice of a second equitable mortgage sold the mortgaged property. Upon completion of the sale, the balance of the purchase money, after payment of the claim of the first mortgagees, was handed to the mortgagor. The question in the action was whether the first mortgagees were liable to the second mortgagees for this misapplication of the purchase money. Bacon, V.C., 27 Chy. D. 187, held that they were, and the Court of Appeal affirmed his decision. Cotton, L.J., says:

"It is conceded that if he exercises his power of sale as mortgagee, whether under the terms of the mortgage deed, or by statute, he is answerable for the money he receives if he pays it to the wrong person, that is to say, if he passes over the second mortgagee and pays it to the mortgagor, who has no right to receive it. Ought we then to make any distinction between such a case and the present? Here the first mortgagees, though they did not concur with the mortgagor in putting up the property for sale, did concur with him in the conveyance. Having done so with the knowledge that part of the purchase money was going to be applied in violation of a right of which they had notice, they are, in my opinion, just as liable as if they had received the whole of the money."

ADMINISTRATION—STATUTE OF LIMITATION—R. S. O. c. 61, s. 8.

In *In re Johnson, Sly* v. *Blake*, 29 Chy. D. 964, Chitty, J., determined that the 23 & 24 Vict. c. 38, s. 13, which is similar in terms to R. S. O. c. 61, s. 8, is retrospective, so that the limitation of twenty years "next after a present right to receive the same shall have

accrued" within which actions are to be brought to recover personal estate of any person dying intestate, possessed by the legal personal representative of such intestate, is not confined to cases in which the intestate died after the Act came into operation, but extends to cases where the intestate was dead prior to the Act; and for this reason the claim of next of kin for general administration of the estate of an intestate who died in 1848 was barred at the end of twenty years from that date; and leave to revive an administration suit relating to the same estate, in which no proceedings had been taken since he decease in 1855, was refused. But with respect to assets of the intestate not received by the administrator until 1870, more than twenty years after the intestate's death, but within twenty years before the issue of the writ, it was held that the claim of the next of kin to administration, limited to such assets, was not barred, it being held that there was no "present right to receive" on the part of the next of kin until the assets had been actually received by the administrator. It was, moreover, held that part payment by the administrator out of a particular asset which has so fallen in, will not revive the right to sue for a general administration which was, at the time of the payment, barred by the statute.

DOMICILE OF ORIGIN—UNSETTLED RESIDENCE.

In re Patience, Patience v. *Main*, 29 Chy. D. 976, is another decision of Chitty, J. The question in controversy was as to the domicile of an intestate who was born in Scotland in 1792 of Scotch parents. In 1810 he obtained a commission in the army and immediately proceeded with his regiment on foreign service, and served abroad till 1860 when he retired from the army. From that time until his death he resided in lodgings, hotels and boarding-houses in various places in England, dying in 1882 intestate, and a bachelor, in a private hotel in London, having no real estate in England and no property whatever in Scotland, and for the last twenty-one years of his life having never left the territorial limits of England. Under these circumstances it was held that the intestate's domicile of origin had not been lost, and that his domicile was consequently Scotch at the time of his death. Chitty, J., says, at p. 984:

"It appears that the intestate in this case was moving about England, and I think this shifting from place to place shows a fluctuating and unsettled mind; and that the fact of residence, although for twenty-two years, standing alone without any other circumstances to show the intention, is insufficient to warrant me in coming to the conclusion that he had intended to make England his home. . . . If there was an intention shown by any other acts on his part, such as the purchase of land, if he had a family bringing the family here, buying a grave, or any other circumstance, even a slight circumstance, then I should have been warranted in coming to a different conclusion."

EVIDENCE—BAPTISMAL REGISTER—ENTRY OF DATE OF BIRTH—DECLARATION OF DECEASED FATHER.

The next case, *In re Turner, Glenister* v. *Harding*, 29 Chy. D. 985, is also a decision of Chitty, J., and turns on a question of evidence—and discloses a somewhat curious state of facts. The action was brought for the administration of the estate of Lucretia Turner by two of her alleged next of kin, and it being suggested that the testatrix was illegitimate, and that the gift of the residue of her estate in trust for her next of kin was therefore void, an inquiry was directed as to her next of kin. The deceased testatrix and her sister Jane, it appears, were the daughters of Wm. Ireson and a Mrs. Fry, who were married on the 29th April, 1824—it also appeared that Jane and Lucretia were both baptized on the 9th March, 1825. The baptismal certificate of Jane contained this entry, "when born, November 19, 1815" and that of Lucretia, "when born, July 3rd, 1818." It was also proved that in 1839 the father entered into negotiations to purchase a farm in the name of his daughters, and among the papers of the solicitors who conducted the purchase was found a draft letter from a deceased member of the firm addressed to Wm. Ireson, dated 29th March, 1839, requesting to be informed "whether your daughters are now of age," and, among these papers was also found a letter purporting to come from Wm. Ireson, but which was proved to be in the handwriting of his daughter Jane, dated 2nd April, 1839, containing the following passage: "I have to inform you that my daughter Jane is twenty-four years of age on the 19th November next, and Lucretia is twenty-one years of age on 3rd July next," and it was proved that Jane was in the habit of writing letters for her father.

The lands in question were copyhold lands, and it was shown that the transaction was carried out in 1839, and that, according to the custom of the manor, infants were not admitted without at the same time the appointment of a guardian. On the other hand, it was proved that Lucretia was always acknowledged and treated in the family as the legitimate child of Wm. Ireson and his wife, and that it was never suggested that she was illegitimate; that Wm. Ireson described Jane and Lucretia in his will, as "my daughters," and that letters of administration to Mrs. Ireson's estate issued to Lucretia, who described herself, on applying for the grant, as one of the "natural and lawful children, and one of the next of kin" of Mrs. Ireson. The question, therefore, was how far the documentary evidence was admissible to rebut the evidence of reputation. The learned judge held both the letters and certificate were admissible, and though the statement as to the date of birth in the certificate, being one which the official duty of the rector did not require that he should make, was one to which not much weight should be attached if it stood alone, yet, in conjunction with the letters, the inference to be drawn from the documents was irresistible, and he determined therefore that Lucretia was illegitimate.

HUSBAND AND WIFE—CONVEYANCE BY WIFE—SETTLEMENT.

The case of *Fowke* v. *Draycott*, 29 Chy. D. 996, demands a brief notice, inasmuch as North, J., therein decided that when a wife obtains an order under the Impl. Stat. 3 & 4 Will. IV. c. 74, s. 91, empowering her to convey her lands without her husband's concurrence, the order has not the effect of depriving the husband of his common law rights to the rents during the coverture. But the wife having separated from her husband on the ground of cruelty, and asserting her equity to a settlement, it was held that the husband was bound to provide for her out of the rents, and under the circumstances the whole of the rents were settled upon her.

