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THE most important of the Acts passed at the recent session of the Local Legislature have been published with commendable promptitude. We shall hope to review them in our next issue.

WE note that Sir John Rigby, Solicitor-General of England, has been promoted to the office of Attorney-General, his place being filled by Mr. R. T. Reid. Those holding the offices are now to be entirely prohibited from private practice; it has, indeed, been found that their official duties are so absorbing as to give little time for other work.

Synge v. *Synge*, referred to *ante* p. 235, appears, from the report in the *Law Times* (70 L.T.N.S. 221), to have been heard by Lord Esher, M.R., and Lopes and Kay, L.JJ., Kay, L.J., having delivered the judgment of the court. The report of the case in the Law Reports, as already pointed out, omits to show that either Lord Esher or Lopes, L.J., were parties to the judgment.

IT is nothing new to hear of a suggestion to appoint members of the Bench or Bar in the colonies to the Judicial Committee of the Privy Council. We referred to the matter some three years ago, though expressing a doubt as to whether all the arguments were in favour of that suggestion. However that may be, we should be glad to see the compliment paid, and would not fear any evil results; perhaps rather the contrary. We understand that something may be done in this direction after the confederation of the Australian provinces, an event which it is expected will shortly be consummated.

SPECIALLY INDORSED WRITS.

In a former issue (see *ante* vol. 29, p. 280) we drew attention to the uncertainty which appears to prevail on the very simple question, whether to a liquidated demand which is properly the subject of a special indorsement may be added a claim for unliquidated damages. We then pointed out the apparent inconsistency which exists in Rules 249 and 711; and that while the former Rule appears to contemplate that such claims cannot be joined, the latter Rule seems to contemplate that they can. The recent English decisions are clear, that if such claims are joined in the indorsement, then it ceases to be a *special indorsement*, and final judgment cannot be signed under it for any part of the claim, in default of appearance; nor can a motion under Rule 739 be made for leave to sign judgment in case the defendant appears: *Wilks* v. *Wood*, (1892) 1 Q.B. 684; *Sheba Gold Mining Co.* v. *Trubshawe*, (1892) 1 Q.B. 674. These cases were followed by Armour, C.J., in *Monro* v. *Pike*, 15 P.R. 164, and recently by the Divisional Court of the Common Pleas Division in *Solmes* v. *Stafford*, 16 P.R. 78; but, unfortunately, neither in the English cases is the English Rule 107 noticed, nor in either of the Canadian cases is Rule 711 referred to, nor yet the cases of *Huffman* v. *Doner*, 12 P.R. 492; *Hay* v. *Johnston*, *Ib.*, 596; and *Mackenzie* v. *Ross*, 14 P.R. 279, in which Boyd, C., and Meredith, J., came to a different conclusion. This is unfortunate, as it robs the decision of the Divisional Court of the value it would otherwise have had, and tends to leave the practice on this very simple point still in a state of doubt and uncertainty.

THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

There have been, of late, some rather uncomplimentary reflections cast upon the Judicial Committee of the Privy Council. Senator Scott, notably, in a recent speech in the Senate, spoke in a manner anything but respectful of that august body; and in a recent article in the *Canadian Law Times*, from the pen of Mr. Marsh, Q.C., we find some sneers which are equally objectionable.

It is to be regretted that attacks of this kind should be made, as they are calculated to create a want of confidence in the tribunal, which we believe to be altogether undeserved.

Mr. Marsh takes as his text a quotation from this journal, in which we expressed the opinion that the decision of the Judicial Committee in *The London & Canadian Loan and Agency Co.* v. *Duggan* was one of the cases which are calculated to induce a sense of thankfulness that there is a Privy Council.

Mr. Marsh says that the decision of the Judicial Committee in that case is merely the law because there is no higher tribunal to which an appeal can be carried, and not because it is by any means clear that the decision can be supported on legal principles.

This remark appears to be based on the erroneous assumption that the ultimate court of appeal is, or ought to be, bound by the decisions of inferior courts, which establish "the legal principles" to which Mr. Marsh refers—a proposition which seems to us to be altogether unsound. It is the highest function of the ultimate court of appeal to be able to determine causes free from any restraint imposed by the decisions of inferior tribunals, and to be free to reject the precedents of those tribunals which appear to be based on unwise or injudicious principles. Law, after all, is merely the best and most judicious exercise of reason applied to human affairs, and this is especially the case with our judge-made law. In the particular case referred to, the decision of the Supreme Court had practically led to the conclusion that, in order to deal with the shares of a company, it would be necessary for a purchaser, on each transaction, to require a regular chain of title to be deduced from the original issue of the shares, and to employ a solicitor, and go through all the trouble and inconvenience and expense of an investigation of title, such as is customary on a transfer of land. From such an absurd and inconvenient result the Privy Council has delivered us.

Mr. Marsh insinuates that the Privy Council has not been always consistent with itself. It is possible he may be correct, but the instances which are selected as justifying the observation are not happily chosen.

Cases decided under the B.N.A. Act must, almost of necessity, sometimes involve apparent inconsistencies, but that is due to the Act itself, rather than to the court which interprets it.

This Act, as is well known, gives a number of matters exclusively to the Dominion Parliament, hardly any of which can be legislated upon without affecting property and civil rights in the different Provinces; and yet by another section the Act gives the subject of property and civil rights in the Provinces exclusively to the Local Legislatures. The Act gives marriage and divorce exclusively to the Dominion Parliament, and yet it gives the solemnization of marriage exclusively to the Local Legislatures; and it gives criminal law exclusively to the Dominion Parliament, and yet gives the imposition of fines and imprisonment for breaches of Provincial laws exclusively to the Local Legislatures; it also gives the regulation of trade and commerce exclusively to the Dominion Parliament, and yet gives the police power, and the imposition of shop, saloon, tavern, and auctioneer and other licenses exclusively to the Local Legislatures; it further gives the raising of money by any mode or system of taxation exclusively to the Dominion Parliament, and yet gives direct taxation within the Provinces in order to the raising of a revenue for provincial purposes exclusively to the Local Legislatures.

When we remember the broad, far-reaching general principle laid down and illustrated by *Russell* v. *The Queen*, and *Hodge* v. *The Queen*, and in the matter of the Dominion License Acts, namely, that an Act which in one aspect and for one purpose comes within the jurisdiction of the Local Legislatures may, in another aspect and for another purpose, come within that of the Dominion Parliament, it must, we think, be admitted that the Judicial Committee have, with great astuteness, formulated the only general principle whereby it is possible to reconcile the apparent inconsistencies of the Act which they had to construe. It is not our opinion only, but also that of one who has made a very careful and special study of the decisions of the Privy Council on our Constitutional Act, separately and in relation to each other, that the assertion that there is any inconsistency to be found in the decisions of that supreme tribunal is without any warrant whatever; they are not only consistent, but satisfactory.