RAILWAY—SALE OF SUPERFLUOUS LAND—PROHIBITION AGAINST BUILDING.

The only case remaining to be noted is that of *Bird* v. *Eggleton*, 29 Chy. D. 1,012, a decision of Pearson, J. An Act of Parliament of 1806 provided that no buildings should at any time thereafter be erected on a certain strip of land. In 1865 a railway company under their statutory powers acquired the land for the purposes of their undertaking. A part of the land thus acquired became superfluous land—and was sold by the company in 1868 to the defendant's landlord. The defendant in 1885 commenced to build on it, and the present action was brought by an adjoining proprietor to restrain him from so doing. The injunction was granted, the learned Judge holding that, as the railway company could only use the land for the purpose of their undertaking, that they could not themselves have built upon it, except so far as was necessary for the purposes of their railway, and that therefore when the land was sold as superfluous land, they could confer no greater power on the purchaser, but that the restriction imposed by the Act of 1806 bound the land in the hands of the latter.

SELECTIONS.

CARRIERS' CONDITIONS AS TO PUNCTUALITY.

Wills, J., made what may seem a very trite remark in *M'Cartan* v. *North-Eastern Ry. Co.*, that, "when you have a contract to construe, the best thing to do is to see what it says before you begin to see what other people have said in other cases and under other circumstances and what construction has been put on other words." But this true and pithily put rule is commonly enough overlooked, and to that circumstance much of the confusion between cases relating to the construction of contracts may be traced. Especially is this so in reference to the cases on railway "conditions," and it was in reference to them that *M'Cartan's* case was decided.

Following the principle laid down by Wills, J., let us first see what was said by the contract there construed. The plaintiff, it should be premised, had taken four third-class tickets at the defendants' station at Durham by the 2.11 p.m. train for Belfast

via Leeds, Midland Railway, and Barrow, which was printed on the tickets, and it was further stated that they were "issued subject to regulations in time-tables." Now, on the outside of the defendants' time-table appeared the following, "Notice.—The hours or times stated in these tables are appointed as those at which it is intended, so far as circumstances will admit, the passenger-trains should arrive at and depart from the several stations; but their departure or arrival at the times stated, or the arrival of any trains passing over any portion of the company's lines in time for any nominally corresponding train on any other portion of their line, is not guaranteed; nor will the company, under any circumstances, be held responsible for delay or detention, however occasioned, or any consequences arising therefrom. The issuing of tickets to passengers to places off this company's lines is an arrangement made for the greater convenience of the public; but the company will not be held responsible for the non-arrival of this company's own trains in time for any nominally corresponding train on the lines of other companies, nor for any delay, detention, or other loss or injury whatsoever which may arise therefrom, or off their lines." At the end of the time-bills there was a number of pages entitled "Connection with other Railways," and from one of those pages, headed "Through Communication between the North-Eastern Line and Ireland, Belfast *via* Leeds and Barrow," it appeared that the 2.11 p.m. train should arrive at Leeds at 4.45, and leave there at 5.10 by the Midland Company's line. Thus, there would have been twenty-five minutes spare time had the North-Eastern train been punctual; but instead of arriving at Leeds at the time stated. the train did not arrive till 5.22—thirty-seven minutes late. In consequence, the plaintiff missed the 5.10 p.m. Midland train, was unable to proceed to Belfast that night, and had to put up at a hotel at Leeds. The action was brought, accordingly, to recover the expenses to which he had been put; and the County Court Judge, holding that there was an implied contract that the defendants would use reasonable efforts to insure punctuality, and that the defendants had failed to show that the delay arose from no want of such reasonable efforts, gave judgment in favour of the plaintiff.

From the report in the August number of the *Law Journal*, it appears that a special case was then stated by way of appeal on the part of the defendants, who contended that the words, "nor will the company, under any circumstances, be held responsible for delay or detention, however occasioned," as well as the other portions of the conditions, were amply sufficient to exempt the defendants from all liability. But, said *Meek*, for the plaintiff, the words "intended as far as circumstances will admit" clearly indicate an intention on the part of the company not to exclude themselves from all liability, the result of which exemption would be that they could start their trains as and when they liked. And no doubt if the words were apt for the purpose, the company might enjoy the advantage of such a condition: *Haigh* v. *Royal Mail Steam Packet Co.*, 52 L. J. Q. B. 640. Had they done so? was the question—the contract being collected from the ticket, the time tables and the conditions: *Le Blanche* v. *The London and North-Western Ry. Co.*, 1 C. P. D. 286. In other words, had they said, in effect, our trains will start and arrive as and when we like, and we shall be liable for nothing? "The hours or times stated in these tables are appointed as those at which it is intended," etc. "Intended" shows that was their intent, submitted *Meek*. Not so, held Huddleston, B.; they mean to say, "we intend to do so, if we can, but we do not intend to be bound by it"; or, as Wills, J., put it, "we intend, and we hope, and we mean, as far as circumstances will permit, to keep these times; but, mind you, we do not guarantee anything." But, may it not be said, the intention was "as far as circumstances will admit," which is in consistent with liberty reserved to start and arrive as and when the defendants chose, and the consequent exemption from all liability; and if so, should not the subsequent unlimited indulgence reserved to the company give way to the effect of the precedent clause? *Le Blanche* v. *The London and North-Western Ry. Co.*, *ubi supra*. But the Court felt unable to get over the effect of the subsequent terms, and strong enough they certainly were. We find them severally paraphrased by Huddleston, B.:—"We

intend to run these trains according to these tables; but we do not guarantee their departure or arrival." "We intend to do this but we will not guarantee the departure or arrival at the times mentioned, and under no circumstances will the company hold themselves responsible for delay or detention, however occasioned." "We give you tables, we state our intention that the train shall arrive in correspondence with the statement in the tables; we will not guarantee it; under no circumstances will we be responsible for delay or detention, however it may be occasioned; and although it may happen upon any occasion that we do not arrive in time for the corresponding train, yet we will not be liable for that; nor will we be responsible for the acts or defaults of other parties, nor for the correctness of the times over the lines of other companies." Well, if that was their intention those words would have more clearly indicated it; but those were not the words.

Now, *Le Blanche's* case was properly pressed as showing that the company were bound to use all reasonable efforts to carry out their contract with the plaintiff. There the condition declared, in the first place, that "every attention shall be used to insure punctuality as far as practicable"; and it was held that, these words being inconsistent with the unlimited indulgence preserved to the company by the subsequent words, one part must give way, and the subsequent should give way to the first part. In one case the words are "it is intended," and in the other "shall be"; in one they are "as far as circumstances admit," and in the other "as far as practicable." The cases are distinguishable, said the Court; and judgment was given for the defendants.—*Irish Law Times.*

THE NEIGHBOUR TO WHOM DUTY IS DUE.

"Who is one's neighbour?" is almost as important a question in the catechism of the law as "What is one's duty towards one's neighbour?" and the answer to it, although not so liberal as that of another catechism, is in the increase of the complicated relations of life becoming daily more sweeping. The definition of a proprietory neighbour—the proprietor of the *alienum* of the legal maxim—presents no great difficulty, nor is it difficult to put the finger on the person to whom duties are owed in the familiar events of life, such as driving in the street. It is when the idea of contract is mixed up with the question of a liability independent of contract that the lawyer's difficulty arises. The liability of one party to a contract to the other presents no difficulty of this kind; but of late years there have been before the Courts many cases raising the question whether a person under an undoubted contractual obligation to another is under a similar duty to all the world, or, if not, to what portion of the rest of his fellow-citizens. In other words, who is the neighbour to whom duty is due? The tendency of modern decisions has been gradually but largely to extend the area of the obligation in this direction. The case of *Elliott* v. *Hall*, 54 Law J. Rep. Q. B. 518, reported in the October number of the *Law Journal Reports*, is an example of the broader view recently taken by the judges in this matter in obedience to the impetus given by the decision of the Court of Appeal in *Heaven* v. *Pender*, 52 Law J. Rep. Q. B. 702, to the extension of the liability as tort feasors of persons under no contractual liability to the person injured, but under such liability to some one else. In that case, it will be remembered, a workman in the employ of a painter who had contracted to paint a ship for her owner was held entitled to recover damages from the dock company for injuries caused by the staging on which he stood falling by reason of a defect in a rope provided by the company. In the Divisional Court judgment was given for the defendant; but in the Court of Appeal the decision was reversed, the Master of the Rolls taking a very liberal view of the extent of the responsibilities of persons liable by contract or otherwise for negligence, and Lord Justice Cotton and Lord Justice Bowen preferring to treat the case as within the authority of *Indermaur* v. *Dames*, 36 Law J. Rep. C. P. 181. This was the "shaft" case, in which the defendant was held liable on the principle that he was bound to use care in the management of his premises in the interests of persons invited to come upon them. The variety of the facts in this

class of cases makes it not easy to attach the circumstances of each to the name of the case, so that they may well have an explanatory addition to their respective titles. Thus, as *Langridge* v. *Levy*, 7 Law J. Rep. Exch. 387, has been called the "gun" case; *Winterbottom* v. *Wright*, 11 Law J. Rep. Exch. 415, the "coach" case; *George* v. *Skivington*, 39 Law J. Rep. Exch. 8, the "hair-wash" case; *Elliott* v. *Hall* may be called the "railway truck" case. In all these cases the plaintiff was successful, except the coachman who brought an action against the coach builder for injuries due to the breakdown of the wheel. Whether this case, which was so decided in consideration of the necessity of "drawing the line" to prevent an indefinite liability on the part of the maker of an article, will be upheld at the present day, may be open to doubt, and it is contrary to the tendency of the judicial opinon of the day.

In *Elliott* v. *Hall* the plaintiff, a workman in the employ of a coal company, had in the course of his duty to unload a truck of coals supplied by the defendant. The truck was hired by the defendant of the Midland Waggon Company, which undertook to do substantial repairs, leaving small matters to be repaired by the defendant. In the bottom of the truck was a trap-door kept in place by a pin, which was itself secured by a catch. The catch was lost, the pin was jerked out of place, and the plaintiff fell through the trap-door with the coals upon him. The jury negatived contributory negligence, and gave the plaintiff £200. In the argument of the case, *Heaven* v. *Pender* was relied upon as a conclusive authority. Mr. Justice Grove lays it down that "there was a clear duty on the defendant to supply an efficient truck, and the plaintiff was the servant of the person to whom the coals were supplied and the person whom the defendant might reasonably have supposed would unload the truck." This is the whole reason given by Mr. Justice Grove for his decision, except to comment on *Heaven* v. *Pender* in a way to show that the facts of it were not present to his mind. He says that the only question in that case was whether the dockmaster was liable to the plaintiff as well as the person who put up the staging, when in fact the dockmaster was the person who put up the staging. Mr. Justice Smith is equally brief. He says "the plaintiff was not one of the public, not a bare licensee, not a stranger, but a person whose duty it was to unload the truck." So in *Winterbottom* v. *Wright* the plaintiff was not a stranger, but the coachman whose duty it was to drive the coach, and yet he was nonsuited. In regard to the contention on the part of the defendant that the duty is limited to occupiers of property, Mr. Justice Smith says, "In the case of *Foulks* v. *The Metropolitan Railway Company*, 44 Law J. Rep. C. P. 361, it was held that there was a duty to the plaintiff, although he had no ticket, since by providing the carriages the company held out an invitation to passengers to use them." But in that case the plaintiff had a ticket, and the Lords Justices were of opinion that a contractual relation existed between the plaintiff and the defendants, although, in the alternative, they considered that the "defendants had invited and received" the plaintiff so as to make them liable independently of contract.

Judgments so slenderly supported by reasoning from the previous decisions must have been based on the adoption of the broad principle laid down by the Master of the Rolls in *Heaven* v. *Pender* —namely that "wherever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct in regard to those circumstances he would cause danger or injury to the person or property of the other, a duty arises to use ordinary care and skill in regard to such danger." We have already (November 17, 1883) given reasons for not accepting this vague test, either as a sufficient rule or useful in itself or as reflecting the cases; and it was not concurred in by Lord Justice Cotton or Lord Justice Bowen, who decided the same case. It may very well be that the decision in *Elliott* v. *Hall* is right—the probabilities are that it is, because the circumstances of the case do not seem to carry the liability to an unreasonably wide extent —but at present we are sadly in want of a rule which will give us the legal test of the extent of liability in tort, while reconciling *Winterbottom* v. *Wright* or overruling it once for all, and with sufficient authority.—*Law Journal.*

REPORTS.

Referred to. McGowan v. Hudson's Bay Co., 5 Terr. L.R. 15-3.

ONTARIO.

ASSESSMENT CASE.

IN THE COUNTY COURT OF THE COUNTY OF LINCOLN.

TOWN OF NIAGARA V. DONALD MILLOY AND J. MCMILLAN.

Assessment—Name of owner—Non-resident—Payment of taxes by note—Recovery in special manner—Principal and agent.

In an action brought by the Corporation of the town of N. to recover $114.76 taxes against defendants as executors of the estate of D. M.,

Held, (1) that, the plaintiff's statement of claim not showing or alleging that the taxes could not be recovered in any of the special manners provided by the Assessment Act, the action could not be maintained.

Held, (2) that the legal effect of a note given by M. for taxes, and signed "J. M., agent for the M. estate," is that it is the personal note of M., and under the circumstances of this case it could not be treated as a payment of the taxes.