Mr. Marsh considers it a most unsatisfactory rule that the Privy Council refrains, as far as possible, from laying down general principles, but endeavours in each case to determine the question upon some narrow point peculiar to the case in hand. But what Mr. Marsh regards as a defect, we regard as a mark of

the superior wisdom of the Judicial Committee. As Mr. Marsh well knows, a case is only authority for the actual point decided in it; the general principles which some judges lay down being, for the most part, mere *obiter dicta*, and of no binding authority on any other judge who may happen to take a different view of those principles. What conceivable benefit the Privy Council could confer by "laying down general principles," except so far as immediately necessary for the decision of the point in hand, we fail to see, except it be to furnish Mr. Marsh and some of his brethren of the Bar with material for arguing on any inconsistencies the court might display in sticking to principles thus laid down *obiter* which it might find subsequently impossible or difficult to apply in other cases.

It is not, it appears to us, the primary duty of a court even of first instance, and still less of one of ultimate appeal, to "lay down general principles." Their duty is to decide the case in hand, and, from the decisions from time to time pronounced, it is the business of the Bar to draw out the general principles. Judges of inferior courts, in deciding cases, deduce these general principles from previous decisions in similar cases, if any, as furnishing reasons for their decision in the case before them: but the ultimate Court of Appeal is at liberty to review and revise or reject the general principles laid down by inferior tribunals, or to refuse to apply them to cases where they would operate unreasonably: and instances may be readily called to mind where the courts of appeal have upset principles laid down by inferior tribunals after they have been received as law for many years. Thus the principle laid down in *Godsall* v. *Boldero*, 9 East 72, in 1807, was overturned by the Exchequer Chamber in *Dalby* v. *India and London Life Insurance Company*, 15 C.B. 365, in 1854; and the absurd principle laid down in 1849 in *Thorogood* v. *Bryan*, 8 C.B. 114, was, in 1888, upset by the House of Lords in *Mills* v. *Armstrong*, 13 App. Cas. 1. It is true that the highest court of appeal occasionally feels that an erroneous principle has been too well established to permit it to be overthrown by judicial decision; as, for instance, in *Foakes* v. *Beer*, 9 App. Cas. 605, where the House of Lords declined to overrule the ridiculous principle laid down in *Cumber* v. *Wane*, 1 Str. 426, because it had been recognized as law for 280 years; but, it is safe to say, if that principle had been earlier before such a tribunal as the Judicial Committee, it would have failed to pass muster.

The learned writer whose remarks we have ventured to criticize makes it a matter of complaint that authorities are rarely referred to by the judges of the Judicial Committee, but it must be remembered that the authorities bearing on the case have already been referred to and thoroughly discussed in the courts below, and it is not fair to assume that they are ignored because they are not specifically mentioned.

With all due deference to Mr. Marsh and Mr. Senator Scott, we think the Judicial Committee of the Privy Council, "the legal heart and head of the British Empire," is a tribunal deserving of confidence, and one of which no British subject need be ashamed.

Invidious comparisons are sometimes made between the Judicial Committee and the Supreme Court of the United States; but we do not think the Committee has any reason to be ashamed of the comparison. It deals with a far wider range of law. Hindoo, Turkish, Roman-Dutch, French, canon, and civil, and the various forms of English law, all come under its ken; yet it has kept up with its work, and there are no such enormous arrears accumulated as hang like a millstone round the neck of the Supreme Court of the United States. Its decisions, too, are unanimous, and no conflicting opinions are promulgated to embarrass the suitor or provoke litigation.

In the interpretation of our Canadian Constitutional Act, its decisions, both where they have affirmed and where they have reversed those of the Canadian courts, have, in the main, been such as to commend themselves to the reason and judgment of the public at large, and they have been so admirably worded as to leave no room for any suspicion of partisanship or unfairness.

It is possible that Mr. Marsh's lucubration may be partly accounted for by the fate which befel the case of the *North-West Transportation Co.* v. *Beatty*, 12 App. Cas. 589, in which he appeared as counsel for the party whose apple-cart was upset by the Judicial Committee; for, when one takes a great interest in a case, one is apt, without knowing it, to feel unduly the weight of one's own arguments. But we venture to suggest that our critic has a good deal of assurance, under all the circumstances, to announce to the profession his opinion that the judgment of the Privy Council "is an extraordinary decision, wholly unsupported by authority." He seems to have forgotten that the English judges, in that case, affirmed the unanimous

decision of our Court of Appeal; and here it may be noted that Mr. Strong did not sit when the case was before the Supreme Court, which might have made a material difference there.

As to the *Duggan* case, our readers may remember that the Court of Appeal was also unanimous in the same view as the much-criticized Judicial Committee. The Supreme Court certainly reversed the Court of Appeal, but were not unanimous, Taschereau and Patterson, JJ., having dissented; as we pointed out when the decision was given, there were five Canadian judges and eight judges of the Privy Council against Street, J., and three judges of the Supreme Court. It will thus be seen that the weight of judicial opinion, which even our critic will admit stands for something, is largely in favour of the decision ultimately arrived at. We venture to add also that, if common law is common sense, the decision is one which must be considered good law, and can "be supported by legal principles."

RECENT SUPREME COURT DECISIONS.

Beyond the cases dealt with in former numbers of THE LAW JOURNAL, number one of the current volume of Supreme Court Reports does not contain any decisions calling for extended notice. There are one or two cases in the number, however, which should not be passed over without some notice.

The case of *Fleming* v. *C.P.R.*,* vol. 22, p. 33, would seem to indicate a desire on the part of the court to avoid entertaining appeals when possible. In that case, which was an action against the railway company for injuries caused by negligence in not giving proper warning of the approach of a train into the station at St. John, N.B., the trial of the action had proceeded to the extent of taking the evidence, when the counsel on both sides agreed "that the jury should be discharged without giving a verdict, and the whole case referred to the court, which should have power to draw inferences of fact," and give judgment accordingly,

*We here give the name of the case as it appears in the court below. The stupid system of transposing the names of plaintiff and defendant when the case goes to appeal should be abandoned. There is no sense in thus making confusion worse confounded. By the time a case goes up to a second court of appeal, its identity is, frequently, entirely lost, to say nothing of the trouble of finding out who is intended by the words plaintiff and defendant, or appellant and respondent.—ED. C.L.J.

assessing damages if the judgment should be for the plaintiff. Upon an appeal from judgment for plaintiff, in pursuance of this agreement, it was held that the court below was not exercising its usual judicial functions in determining the case, but acted as *quasi* arbitrators, and its decision could not be reviewed on appeal.

This decision may be strictly right, but it must strike the ordinary practitioner as being a hardship upon the railway company. If a special case had been stated in the very terms of the agreement, there would have been an appeal. If the agreement had not given the court power to assess damages, it would not have been easy to contend that an appeal would not lie; and, if that is so, the insertion of that authority should not have been held to affect the whole transaction. The authorities relied on by the Chief Justice show that the mode in which the damages were assessed was the main ground of the decision.