Held, (3) that real estate assessed to "M. estate" or "Estate of D. M." sufficiently designates the owner within the meaning of the Assessment Act, and that it was not necessary to give the names of the executors in whom the legal estate was vested.

Held, (4) that the defendants, who carried on business, but did not live in "N." were "residents" within the meaning of the Assessment Act, and that the land was properly assessed as "resident."

[St. Catharines, Oct. 10.—Senkler, Co.J.

The action was commenced 18th Feb., 1882, and was brought to recover the amount of certain taxes appearing on the Assessment Roll for the Town of Niagara for the year 1879 as follows:—

East Ward.

No. 12. Isaac Addison (tenant), Milloy Estate (owner), Dock property..... $300 00
No. 13. Wm. H. Dobson (occupant), Milloy Estate (owner), Dock property 900 00
No. 16. Patrick Henney (occupant), Milloy Estate (owner), dock property..... 300 00
No. 17. Estate of D. Milloy (owner), old car buildings..... 4000 00
No 18. Estate of D. Milloy (owner), wharf. 4000 00

Western Ward.

No. 1. John Goodman (tenant), Milloy Estate (owner), Victoria St., No. 9... $400 00

There was appended to each of the first five assessments a memorandum, "Notice dated 25th March, 1879," and to the last assessment, "Notice dated 24th March, 1879."

A by-law was passed by the Town Council of Niagara on 8th July, 1879, directing that certain rates should be raised for certain purposes amounting in all to eleven mills on the dollar on the assessed property in the town. A collectors roll was regularly prepared and given to the collector in which the several properties above mentioned, and the values and the amounts to be collected were shown.

It was admitted that the defendants were the executors of the late Duncan Milloy. They were in fact not only his executors but also the devisees and trustees of his real and personal estates under his will, and it was assumed for purposes of the argument that this was admitted. Neither of the defendants resided in Niagara, but both resided in Toronto.

Mr. Rogers, who was clerk of the Town of Niagara for 1879, and continued in that office until his death, died about a year ago.

It appeared from the evidence of John Murphy who was in the employ of defendant in 1879, and for some time before and after that year, looking after the wharf at Niagara for them, that on or about the 19th December, 1879, he had a conversation with Mr. Rogers, who told him he was short of money to make some payments. Murphy said he had no money, but would give his note if that was any use. Rogers said, very well, and Murphy accordingly gave Rogers a promissory note for $117.10, dated 20th December, 1879, at three months, payable at the Quebec Bank, St. Catharines, to the order of John Rogers, Town Treasurer. This note was signed John Murphy, agent for the Milloy estate, and Rogers gave Milloy a receipt signed by William Curtis, collector for $114.76. The receipt read as follows:—

$109.30 NIAGARA,
$5.46 p ct. 19th December, 1879.

$114.17

Received of estate late D. Milloy, by J. Murphy, the sum of one hundred and fourteen dollars and seventy-six cents, being the amount of his taxes for the use of the Town of Niagara for the year 1879.

(Signed) WILLIAM CURTIS,
Collector.

It appeared from the evidence of Curtis, that he was not at Niagara on the day this note was taken

and receipt given. When Curtis went from home, he was in the habit of leaving with Mr. Rogers his book of blank receipts with several receipts signed, and if any one paid his taxes to Rogers, he would fill up one of the receipts and give it to the person paying, and write the name, etc., on the stub.

Curtis said that Murphy had charge of the wharf, and that he served demands of payment on Murphy for the Milloy Estate; that he never mailed any notices, but delivered some to Murphy and some to defendant, McMillan. He did not specify any particular notices beyond demands of payment and did not specify any year in which he gave them. The note given by Murphy, no doubt, had the discount added in. It was discounted but not paid when due on 23rd March, 1880. New note for $120 was given by Murphy, as agent for the Milloy Estate, at two months payable in the same way as the other. This was also discounted and protested for non-payment. It had not been paid, and was still held by the corporation.

In February, 1880, Murphy had a settlement with the Milloy Estate, on which he charged them with $114.76, paid taxes and produced the receipts given him as a voucher, and they allowed him as for a cash payment.

Nicol Kingsmill, for the defendant, contended:

1. That the defendants were not assessed by name, and that an assessment to the Milloy Estate, or the Estate of D. Milloy, is in fact a void assessment.

2. That the defendants being non-residents of Niagara could only be assessed in respect of unoccupied property upon their written request to be so assessed, which request is not shown to have been ever made, and the principal property, *i.e.*, the car shops and wharf, are unoccupied.

3. That no proper notices of the assessment were given.

4. The proper modes of collecting the taxes were not shown to have been exhausted, and no action can be brought except when the taxes cannot be collected by the special modes given by the Act.

5. That the taxes were paid by Murphy's note.

Rykert, contra.

SENKLER, Co.J.—It is declared by section 6 of the Assessment Act that all land and personal property in the Province shall be liable to taxation subject to certain exceptions which do not affect the present case.

By section 14 land occupied by the owner shall be assessed in his name.

By section 15 land not occupied by the owner, but of which the owner is known, and at the time of assessment being made resides or has a local domicile or place of business in the municipality or has given the notice mentioned in section 3, shall be assessed against such owner alone if the land is unoccupied, or against the owner and occupant if such occupant is any other person than the owner.

By section 16, if the owner of the land is not resident within the municipality, but resident within the Province, then if the land is occupied it should be assessed in the name of and against the occupant and owner; but if the land is not occupied and the owner has not requested to be assessed therefor, then it shall be assessed as land of a non-resident. Section 17 refers to the case of land owned by a person not resident within the Province.

By section 12 it is enacted that the assessor shall prepare an assessment roll, in which, after diligent enquiry, he shall set down according to the best information to be had

(1) The names and surnames in full, if the same can be ascertained, of all taxable persons resident in the municipality who have taxable property therein, and

(2) And of all non-resident owners who have given the notice in writing mentioned in section 3, and required their names to be entered on the roll.

It is evident that it was intended that the name in full of each owner who is assessed should appear on the assessment, if, after diligent enquiry, the same can be ascertained. The question is whether this direction is imperative or whether it is merely directory. I have not been referred to, nor have I been able to find, any decision in our own Courts on the subject.

In Cooley on Taxation, 278, note (i.) I find a reference to two American cases. Listing of land belonging to an estate to "widow and heirs" of the deceased person was held sufficient: *Wheeler* v. *Anthony*, 10 Wend. 346. A listing to "Estate of J. B. Coles" was held good: *State* v. *Jersey City*, 24 N. J. 108. Not having the American statute to refer to I cannot say how far these decisions are applicable. Considering the words of the sub-section 1 of section 12, the assessor is to put down the name and surname in full, if the same can be ascertained, of all taxable persons, etc. I cannot think it was intended that the names should be an absolutely essential part of the roll; the words seem to me to imply the possibility of the names not being obtained, and if so, it can hardly have been intended that the assessment should fail for want of the name. If the name can be dispensed with in any event is the Court to enter upon a consideration in each case of the degree of diligence that has been exerted in making inquiry about the same?