Mr. Justice Patterson's dissenting judgment on the merits of this case covers nearly fifteen pages of the reports, and we would again take exception to the practice of publishing lengthy judgments which do not bear on the decision of the court. In some instances, where a case has gone off on some technical point, an individual opinion on the merits may be of use, in view of a similar question arising in future; but here the majority of the court had announced that if the case had been properly before them, their decision would have been opposed to the view of the dissentients.

NEGLIGENCE—HAZARDOUS WORK.

Brown v. *Leclerc*, 22 S.C.R. 53, seems to carry the doctrine of liability for negligence in carrying on hazardous works pretty far; but as the Supreme Court was the third tribunal which passed upon the matters in issue, all holding the same opinion, the decision must be admitted to be a well-considered one.

The case may be briefly stated thus: Two stevedores were engaged in loading a vessel, one with flour, the other with cattle. There was no community of service between them or their respective employees. It being necessary to fasten the cattle in compartments near the hatchway, through which the flour was being lowered, the stevedore engaged with the latter was asked to suspend operations for ten or fifteen minutes, but refused. One

of the men working with the cattle was stationed near such hatchway with a light, and, while there, a sack of flour, with no rope attached to guide its descent, was lowered, and, swinging outside the hatchway, struck the man with the light and knocked him down to the bottom of the hold, injuring him so that he died a few days after. His widow was held entitled to damages from the stevedore loading the flour. It should be stated, too, that one of the men working with him had warned deceased that he was standing, unnecessarily, in a dangerous position.

This decision is, no doubt, strictly in accordance with legal principles, but it imposes upon labourers and employers of labour the burden of taking the most elaborate precautions against accident. And, even from a legal standpoint, it can hardly be denied that the dissenting judgment of Mr. Justice Gwynne contains cogent reasons for believing that, had the decision been the other way, it might not have been easy to assail it. However, the decisions on questions of negligence are not, in the majority of cases, of much importance as precedents, inasmuch as no two cases are precisely alike in their facts, and it is upon the facts that the judgment must necessarily be based.

THE LAW OF CONTRACTS.

Stephens v. *Gorden*, page 61, is a case on the construction of a contract for the purchase of timber, and particularly on one clause which reserved to the owner of the land the full enjoyment of the same, "save and in so far as may be necessary for the cutting and removing of the trees and timber." The purchaser of the timber, in removing a portion of it, broke down some fences and destroyed or damaged crops, for which the owner sought compensation. His right to the same has been denied, however, by the Supreme Court and the Court of Appeal reversing the decision of the Chancellor at the trial.

We do not propose to review the judgments in this case, as the report contains the dissenting opinion of Mr. Justice Gwynne, which about exhausts the subject from the plaintiff's point of view, namely, that the method by which the timber was removed was not justified by the contract, and that he was entitled to damages; and Mr. Justice Sedgewick, in delivering the judgment of the court, presents the reasoning to the contrary. The case is one which will repay careful examination, and assist the profession in the study of the law of contracts.

CURRENT ENGLISH CASES.

COVENANT TO SETTLE AFTER-ACQUIRED PROPERTY—SEVERANCE OF JOINT TENANCY.

In re Hewett, Hewett v. *Hewett,* (1894) 1 Ch. 362, a lady on her marriage, in 1880, executed a settlement whereby she and her husband covenanted to settle the wife's after-acquired property. In 1883 the wife became entitled to an interest as joint tenant with others under a will. Had the settlement of 1880 the effect of severing the joint tenancy? was the question presented for the decision of North, J. He held that it did, and considered it clear that "any agreement to sever made by a joint tenant, if it binds the parties, if it is made for value, is just as effectual as if the intention of the parties expressed in the agreement had been actually carried out by a conveyance of the property."

BUILDING SOCIETY—DISSOLUTION—PRIORITY OF PAYMENT OF MEMBERS.

In *Barnard* v. *Tomson,* (1894) 1 Ch. 374, a building society had been dissolved, and the present action was brought by a member against the trustees for the purpose of determining the rights *inter se* of different classes of members. Under the rules, it was provided that members might withdraw by giving one month's written notice to the directors, but if more than one member should give notice to withdraw at one time they should be paid in rotation. Some members gave notice of withdrawal before the instrument of dissolution was executed, and it was held by North, J., that, notwithstanding the dissolution, they were entitled to be paid in priority, according to the dates of their notices; and that such notices, having been given and matured before there was any intention of dissolution, were validly given.

PARTNERSHIP—RECEIPT OF SHARE OF PROFITS—IMPLIED PARTNERSHIP—LAND EMPLOYED IN BUSINESS—CONVERSION.

Davis v. *Davis,* (1894) 1 Ch. 393, although a decision under the Partnership Act, 1890 (53 & 54 Vict., c. 39), yet appears to be worth consideration, inasmuch as that Act is, we take it, in the main, but a codification of the prior existing law. The question was whether a partnership existed, and North, J., held that under the Act, just as before it, the receipt by a person of a share of the profits of a business is *prima facie* evidence that he is a partner in the business, but this is not to be regarded as a presumption which

has to be rebutted by other circumstances; but all the circumstances are to be considered, and an inference drawn from them as a whole, without attributing any undue weight to any one of them. He also held that on the evidence in this case a partnership was proved. It appeared that the partners were tenants in common of certain property on which they borrowed money, which they expended in adding a part of the mortgaged property to the adjoining workshops on which the partnership business was carried on, but it was held that this expenditure had not the effect of making the premises so added partnership property so as to descend as personalty on the death of one of the partners.

POWER—GENERAL POWER OF APPOINTMENT—EXERCISE OF POWER BY WILL—DEATH OF APPOINTEE BEFORE TESTATOR—DEVOLUTION OF APPOINTED PROPERTY.

In *Coxen* v. *Rowland*, (1894) 1 Ch. 406, a testatrix having a general power of appointment over certain real estate gave all the real estate which she might be possessed of or entitled to, or of which, by virtue of any power, she was competent to dispose, "in manner following"; and then after certain specific devises, in which she treated the property devised as her own, she gave the property which was the subject of the power to her husband, and also made him residuary devisee and legatee. Her husband predeceased her. The question then arose how the property, the subject of the power, should devolve. Stirling, J., was of opinion that she had indicated her intention that the power should be exercised, and that the property subject to it should be deemed hers for all purposes, and consequently went to her heirs and not as on default of appointment. The effect of this decision was somewhat curious, as in default of appointment the property would have gone to the heirs of the husband.

COSTS—INTEREST ON—JUDGMENTS ACT, 1838 (1 & 2 VICT., C. 110), S. 18—R.S.O., C. 67, S. 10)—ORD. XLII., RR. 14, 16 (ONT. RULE 891; ONT. JUD. ACT, S. 88).

In *Taylor* v. *Roe*, (1894) 1 Ch. 413, Stirling, J., decided that as under the Judgments Act, 1838 (1 & 2 Vict., c. 110)—(see R.S.O., c. 67, s. 10), an interlocutory order for payment of costs is to be deemed a judgment, therefore the costs bear interest from the date of the order. (See Ont. Rule 891; Ont. Jud. Act, s. 88.)