No doubt the cases are rare in which inquiry in the proper quarters would not discover the name, but an assessor's means of inquiry are limited. I

do not know that he is called on to go out of his municipality to make inquiries, or to send to registry offices or surrogate courts miles away to search into deeds or wills: the words: "Estate of D. Milloy" or "Milloy Estate" are susceptible of explanation and proof of what they mean. They seem to have been used in the assessments at Niagara for several years, and the defendants themselves did not repudiate their own agent's act in recognizing the assessment and settling the amount. It is undoubtedly a most unsatisfactory mode of assessment, and one not to be encouraged, but I do not feel justified in holding it void.

As to the second objection, with respect to all the assessments except those of the "wharf" and "car shops," it appears that the several properties were occupied by tenants who are assessed for them, and it seems to me to follow under section 16 that the owners, if resident in the Province, must be assessed also.

With respect to the "wharf" and "car shops," if these properties were unoccupied, and if the defendant neither resided or had a legal domicile or place of business within the municipality, and had not given the notice mentioned in section 3, it is clear that these properties should be assessed as lands of non-residents. It appears to me, however, from the evidence of Murphy, that the wharf cannot be considered as unoccupied. A business was carried on there by the defendants through their agent Murphy; a personal occupation of the land is not necessary. I do not see how a property including a wharf at which boats stop daily, or at least frequently, and a warehouse in which goods are kept for remuneration, both under the control of an employé of the owner, can be treated as unoccupied, and I think it was properly assessed and should not have been assessed as non-resident land.

As to the "car shops" there is no evidence that they were occupied, but if the defendants who own them had a place of business in the municipality as they had at the wharf, I do not see why they should not be assessed for the property under section 15. There is an apparent conflict between sections 15 and 16; in the former the words are, "resident or have a legal domicile or place of business" in the municipality; in the latter they are, "is not resident within the municipality." Unless the word resident in the latter is construed to include "the having a place of business," I do not see how they can be reconciled, and I think it must be so construed in that section. A place of business seems to be preferred for purposes of assessment to a residence, see sections 31 and 32; and in these sections the terms are not used as representing the same thing, but are opposed to each other. In section 16 it seems to me to be different. I therefore think the "car shops" are properly assessed and should not have been assessed non-resident land.

As to the third objection, I think the memorandum of delivering the notice of assessment on the assessment roll sufficient evidence under section 41. As to the fourth objection, I am of opinion that it is not shown that the taxes could not be recovered in any special manner provided by the Assessment Act; and that for this reason the action cannot be maintained. It was on this ground that Mr. Justice Richards argued that the action could not be maintained in *Berlin* v. *Grange*, 5 C. P. 211; and his reasons seemed to be approved by Chief Justice Robinson in the Court of Appeal in same case: 1 E. & A., although the action was held not to be maintainable on other grounds also.

Mr. Justice Richards in that case, which was brought to recover taxes in arrears, after stating how non-resident owners of land should be assessed, gives his opinion (3rd) that having failed to recover the tax as to personal property of any person rated on the roll, for want of property to distrain, the amount of such tax may be recovered with interest as debt due to the municipality. (4th) As to taxes due on any lands that they cannot be sued for as a debt due to the municipality until after they have been five years in arrear, and on a sale of the lands the amount of the taxes cannot be recovered in that special manner provided by the Act. I have found no case in which this view of the law has been dissented from or reversed, and on this ground I am of opinion that the present action cannot be maintained, the plaintiffs not having attempted to collect the taxes by sale the lands assessed, which is one of the special modes pointed out by the Act for collecting the taxes. This practically disposes of the case, but as the question whether the claim of the town for those taxes had not been paid by the taking the note of Murphy for the amount was fully argued, I may give my opinion on this point.

Murphy was in the employ of defendants when he gave the note on the 19th or 20th Dec., 1879, to Rogers, the Town Clerk, who handed the receipt to him and entered in the collector's roll opposite each of the items, making up the amount for which he gave the receipt, the words "paid 20th Dec., 1879."

Murphy signed the note: "John Murphy, agent for the Milloy Estate," and the legal effect of this (the defendants contended) is that it is the personal note of Murphy and that he alone could be sued upon it, and they further contend that the plaintiff's having taken the note of a third person and given a receipt in full (treating the payment as cash), and

having marked on the margin of the collector's roll that these items were paid on the day the note was given; that these facts show an intention on their part to take the note as payment and look to it alone, and that this view ought especially to be taken when it is borne in mind that the defendants have settled with Murphy on the faith of the receipts and allowed him in his acconnts for the amount as if paid in cash, and that the effect of compelling them to pay in the present suit would be to make them pay twice.

The accounts produced did not show that the result last mentioned would follow at all. They do show that Murphy has entered the amount of the taxes as a payment made by him, and has endeavoured to reduce the amount of his indebtedness to the Milloy Estate by this amount; but after this reduction there remained a large indebtedness from him to the estate which he has not paid. The settlement, if any, was merely an adjustment of the account and was not followed by any payment on either side; if in consequence of Murphy's statement that he had paid these taxes the balance is not so large as it otherwise would be, that is a matter that could easily be made right when the falseness of Murphy's statement was discovered. Murphy's debt remains and it is a mere question of account. It is very different from the case of a settlement actually carried out and closed between a principal and agent in which some credit has, through the fault of a third party who has been dealing with the agent, been allowed the agent which he was not really entitled to; in such a case no doubt the principal would be protected from any claim on the part of the third party which would put him to loss, and the third party will be left to his remedy against the agent. In the present case it cannot be said that the defendants have been in any way prejudiced by what was done by Mr. Rogers. They have not altered their position in any way in consequence of it.

Then assuming that the legal effect of the note is that it is the note of Murphy, as I think at present is the case, what right had either the collector or the Town Clerk to take it? The collector's duty is to collect money: Cooley on Taxation 501, Harrison's Mun. Manual, 4th ed., 696, note (i.); *Spry* v. *McKenzie*, 18 U. C. R., 161, and he has no right to take anything else, and if he did the right to distrain would be interfered with: Harrison, 696, note (i.). The collector is a servant of the municipality performing a public duty, and his wrongful act cannot affect the public right.

I do not think the note was treated as payment of the tax.

For the reasons herein given then I am of opinion that the plaintiffs must fail at present, and for the same reasons I think judgment must be given against them on the demurrer; the plaintiffs' statement of claim not showing or alleging that the taxes cannot be recovered by any special manner pointed out in the act.