PRACTICE—SERVICE OUT OF JURISDICTION—ACTION FOR EXECUTION OF TRUSTS—NO PROPERTY WITHIN JURISDICTION—ORD. XI., R. 1 (D) (ONT. RULE 271 (D)).

In *Winter* v. *Winter*, (1894) 1 Ch. 421, Stirling, J., set aside the service of a writ out of the jurisdiction on the ground that the court had no jurisdiction to allow the service. The action was brought for the administration of the trusts of a settlement. The trust property originally consisted of a sum of consols, but previous to the action the defendant had sold out the consols, and had left England. At the time the action was brought there was no trust property within the jurisdiction, and therefore the case was not within Ord. xi., r. 1 (*d*) (Ont. Rule 271 (*d*)), which is confined to cases where the trust property is within the jurisdiction: and it is not enough to satisfy the Rule that the trust property ought to be, or, if the trusts were duly executed, would be, within the jurisdiction.

TRUSTEES—CUSTODY OF TITLE DEEDS—BUILDING ESTATE—CONVERTIBLE SECURITIES HELD IN TRUST, CUSTODY OF.

In *Field* v. *Field*, (1894) 1 Ch. 425, the plaintiff who was a *cestui que trust*, applied for an injunction to restrain his trustees from permitting the title deeds of the trust estate to remain in the custody of their solicitors. But it appearing that the trust property was a building estate, concerning which there were transactions constantly in progress needing a reference to the deeds, Kekewich, J., declined to make any order, there being no suggestion that the solicitors were not, in any other respect, fit and proper persons to have the custody of the deeds. He, however, intimated that in the case of securities payable to bearer the trustees should keep them under their own control, and not leave them in the control of their solicitors or any other agents: but that in the case of title deeds they have a discretion to leave them in the hands of solicitors when the exigencies of the trust require it, but where there is no such necessity they should keep them under their own control.

B. N. A. ACT, S. 91, S-S. 15; S. 92, S-S. 13—DOMINION BANK ACT (R.S.C., C. 120)—WAREHOUSE RECEIPTS.

In *Tennant* v. *The Union Bank*, (1894) A.C. 31, the Judicial Committee of the Privy Council have affirmed the decision of the Court of Appeal (19 R. App. 1.), and in doing so discuss the effect of Dominion and Provincial legislation bearing on the

same subject-matter, and determine, in effect, that where the legislative powers of the Dominion and a Province overlap, the statute of the Dominion virtually overrides that of the Province. In the present case the contest was between an assignee for creditors and a bank which had advanced moneys to the assignors on the security of warehouse receipts. These warehouse receipts were invalid under R.S.O., c. 122, but valid under R.S.C., c. 120 (the Dominion Bank Act), then in force; and their lordships determined that the provisions of the Bank Act were *intra vires* of the Dominion, and, in effect, superseded the provisions of the Provincial statute as to warehouse receipts, so far as banks advancing money thereon were concerned. The term "banking" they considered wide enough to include every transaction coming within the legitimate business of a banker. Therefore, as to all matters assigned to the legislative control of the Dominion Parliament, that power may be validly exercised to the fullest extent, although it may have the effect of modifying civil rights in the Provinces. (See *ante infra*, p. 189.)

MASTER AND SERVANT—LIABILITY OF MASTER FOR WRONGFUL ACT OF SERVANT—SERVANT ACTING WRONGFULLY WITHIN SCOPE OF HIS EMPLOYMENT—LIABILITY OF EMPLOYER FOR ACT OF SUB-CONTRACTOR.

Black v. *Christchurch Finance Co.*, (1894) A.C. 48, was an action brought by the owner of land to recover damages from the defendants, who were adjoining proprietors, for injury to the plaintiff's property by reason of the spreading of a fire from the defendants' to the plaintiff's land. It appeared that the defendants had entered into a contract with one Wright to clear up a large tract of land, and that he had, at their request and with their consent, let the clearing of an additional piece of bush to one Nyman. Nyman, in the course of his employment, and for the purpose of clearing, negligently started the fire, which had spread to and injured the plaintiff's land. The Judicial Committee of the Privy Council held that the defendants were liable, notwithstanding that Nyman had disregarded an express stipulation in the contract relative to the time at which the fire should be lit, and that, so long as Nyman could not be considered a trespasser, the defendants were answerable to third parties for the result of his negligence.

CRIMINAL LAW—EVIDENCE OF CRIMINAL ACTS OTHER THAN THOSE CHARGED, WHEN ADMISSIBLE—(CRIMINAL CODE, S. 746 (F.)).

Makin v. *Attorney-General*, (1894) A.C. 57, is an appeal in a criminal case from New South Wales, in which the question involved was how far evidence tending to show that the accused had been guilty of criminal acts other than those charged is admissible. The Judicial Committee determined that such evidence is only admissible upon the issue whether the acts charged were designed or accidental, or to rebut a defence otherwise open to the accused. In the present case the prisoners were convicted of the wilful murder of an infant, which the evidence showed they had received from its mother on certain representations as to their willingness to adopt it, and upon payment of a sum inadequate for its support for more than a very short time, and whose body had been found buried in the garden of the prisoners' house. The evidence objected to went to show that the prisoners had received several other infants from their mothers on like representations and terms, and that bodies of several infants had been found buried in the gardens of houses occupied by the prisoners. Their lordships held that this evidence was relevant to the issue which had been tried. They also took occasion to express views as to the effect of a provision in the New South Wales criminal law, somewhat similar in its terms to the Canadian Criminal Code, s. 746 (*f*), and declare that it does not, in their opinion, authorize an appellate court to affirm a conviction where improper evidence has been secured, unless it is of a purely formal character, and could not possibly have influenced the verdict.

Notes and Selections.

TELEPHONE—AFFIDAVIT—IDENTIFICATION.—It was held last month by the New York Court of Appeal, in *Murphy* v. *Jack*, that since it is possible to recognize a person's voice at the other end of a telephone an affidavit based upon such a conversation is admissible, and is sufficient to justify the court in acting upon such an affidavit, if it is made to appear that the deponent was acquainted with the person at the other end of the telephone and recognized his voice, or if it appeared, in some satisfactory

way, that he knew it was that person who was speaking to him; but, in the absence of such identification, such an affidavit is inadmissible.

PHOTOGRAPHY IN LITIGATION.—An exchange in the Far West thus discusses the subject in connection with a suit now on trial in the United States District Court at Cincinnati: "The suit is one of long standing, involving the title to one thousand five hundred acres of valuable farm lands. It is based on a deed made nearly seventy-five years ago by the owners of the land, and turns on the point whether the deed had five signatures or only four. In order to test this question it was decided to have the deed photographed, and the clerk of the court was ordered to give the matter his personal supervision. For that purpose it was taken to Washington, and submitted to an expert photographer of that city. The original deed, discoloured and yellow with age, showed traces of four signatures, and a space where there might have been a fifth, but no trace of it. The photographing was done in the presence of the clerk of the court, who refused to let the deed go out of his sight. The negative revealed traces of the missing signature, and when it was enlarged ten times the entire name became as plain as when first written. The court pronounced the evidence conclusive, and the result will be the reversal of a former decision, and a change in the ownership of the land."

LEGAL DISPENSARY.—The Philadelphia lawyer is proverbially good in difficult cases. Recently he has devised a way of enlarging the field of practical study for the law student, and, at the same time, of helping the impecunious litigant. This has been done in the establishment of the Law Dispensary of Philadelphia, wherein a poor person having an action to bring can receive help much in the same way that people in the same condition of life can obtain relief at the hospitals for their physical ills, and at the same time afford opportunities for the enlargement of the knowledge of the walker of the hospital. The plan of the dispensary is to invite applications from poor people in need of legal assistance who have no means with which to pay for it. A committee sits at stated intervals to hear applications and accept cases; the latter are turned over to the students to be worked up until they reach

the court, when the sympathetic assistance of some member of the Bar in full standing is obtained to examine witnesses and make arguments. So far the dispensary has received about thirty applications, accepted twelve cases, and carried two into court—and won them. The improvement of this system over the ordinary suit *in forma pauperis* must commend itself to litigants, however differently it may be regarded by the various legal professions that adorn the various nations of the world.—*Pall Mall Gazette.*

SHOOTING BURGLARS.—The following letter, discussing the right of a householder to fire at a burglar in his house, appeared some time ago in the *Times*. It is reproduced now as in point in connection with some recent housebreaking events: "In my own case, having just missed catching the burglars in the pantry in consequence of their escape through the window, I fired two shots from my revolver after them, and again, having an hour after, by chance, and at a greater distance from home, met one in the road, from whose possession I forcibly abstracted about a third of the plate of which he had robbed me, I should undoubtedly have fired when he fled away had I had my pistol with me. As it was, he escaped in the darkness and rough ground, carrying off some £20 worth of my plate. The question arose afterward between me and several of my legal friends, including two judges and a police magistrate, whether I was justified, first, in firing from the window, or, next, should have been justified in firing the second time, when the burglar was flying before me with my plate in his hand, had I carried my pistol with me. Here is a quotation from 'Stephen's Digest of the Criminal Law' (1877), which one learned friend gives: 'The intentional infliction of death or bodily harm is not a crime when it is done by any person in order to arrest a traitor, felon, or pirate, or retake or keep in lawful custody a traitor, felon, or pirate who has escaped or who is about to escape from such custody, although such traitor, felon, or pirate offers no violence to any person, provided in each of the said cases that the object for which death or harm is inflicted can not be otherwise accomplished.' And he adds: 'Where an actual felon is concerned, a private person has the same rights as to arrest and detaining as a constable.' Another learned friend says: 'A man may shoot another whilst actually

engaged in committing a burglary in his house, on the ground that burglary is a class of crime that necessarily puts his own life or person in danger. But he has no right to shoot, or, at all events, to kill (and if he shoots at all he is very likely to kill), a flying thief or burglar unless the circumstances are such as to lead to a reasonable fear that his own life will be in danger if he pursues, leaving the burglar unharmed. If the burglar, on being pursued, shows fight, shooting would be justifiable. In my opinion, also, if I am pursuing a flying burglar in the dark, and have no means of knowing whether the next thing that may happen will not be that he will turn about and fire upon me, I am not obliged to give him the chance of firing the first shot.' A third speaks thus: 'I am satisfied now that a private individual has the same rights as a peace officer. Probably the whole thing is a good deal guarded and limited by this—that that must be the only means of capture, and that the object in the case of a private individual must be capture, and not revenge or recovery of property.'"

The many advisers of this correspondent led him pretty straight to the right legal construction—that a man may shoot a burglar in defence of himself and of his property, and also in pursuit if he can not otherwise arrest his flight. Some years ago an Irish landlord was shot at from behind a hedge and missed. The would-be assassin took to flight, was challenged to stop, and was ultimately shot and killed by the landlord. The Irish coroner's jury returned a verdict of murder; but the Irish law officers recognized the right of the pursuer, and abstained from prosecution. In any civilized country he that shoots at a burglar may expect a very large charity from any jury into whose charge he falls. A case recently tried at the Manchester Assizes in England, before Mr. Justice Grantham, is in point. The facts were as follows: An innkeeper named Higgins was charged with having at Manchester, on September 5th last, feloniously shot at Owen Riley with intent to do him some grievous bodily harm. At 2.10 a.m. on the day in question a police constable, hearing a whistle, went to the Victoria Hotel, kept by the prisoner, whom he found standing on the steps. He said he had shot Riley, whom he had found in his house. On being charged, he stated that at 1.50 a.m. he was awakened by his wife, and, after listening for a time, heard a noise down stairs. He took his revolver,

went down stairs, called "Who is there?" and getting no answer opened the door. Riley was crouching down, the room being nearly dark. Being frightened, and not knowing how many burglars might be in the house, he fired and hit Riley in the chest. In a subsequent statement he said that he only intended to frighten the man he saw, and was very sorry for what had happened. Owen Riley was called as a witness, having previously pleaded "guilty" to the charge of burglary. He said that the defendant had shot him from inside the kitchen door, and that there was a light in the room. Counsel for the defence submitted that even on the assumption that Higgins had shot Riley intentionally he could not be convicted, as he was acting reasonably in defence of his life and property when a felony had been committed. Mr. Justice Grantham ruled that there was no evidence against the prisoner of shooting with a felonious intention. The prosecutor having, by his own account, broken into the house and searched it for what he could steal, the prisoner, coming into the room as he did, was entitled to shoot at him. The judge, therefore, directed the jury to acquit the prisoner, who was thereupon discharged.

One of our exchanges, commenting on the above, says:—"In the State of New York the law is substantially the same. The courts there have repeatedly decided that one who is opposing a felony may lawfully use all necessary force, even to the killing of the felon. See the cases of *Ruloff* v. *People*, 45 N.Y. 213, and *People* v. *Hand*, 4 Alb. L.J. 91. The Penal Code of that State provides (section 205) that homicide is justifiable when committed in the actual resistance of an attempt to commit a felony upon the slayer, in his presence, or upon or in a dwelling or other place of abode in which he is."

Reviews and Notices of Books.

Car Trusts in the United States. A Brief Statement of the Law of Contracts of Conditional Sale of Rolling Stock to Railroads. By Gheraidi Davis and G. Morgan Browne, Jr., of the New York Bar. New York, 1894.

This pamphlet was, as the authors state, suggested by difficulties which presented themselves in several cases in which the

question of the validity of certain car trusts was raised. An interesting address on this subject was given before the American Bar Association in 1885, but few references are to be found in the text-books on the subject. The question of trusts generally is becoming more and more important on this continent, and any literature on this subject will always be helpful.