I, therefore, give judgment for the defendants with costs; but I stay the entry of judgment until the ninth day of November next.

ENGLAND.

RECENT PRACTICE CASES.

FENDALL V. O'CONNELL.

Discovery—Husband and wife—Affidavit as to documents.

When an order for production of documents is obtained against a husband and wife who sue as co-plaintiffs, the affidavit as to documents must cover not only documents in their joint, but also those in their several possession.

[C. A.—29 Chy. D. 899.

COTTON, L.J.— . . . When a husband and wife are co-plaintiffs, the wife sueing in respect of her separate estate, without a next friend, they ought to answer severally as to documents, for the wife may have in her actual possession documents relating to her separate estate. If so, she holds them as part of her separate estate, and she must answer as to them. They are in no sense in the custody of the husband and wife.

LINDLEY, L.J.— . . . Having regard to the present status of married women, an affidavit by husband and wife, confined to documents in their joint possession, would be in substance insufficient, for it would enable them to keep back documents of which they respectively had separate possession.

FRY, L.J. concurred.

Appeal from BACON, V.C., *allowed.*

IN RE CONEY, CONEY V. BENNETT.

Equitable execution—Defaulting trustee—Receiver.

Where a trustee has by the judgment of the Court been ordered to pay money, and is out of the jurisdiction, on default in payment a receiver may be appointed of his equitable interest in property within the jurisdiction.

[CHITTY, J.—29 Chy. D. 993.

CHITTY, J.— . . . I think that a receiver is, under the circumstances, the best remedy that can be found. I therefore make the order as asked. I have to add that the question has been already

decided in *Stanger-Leathes* v. *Stanger-Leathes*. W. N., 1882, p. 71. The decision of Vice-Chancellor Bacon is in my opinion clearly law. I have gone to the trouble of delivering judgment in the present case because the Vice-Chancellor's decision, reported as it is in a mere note, has been doubted, but in my opinion without reason.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

COURT OF APPEAL.

[September 8.

SCRIBNER v. KINLOCH ET AL.

Sale of goods—Vendor employed as clerk—Change of possession—Immediate delivery—R. S. O. ch. 119.

The judgment of the Queen's Bench Division (2 O. R. 265) was affirmed with costs, the judges in this Court being two for and two against the appeal.

McCarthy, Q.C., *H. Cameron*, Q.C., *Dougall*, Q.C., and *McPhillips*, for the appellants.

S. Smith, Q.C., *J. K. Kerr*, Q.C., and *Holman*, for the respondent.

[September 14.

DOUGLAS v. HUTCHINSON.

Married woman—Dower—Separate estate—Fi. fa.

The defendant's first husband died in 1870, and she contracted a second marriage in 1871. This action was begun before the Married Women's Property Act, 1884, was passed.

Held (reversing the judgment of OSLER, J. A., 6 O. R. 581), that the defendant's right to unassigned dower in the lands of her first husband was not separate estate, but fell within the provisions of R. S. O. ch. 125, sec. 3, and was not liable to be sold under execution to satisfy the plaintiff's judgment.

Quære, per PATTERSON, J. A., whether a *fi. fa.* is the appropriate remedy for reaching the separate property of a married woman.

W. H. P. Clement, for the appeal.

J. J. Maclaren, contra.

[September 15.

HENDRIE v. NEELON.

Contract for sale of timber—Non-delivery—Loss of profits—Measure of damages.

The judgment of the Queen's Bench Division (3 O. R. 603) was affirmed on appeal.

Edward Martin, Q.C., for the appeal.

McCarthy, Q.C., contra.

[September 15.

BELL v. FRASER.

Creditor—Security—Account of balance—Loss by agent—Payment into Court—Defence—Condition—Liability—Satisfaction—Order XXVI. O. J. A.

The plaintiff, as assignee of an insolvent estate, claimed from the defendant, a creditor of the estate, an account as to his dealings with timber limits held by him as security, and payment of any balance. The timber was placed in the hands of K. & Co. for sale.

Held, upon the facts stated (affirming the decision of FERGUSON, J.), that the defendant was not liable for a loss occasioned by K. & Co.'s failure to pay over part of the price of the timber sold by him.

The defendant stated in his defence that in case the Court should be of opinion that the defendant was liable for payment of the balance, etc., the defendant brought into Court the sum of $4,300, saying that the same was sufficient to pay in full all claims of the plaintiff in respect of the balance, etc., and paid into Court under this defence the said sum of $4,300, which was withdrawn by the plaintiff after issue and before the trial.

FERGUSON, J., although he held that the plaintiff was not entitled to recover, refused to order him to refund the $4,300.

The members of this Court being equally divided in opinion, an appeal from such refusal was dismissed with costs.

Per HAGARTY, C.J.O., and OSLER, J.A.—There was only one way in which this money

could have been paid into Court, viz., under Order XXVI. O. J. A., unless under a special direction of the Court: the money was not paid in conditionally, but absolutely, in satisfaction of the plaintiff's claim, as an alternative defence, and therefore it was properly withdrawn by the plaintiff.

Per BURTON and PATTERSON, JJ.A.—The defence of payment into Court set up was not strictly pleadable, but was a notice to the plaintiff that the money was in Court to answer his demand if he established it. Money paid into Court under a defence is not inevitably to be regarded as paid in under Order XXVI. O. J. A. The inference that payment into Court is made for immediate satisfaction must yield to a direct notice that it is not made for that purpose; and such notice sufficiently appearing from the pleading, the money was improperly withdrawn by the plaintiff.

McCarthy, Q.C., for the appeal.

Gormully, contra.

[October 13.

MOFFATT v. SCRATCH.

Disclaimer—Grant from Crown—Surrender—Tax sale—Surveyor-General's return.

The judgment of the Common Pleas Division (8 O. R. 147) was affirmed, PATTERSON, J.A., dissenting.

J. H. Ferguson, for the appellant.

Falconbridge and *T. M. Morton*, for the respondent.

[October 13.

HATELY ET AL. v. MERCHANTS' DESPATCH CO. ET AL.

Carrier—Bill of lading—Negligence—Liability—Condition.

The judgment of OSLER, J.A., at the trial (4 O. R. 723) was affirmed against the defendants (appellants), the Merchants' Despatch Co., with costs; but the judgment of the Queen's Bench Division (4 O. R. 723) as to the defendants, the Great Western S. S. Co., was reversed, and the action was dismissed as against these defendants. The question of the costs of the defendants, the Great Western R. W. Co., was reserved for further consideration.

Millar, for the defendants, the Merchants' Despatch Co.

Moss, Q.C., and *Aylesworth*, for the plaintiff.

Osler, Q.C., for the defendants, the Great Western S. S. Co.

W. Cassels, Q.C., and *Holman*, for the defendants, the Great Western R. W. Co.

[October 13.