A Canadian Manual on the Procedure at Meetings of Municipal Councils, Shareholders and Directors of Companies, Synods, Conventions, Societies, and Public Bodies generally, with an introductory review of the Rules and Usages of Parliament that govern Public Assemblies in Canada. By J. G. Bourinot, C.M.G., LL.D., D.C.L., D.L., Clerk of the House of Commons; author of "Parliamentary Procedure in Canada," "Manual of Canadian Constitutional History," "Federal Government in Canada," "Canadian Studies in Comparative Politics," etc. Toronto: The Carswell Co. (Ltd.), Law Publishers, etc., 1894.

The author's valuable work on "Parliamentary Procedure," some years ago, has apparently put the public in touch with him, and has produced many inquiries on various points of order that have arisen from time to time in municipal and other meetings. He has consequently seen the practical necessity for what he calls a "short treatise," directly applicable to the special wants of municipal councils, public meetings and conventions, religious conferences, shareholders' and directors' meetings, and societies in general. The present treatise is, in effect, a supplement to his larger work, which is exclusively devoted to parliamentary procedure and government.

The writer divides his work into (1) A statement of the leading rules and principles of parliamentary procedure which lie necessarily at the basis of the proceedings and deliberations of all public assemblies and societies of this country; and (2) An application of those rules and principles to the proceedings of public meetings, societies, conventions, church conferences and synods, companies' meetings, and municipal councils.

The work seems to be admirable in its arrangement, and will doubtless meet all the requirements likely to arise in relation to the subject treated of. It can scarcely be called a short treatise, inasmuch as it contains nearly four hundred and fifty large pages of matter. It is supplemented by a full index.

The Criminal Code of Canada and the Canada Evidence Act, 1893, with an extra appendix containing the Extradition Act, the Extradition Convention with the United States, the Fugitive Offenders' Act, and the House of Commons Debates on the Code, and an analytical index; by James Crankshaw, B.C.L., Barrister. Montreal: Whiteford & Theoret, Law Publishers, 1894.

The editor designs to give in this large and complete work of his (containing nearly one thousand pages) a full general view of our criminal law and criminal procedure, hoping that it may be of practical use to judges, magistrates, Crown officers, lawyers, and others concerned in the administration of justice.

We think he has succeeded. There are some features of this annotation which make it especially useful. We will refer shortly to some of them. The introduction points out the changes which have been effected in the law, the offences which have been abolished, the new offences created, and the alterations and amendments made in relation thereto. In addition to the usual references to the English, Canadian, and American authors in his report, Mr. Crankshaw gives copious illustrations of cases coming within the scope of the various cases. As examples of these, we might refer to pages 12 to 15, and 31 to 40. Again, those dealing with the Criminal Code realize the difficulty of finding all the provisions affecting one particular subject. This is met by the collection of, or reference to, the several provisions, in one place, affecting the same subject; as, for example, under the head of common assault on page 183. The author supplies also a number of useful forms. We would especially refer to the statements of the various offences in the Code for use in preparing indictments.

A very useful table, giving all offences indictable and non-indictable, states the number of the section, the nature of the offence, the extent of punishment, and the tribunal; whilst lists of the limitation of time for prosecuting offences appear at the end of each title of the Code. Another very useful table gives a list of offences triable summarily, showing the offences, the punishment, before whom triable, and the limitation of time for prosecuting the offence. An appendix contains the full text of the Canada Evidence Act of 1893, the Extradition Act, the Fugitive Offenders' Act, as also the debates of the House of Commons at the time of the introduction of the Criminal Code.

It seems rather strange that our two works on the Criminal Code are both edited by members of the Bench and Bar from our sister Province, and one naturally draws a comparison between the volume before us and that which preceded it by Mr. Justice Taschereau, and we cannot help thinking that Mr. Crankshaw's book will prove a formidable rival to its predecessor.

DIARY FOR MAY.

1. Tuesday.....Supreme Court of Canada sits.
2. Wednesday..J. A. Boyd, 4th Chancellor, 1881.
3. Thursday....Ascension Day. Law School closes.
4. Friday .....Mr. Justice Henry died, 1888.
6. Sunday......*Sunday after Ascension Day.* Lord Brougham died, 1868.
8. Tuesday.....Ct. of Appeal sits. Gen. Sess. and Co. Ct. sittings for trial in York. Exam. for Certificate of Fitness (last).
9. Wednesday..Examination for Call (last).
12. Saturday....Battle of Batoche, 1885.
13. Sunday......*Whitsunday.*
14. Monday.....First illustrated newspaper, 1842.
18. Friday......Montreal founded, 1642.
20. Sunday......*Trinity Sunday.*
21. Monday.....Easter Term begins. Convocation meets.
22. Tuesday.....Earl of Dufferin, Governor-General, 1872.
24. Thursday....Corpus Christi. Queen Victoria born, 1819.
25. Friday......Convocation meets. Princess Helena born, 1846.
27. Sunday......*1st Sunday after Trinity.* Habeas Corpus Act passed, 1679. Battle of Fort George, 1813.
28. Monday.....Hon. G. A. Kirkpatrick, Lieut.-Governor, Ontario, 1892.
29. Tuesday.....Battle of Sackett's Harbour, 1813.

Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

COURT OF APPEAL.

From BOYD, C.] [April 4.

COVENTRY *v.* MCLEAN.

Landlord and tenant—Lease—Forfeiture—Option to purchase.

The court will not make a declaration relieving against forfeiture of a lease for non-payment of rent as of the date of a previous tender when the trial of the action for that relief takes place after the lease would have expired by effluxion of time, even though the lease gives an option of purchase to be exercised during the term, and the lessee has attempted to exercise that option after the forfeiture and at time the tender was made.

Judgment of BOYD, C., affirmed.

W. Nesbitt and *A. Monro Grier* for the appellant.

W. Cassells, Q.C., for the respondent.

From C.P.D.] [April 4.

MORROW *v.* CANADIAN PACIFIC R.W. CO.

Negligence—Contributory negligence—Evidence—Onus of proof—Jury.

In an action tried by judge and jury to recover damages for negligence where contributory negligence is set up as a defence, the onus of proof of the two issues is respectively upon the plaintiff and the defendant; and though the

judge is entitled to hold negatively that there is no evidence to go to the jury on either issue, he cannot declare affirmatively that either issue is proved. The question of proof is for the jury.

The necessity for bearing in mind that *Weir* v. *Canadian Pacific R.W. Co.*, 16 A.R. 100, was tried without a jury emphasized.

Judgment of the Common Pleas Division affirmed.

McCarthy, Q.C., for the appellants.

Marsh, Q.C., and *E. Guss Porter* for the respondent.

From Q.BD.] [April 4.

YORK ET AL. *v.* TOWNSHIP OF OSGOODE ET AL.