WHITING v. HOVEY.

Interpleader Issue—Judgment at trial—Appeal.

A motion to quash an appeal to this Court from the judgment of FERGUSON, J., at the trial of an interpleader issue (9 O. R. 314), upon the ground that the decision was merely interlocutory and not appealable, was dismissed without costs, the members of the Court being divided in opinion.

Robinson, Q.C., and *W. M. Hall*, for the respondent.

McMichael, Q.C., for the appellant.

[October 13.

BEATTY ET AL. v. NEELON ET AL.

Misrepresentation—Action of deceit—Parties.

Held, reversing the judgment of WILSON, C.J., 9 O. R. 385, upon the facts stated in the former report, that the unsatisfactory nature of the evidence, the long delay, the conduct of the parties, and their dealings with the matters in dispute, disentitled the plaintiffs to relief.

Per HAGARTY, C.J.O.—The damage claimed was not for inducing the plaintiff to enter into a partnership or company, but for the injury sustained in the company by the misrepresentations of the defendants, a damage resulting to all the shareholders, and therefore the action should have been by the company.

Per BURTON, J.A., this was a common law action for deceit, and, if maintainable at all, was maintainable only by the plaintiffs to whom the alleged misrepresentations were made.

Robinson, Q.C., *Cassels*, Q.C., and *R. Gregory Cox*, for the appellants.

McCarthy, Q.C., and *J. H. Macdonald*, for the respondents.

[October 13.

PORTEOUS v. MYERS.

Creditors' Relief Act, 1880—Distribution—Costs of first execution.

Held, affirming the judgment of the County Court of Perth, that the creditor, under whose execution an amount sought to be distributed under the Creditors' Relief Act, 1880, was levied, was not entitled to priority of payment of the costs of his action.

Moss, Q.C., for the appellant.

J. P. Woods, for the respondents.

[October 13.

KENNEY v. MCKENZIE.

Party wall—Agreement to pay for—Right under covenant.

C. and the defendant were owners of adjacent lots, and C. being about to build on his lot agreed to erect a party-wall on the dividing line, and equally on both lots, defendant agreeing to pay for the half of the front forty feet thereof when erected, and for the rear portion whenever defendant should require to use it. Subsequently C. sold and conveyed his lot to the plaintiffs in fee by deed containing the usual statutory covenants. Some years later defendant erected a building on his lot, making use of the rear part of such party-wall, by reason of which he became liable to pay $98.65 and interest therefor, and did accordingly pay the same to C. In an action by the plaintiffs, as assignees of C.'s interest in the said land, against defendant to recover the sum so due in respect of such wall,

Held, the payment by defendant to C. was proper, and that plaintiffs were not entitled as vendees of C. to insist on payment, the right to payment of the sum stipulated to be paid for the wall not having passed by the conveyance by C. to the plaintiffs.

Aylesworth, for appellant.

Lash, Q.C., for respondent.

CHANCERY DIVISION.

Boyd, C.] [October 28.

RE HONSBERGER, HONSBERGER v. KRATZ.

Interest against executors—Gradation according to conduct—English rule—Canadian rule—Costs—Allowance on money received, pendente lite.

The rules developed by the English cases regulating the award of interest against executors and rustees appear to be as follows:—(1) When money is kept in the executors' hands without sufficient excuse the offence is deemed an act of negligence and the usual court rate will be charged at 4 per cent.; (2) when the executors are not only negligent but commit an act of misfeasance by expending the funds for their own benefit, or in any other way use them, the higher rate of 5 per cent. will be charged; (3) If the act of misfeasance is of such a character as to lead to the conclusion that more than this rate of interest had been made out of the money, as for instance, if it is employed in ordinary trade or in speculation, the beneficiary will be allowed the option of either having an account of the profits or having the interest taken with rests. This gradation may be approximated here, (1) By charging an executor who negligently retains funds which he should have paid over or made productive for the estate at the statutory rate of 6 per cent.; (2) By charging him who has broken his trust by using the money for his own purposes (though not in trade or speculation) at such a rate of interest as is the then current value of money; and (3) By charging him who makes gain out of his trust by embarking the money in speculation or trading adventures with the profits or with compound interest as the case may be.

The executors in this case kept considerable and constantly increasing balances in their hands from year to year, and allowed the acting executor to use the money as he pleased. It was not proved that any profit was made out of it, and no special evidence was given to show what the current rate of interest during that period was; but that the notes and mortgages held by the executors bore interest for the most part at 6 per cent. On an appeal from the report of the Master it was

Held, that the interest should be charged at 6 per cent. yearly, and that the awarding of compound interest is opposed to the spirit of the decision in *Inglis* v. *Beaty*, 2 A. R. 453, and could only be upheld as being in the nature of a penalty imposed on the executors.

The executors should get costs because the action was not occasioned by their misconduct; but they should not get the costs of such part of the enquiry as was caused by the misapplication of the funds or their failure to make reasonably accurate entries of their dealings with the estate.

The taking of administration proceedings does not deprive them of their functions as executors or even suspend them, and a reasonable allowance should be made for moneys received *pendente lite*.

Hoyles and *Ingersoll*, for the plaintiff.

Clement and *Collier*, for the defendants, the executors.

McClive, for the widow.

Boyd, C.] [October 21.

SNARR v. BADENACH.

Annuity—Interest on—As against assignee in insolvency of covenantor to pay annuity—Repairs—Covenant to keep houses suitable for tenants.

J. S. by his will gave his wife, E. S., an annuity of $2,000 a year, and charged it on his estate. After his death, E. S., the annuitant, C. E. S. and M. A. S., two daughters, and W. A. S. and G. E. S., two sons, entered into an agreement whereby the annuity was charged on certain real estate and other property, and the sons covenanted to pay it, and the executors of J. S. transferred all their interest as executors in all the estate of J. S. to the said sons, subject to the said charge. W. A. S. and G. E. S. afterwards became insolvent, and B. became assignee in insolvency. The annuity fell into arrear for several years, and E. S. died, having made a will by which she devised all her estate to C. E. S. and M. A. S., the two daughters. C. E. S. and M. A. S. brought an action against B. to have a lien declared on the property for the amount of the arrears of the annuity, which was referred to the Master, who found that they had the right to maintain the action, and settled the amount of the annuity due at $8,993.95, on which he allowed interest for the six years preceding action brought at $1,738.05. On an appeal from the Master's report, it was

Held, that R. S. O. c. 50, ss. 266 and 267, under which the interest was allowed, is not applicable to cases where a recovery is sought, not against a defendant personally, but against his estate and following *Booth* v. *Coulton*, 2 Giff. 520, except under extraordinary circumstances upon particular grounds suggested of hardship or peculiarity, interest is not to be allowed upon the arrears of an annuity, and in this case no interest should be allowed as against the estate and other creditors. Even if the statute justified the giving of interest as between the parties to the contract the awarding of interest could not be upheld as against the assignee in insolvency—the general rule being that interest ceases at the date of the assignment upon all debts where interest is not made part of the contract, unless it is evident that there is a surplus to be returned to the debtor.