Waters and Watercourses—Ditches and Watercourses Act—R.S.O., c. 220—"Owner"—Tenant at will.

The word "owner," as used in the Ditches and Watercourses Act, R.S.O., c. 220, means the actual owner, and not the assessed owner; and a tenant at will of land affected assessed as owner is not an owner affected or interested within the meaning of the Act.

Judgment of the Queen's Bench Division, 24 O.R. 12, reversed.

Moss, Q.C., and *MacTavish*, Q.C., for the appellants.

Shepley, Q.C., and *G. F. Henderson* for the respondents.

From Ch.D.] [April 4.

HEADFORD *v.* THE MCCLARY MANUFACTURING COMPANY.

Master and servant—Workmen's Compensation for Injuries Act—R.S.O., c. 141—Way—Defect—Hoist.

An unguarded hoist on one side of a well-lighted passage, twelve feet wide is not a defect, in a way, within the meaning of the Workmen's Compensation for Injuries Act, R.S.O., c. 141.

Judgment of the Chancery Division, 23 O.R. 335, affirmed on other grounds.

Gibbons, Q.C., for the appellant.

W. Nesbitt and *A. Monro Grier* for the respondents.

From STREET, J.] [April 4.

MASON *v.* ARMSTRONG.
MCCLELLAND *v.* ARMSTRONG.
WRIGHT *v.* ARMSTRONG.

Vendor and purchaser—Sale of land—Conditions of sale—Title—Objection—Time—Will—Defeasible estate.

An agreement for the sale of land contained the condition that "the vendee is to examine the title at his own expense, and to have ten days from the date hereof for that purpose, and shall be deemed to have waived all objections to title not raised within that time."

Held, per HAGARTY, C.J.O., and OSLER, J.A.: This condition did not, even in the absence of objection within the time limited, compel the vendee to accept a defective title.

Per BURTON and MACLENNAN, JJ.A.: The condition was sufficiently wide to bind the vendee, in the absence of objection within the limited time, to accept such title as the vendor might be able to give.

A devise to two persons of separate lots of land, with a proviso that if either devisee should die without lawful issue the part and portion of the deceased should revert to the surviving devisee, and with the further proviso that in case both devisees should die without issue the devised lands should be divided by certain named persons, as they should deem right and equitable, among the relatives of the testatrix, confers upon each devisee only a defeasible fee simple.

Judgment of STREET, J., 22 O.R. 542, affirmed.

Moss, Q.C., and *J. A. Macdonald* for the appellant.

Armour, Q.C., *Marsh*, Q.C., *G. G. S. Lindsey*, and *G. Y. Smith* for the respondents.

From C.P.D.] [April 4.

ROBERTSON *v.* GRAND TRUNK RAILWAY CO.

Railway—Conditions—Negligence—Shipping contract—Horse—51 Vict., c. 29, s. 246 (D.)—Damages—New trial.

The plaintiff delivered to the defendants a racehorse for transport over part of their line of railway, nothing being said as to its value, and at the time signed a shipping contract which stated that the horse was received for transport at a special named rate, and that in consideration of this special rate the defendants should not be liable for any loss unless caused by collision, and then only to the extent of $100. The horse was killed in a collision caused by the defendants' negligence, and the jury found that its value was $5,000.

Held, per HAGARTY, C.J.O., and OSLER, J.A., that the special limitation having been entered into in good faith on the declared value of $100, and not for the purpose of evading liability, was valid, and not in contravention of 51 Vict., c. 29, s. 246 (D.).

Per BOYD, C.: That under that section the limitation of liability for damages resulting from negligence was invalid, but that a new trial should be ordered because of the allowance of excessive damages.

Per MACLENNAN, J.A.: That a limitation of liability against damages caused by negligence would be valid, as being, in effect, a pre-ascertainment of the amount of damages; but that the particular shipping contract in question, having regard to the freight classification made under s. 226 of the Act, did not effect such a limitation, and that a new trial should be ordered because of the allowance of excessive damages. *Vogel* v. *Grand Trunk R.W. Co.*, 2 O.R. 197; 10 A.R. 162; 11 S.C.R. 612, considered.

In the result, the judgment of the Common Pleas Division, 24 O.R. 75, was affirmed.

H. H. Collier for the appellant.

Osler, Q.C., for the respondents.

From Q.B.D.] [April 4.

SEGSWORTH ET AL. *v.* ANDERSON ET AL.

Assignments and preferences—Sale of insolvent's estate—Secret profit by creditor—Inspector—Trusts.

The assets of an insolvent estate were sold by the assignee, at a price that was not complained of, to the insolvent's wife, with the approval of the sole inspector of the estate, the inspector and another creditor becoming responsible for the payment of the purchase money, and, pursuant to a pre-existing undisclosed agreement, taking from the purchaser a chattel mortgage upon these assets as security, not only for the amount of the purchase money, but also for the amount of their claims against the debtor.

Held, *per* BURTON and MACLENNAN, JJ.A., that the inspector and the creditor could not be ordered to account for the profit, if any, made by them, that profit not having been made at the expense of the estate or by virtue of the office of trust filled by the inspector.

Per HAGARTY, C.J.O.: That the transaction was, legally speaking, an improper one; but that, there being no evidence that any loss had been caused to the estate, no reference should be directed.

Per OSLER, J.A.: That any profit must be accounted for, and that a reference to ascertain the amount thereof should be directed.

In the result, the judgment of the Queen's Bench Division, 23 O.R. 573, was reversed.

S. H. Blake, Q.C., and *E. F. Gunther* for the appellants.

James Parkes and *L. F. Heyd* for the respondents.

From Co. Ct., Wellington.] [April 4.

REGINA *v.* MARTIN.

Intoxicating liquors—Powers of license commissioners—License regulations—Liquor License Act, R.S.O., c. 194.

A regulation by license commissioners requiring the lower half of barroom windows to be left uncovered during prohibited hours is valid and reasonable.

Regina v. *Belmont*, 35 U.C.R. 298, questioned.

Judgment of the County Judge of Wellington reversed.

J. R. Cartwright, Q.C., for the appeal.

James Haverson for the respondent.

From Q.B.D.] [April 4.

KERR ENGINE CO. *v.* FRENCH RIVER TUG CO.

Contract—Penalty—Damages—Time.

Where a contract provides that an engine shall be built and placed in position by a certain date, with a penalty of $20 for each day's delay, the time of commencement is of the essence of the contract; and if, owing to the purchaser's

fault, the contractor is delayed in commencing the work, the parties are at large, so far as the penalty is concerned, the purchaser, if the work be not completed by the time fixed, being entitled only to such damages as he has actually suffered.

Holme v. *Guppy*, 3 M. & W. 387, followed.

Judgment of the Queen's Bench Division reversed.

McCarthy, Q.C., for the appellants.

Moss, Q.C., and *O. E. Fleming* for the respondents.

From BOYD, C.] [April 4.

BRETHOUR *v.* BROOK ET AL.