Held, also, that the expense of some flooring, lathing and plastering was properly charged against the defendant, as the sons W. A. S. and G. E. S. had covenanted to keep the house reasonably and sufficiently tenantable and suitable for the occupation of tenants taking the same, and these repairs were made because the tenant threatened to leave.

Held, also, on the evidence in this case, that the Master was right in disallowing a large set-off brought in by the defendant over and above the sum of $16,000 allowed for reconstructing the buildings.

W. A. Reeve and *G. F. Ruttan*, for the appeal.

J. C. Hamilton and *Allan Cassels*, contra.

PRACTICE.

Mr. Dalton, Q.C.] [Nov. 10.

WALMSLEY v. GRIFFITH ET AL.

Security for costs—Co-defendant—Counter-claim.

A defendant asking relief against his co-defendant will not be ordered to give security for costs.

Semble, such relief should not be asked by way of counter-claim.

J. R. Roaf, for defendant Webster.

Echlin, for defendant Hall.

Law Society of Upper Canada.

OSGOODE HALL.

TRINITY TERM, 1885.

During this Term the following gentlemen were called to the Bar, viz.:—

George Morehead, Angus Claude Macdonell, John Jackson Scott, Angus MacMurchy, Leonard Hugh Patten, Spencer Love, James Baird, Philip Henry Simpson, Charles Julius Mickle, Louis Martin Hayes, Stephen Ormend Richards, Ed. William Murray Flock, David Fasken, Sandford Dennis Biggar, Geo. Hamilton Jarvis, John Alfred McAndrew, Archibald Gilchrist Campbell, Joseph Priestly Fisher, George H. Cory Thomson, Henry Thomas Shibley, Douglas Alexander, John Baldwin Hands, Stephen O'Brien, Ambrose Kenneth Goodman, Willoughby Staples Brewster, John Armstrong, John Shilton, John Strange, Henry Brock, Daniel Hugh Allan, Alexander George Murray, Francis Wolferstan Goodhue Thomas, John Frederick Grierson, Henry Walter Mickle, Francis Arthur Eddis, George Sandfield Macdonald, George Hiram Capron Brooke, Albert John Flint, Donald McDonald Howard, John Andrew Forin.

The following Graduates were admitted on 30th June, their admission to date as of Easter Term (18th May) under New Rule 29:—

Robert Maxwell Dennistoun, Heber James Hamilton, John Gumaer Holmes, Gordon Hunter, Matthew Ford Muir, John Irving Poole, William Wallbridge Vickers.

The following candidates were admitted as Students-at-Law, as of Trinity Term, 1885:—

Graduates—Clifford Kemp, Wm. Smith, A. E. K. Greer, E. J. McIntyre, A. D. Cartwright, J. H. Macnee, H. V. Lyon, S. A. Henderson, W. C. Chisholm, J. A. Collins, H. E. Irwin, E. H. Johnston, Jno. Kyles, R. O. McCullough, W. H. Walker, T. Walmsley, H. B. Witton, J. A. V. Preston, A. B. Thompson.

Matriculants—J. B. Holden, W. L. E. Marsh, F. W. Maclean, D. Holmes, A. J. J. Thibaudeau,

Juniors—D. A. McKillop, S. H. Brooke, E. G. P. Pickup, Wm. Mackay, G. B. Carroll, W. J. Hanna, P. H. Bartlett, I. Greenizen, Wm. York, H. D. Macdonald, J. F. Keith, A. F. Wilson, J. Knowles, T. W. Scandrett, J. J. McPhillips, W. F. Smith, H. V. H. Cawthra, A. C. Boyce, O. E. Fleming, W. A. Smith.

SUBJECTS FOR EXAMINATIONS.

Articled Clerks.

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

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

Students-at-Law.

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

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

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

Translation from English into Latin Prose.

MATHEMATICS.

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

ENGLISH.

A Paper on English Grammar.

Composition.

Critical Analysis of a Selected Poem:—

1884—Elegy in a Country Churchyard. The Traveller.

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

HISTORY AND GEOGRAPHY.

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

Optional subjects instead of Greek:

FRENCH.

A paper on Grammar,

Translation rom English into French prose.

1884—Souvestre, Un Philosophe sous le toits.

1885—Emile de Bonnechose, Lazare Hoche.

or Natural Philosophy.

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

First Intermediate.

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

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

Second Intermediate.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

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

For Certificate of Fitness.

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

For Call.

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

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

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

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

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

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

5. The Law Society Terms are as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

15. A Student-at-Law is required to pass the First Intermediate examination in his third year and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second year, and his Second in the first six

months of his third year. One year must elapse between First and Second Intermediates. See further, R.S.O., ch. 140, sec. 6, sub-secs. 2 and 3.

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

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

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

FEES.

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

PRIMARY EXAMINATION CURRICULUM

FOR 1886, 1887, 1888, 1889 AND 1890

Students-at-law.

CLASSICS.

1886.
- Cicero, Cato Major.
- Virgil, Æneid, B. I., vv. 1-304.
- Cæsar, Bellum Britannicum.
- Xenophon, Anabasis, B. V.
- Homer, Iliad, B. VI.

1887.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. VI.
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. I.
- Cæsar, Bellum Britannicum.

1888.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. IV.
- Cæsar, B. G. I. (vv. 133.)
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. I.

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

1890.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. VI.
- Cicero, In Catilinam, II.
- Virgil, Æneid, B. V.
- Cæsar, Bellum Britannicum.

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

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

MATHEMATICS.

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

ENGLISH.

A Paper on English Grammar.
Composition.
Critical reading of a Selected Poem:—
1886—Coleridge, Ancient Mariner and Christabel.
1887—Thomson, The Seasons, Autumn and Winter.
1888—Cowper, the Task, Bb. III. and IV.
1889—Scott, Lay of the Last Minstrel.
1890—Byron, the Prisoner of Chillon; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

HISTORY AND GEOGRAPHY.

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

Optional Subjects instead of Greek:—

FRENCH.

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

1886, 1888, 1890 — Souvestre, Un Philosophe sous le toits.

1887, 1889 — Lamartine, Christophe Colomb.

or, NATURAL PHILOSOPHY.

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

ARTICLED CLERKS.

Cicero, Cato Major; *or*, Virgil, Æneid, B. I., vv. 1-304, in the year 1886: and in the years 1887, 1888, 1889, 1890, the same portions of Cicero, *or* Virgil, at the option of the candidates, as noted above for Students-at-Law.
Arithmetic.
Euclid, Bb. I., II., and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-Keeping.

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