Mortgage—Power of sale—Lease—Possession—Timber—R.S.O., c. 107, clauses 7, 17.

This was an appeal by the plaintiff from the judgment of BOYD, C., reported 23 O.R. 658, and was argued before HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 2nd of April, 1894.

G. Lynch-Staunton and *S. Livingston* for the appellant.

W. Cassels, Q.C., and *C. E. Oles* for the respondents.

At the conclusion of the argument the appeal was dismissed with costs, the court agreeing with the judgment of the learned Chancellor.

From Q.B.D.] [April 4.

STOVEL *v.* GREGORY.

Statute of Limitations—Possession—Trespass—Fencing—"State of nature"—R.S.O., c. 111, s. 5, s-s 4.

The expression "state of nature" in s-s. 4 of section 5 of R.S.O., c. 111, is used in contradistinction to the preceding expression, "residing upon or cultivating"; and unless the patentee of wild lands, or some one claiming under him, has resided upon the land, or has cultivated or improved it, or actually used it, the twenty years' limitation applies. Clearing or cultivating by trespassers will not avail to shorten this limit.

Per BURTON and MACLENNAN, JJ.A.: Merely fencing in a lot without putting it to some actual continuous use is not sufficient to make the statute run.

Judgment of the Queen's Bench Division affirmed.

H. J. Scott, Q.C., and *William Kingston*, Q.C., for the appellant.

W. R. Meredith, Q.C., and *H. Elliott* for the respondent.

[May 8.

DEROCHIE *v.* TOWN OF CORNWALL.

Municipal corporation—Highway—Repair—Sidewalk—Ice—Negligence.

Allowing, for a fortnight, water to collect and alternately freeze and thaw in a depression in a sidewalk in a frequented street is non-repair for which the municipality is liable.

Judgment of the Chancery Division, 23 O.R. 355, affirmed, BURTON, J.A., dissenting.

Cassels, Q.C., and *Leitch*, Q.C., for the appellants.

Moss, Q.C., for the respondent.

From FERGUSON, J.] [May 8.

IN RE STAEBLER, STAEBLER *v.* ZIMMERMAN.

Will—Legacies—Charity—Marshalling—Abatement—Executors and administrators—Evidence—Corroboration—R.S.O., c. 61, s. 10.

Though there can be no marshalling in favour of charities, yet, where charitable and other legacies are payable out of a mixed fund, the proceeds of realty, impure personalty, and personalty, the charitable legacies do not fail *in toto*, but must abate in the proportion which the sum of the realty and impure personalty charged with charitable gifts bears to the pure personalty.

The evidence of executors that promissory notes belonging to the testator had, when they came into their hands, endorsements upon them showing that payments had been made to the testator does not require corroboration under s. 10 of R.S.O., c. 61.

Judgment of FERGUSON, J., reversed.

Robinson, Q.C., and *A. Monro Grier* for the appellants.

J. P. Mabee and *R. T. Harding* for the respondents.

From GALT, C.J.] [May 8.

SUTHERLAND *v.* WEBSTER.

Covenant—Assignment—Damages.

A covenant by an incoming partner to indemnify and save harmless a retiring partner against the liabilities, contracts, and agreements of the firm cannot, after breach of an agreement to sell goods, but before action or ascertainment of the damages, be assigned to the damnified purchaser so as to enable him to recover the damages by direct action against the covenantor.

Judgment of GALT, C.J., affirmed.

Moss, Q.C., for the appellants.

W. M. Douglas for the respondents.

From ARMOUR, C.J.] [May 8.

BANK OF HAMILTON *v.* SHEPHERD ET AL.
BAILEY ET AL. *v.* BANK OF HAMILTON.

Banks and banking—Security—Contemporaneous advance—Bills of exchange and promissory notes—Renewal—Substitution of securities—Assignments and preferences—Confession of judgment—Cognovit actionem—53 Vict., c. 31, ss. 74, 75 (D.)—R.S.O., c. 51, s. 113—R.S.O., c. 124, s. 1.

A renewal of a note is not a negotiation of it within the meaning of s. 75 of the Bank Act, 53 Vict., c. 31 (D.), so as to support a security taken at the time of the renewal in substitution for the previously existing security.

A withdrawal of defence under s. 113 of the Division Courts Act, R.S.O., c. 51, is not a confession of judgment or *cognovit actionem* within the meaning of s. 1 of the Assignments and Preferences Act, R.S.O., c. 124.

Judgment of ARMOUR, C.J., affirmed.

W. Nesbitt and *A. Monro Grier* for the appellants.

E. Myers and *J. N. Fish* for the respondents.

From Q.B.D.] [May 8.

WEALLENS *v.* CANADA SOUTHERN R.W. CO.

Corporations—Delegation of powers—Railways—Negligence—Fire.

A railway company incorporated under the laws of this Province cannot, without legislative sanction, confer upon a foreign railway company the immunities and privileges which it possesses, and the foreign railway company, in running engines over the line of railway in this Province, is subject to the common law liability imposed on a person using a dangerous and fire-emitting machine, and is liable for damages without proof of negligence.*

Judgment of the Queen's Bench Division reversed.

Moss, Q.C., for the appellants.

H. Symons and *D. W. Saunders* for the respondents.

From ROSE, J.] [May 8.

IN RE MCCOLL AND THE CITY OF TORONTO.

Municipal corporations—Arbitration and award—Withdrawal—49 Vict., c. 66 (O.).

S-s. 6 of s. 1 of 49 Vict., c. 66 (O.)—(The Don Improvement Act)—makes applicable to an arbitration under that Act all the provisions of the Municipal Act as to arbitrations, including the provision enabling the council to withdraw from the arbitration, and not merely the provisions for determining the amount of compensation.

Judgment of ROSE, J., reversed.

W. R. Meredith, Q.C., for the appellants.

Lash, Q.C., for the respondent.

HIGH COURT OF JUSTICE.

Queen's Bench Division.

Div'l Court.] [March 3.

BARNES *v.* DOMINION GRANGE MUTUAL FIRE INSURANCE ASSOCIATION.

Fire insurance—Interim contract—Termination of—Notice—R.S.O., c. 167, s. 114, condition 19.

The plaintiff's testator applied to the defendants in writing for an insurance against loss by fire on certain property, and gave an undertaking in writing to

hold himself liable to pay to the defendants such amounts as might be required, not to exceed $46.50, and signed a promissory note, in favour of the defendants, for $15.25. The defendants' agent gave him a written provisional receipt for his undertaking for $46.50, "being the premium for an insurance," etc.

Held, that the application, undertaking, note and receipt constituted a contract of fire insurance within the provisions of R.S.O., c. 167, which could be terminated only in the manner prescribed by the 19th of the conditions set forth in s. 114, that is, by notice; and, as the only notice sent by the defendants did not reach the testator's post office until two days before the fire, and a seven days' notice is required when given by letter, the contract was still subsisting at the time of the fire.

W. R. Meredith, Q.C., for the plaintiff.

Aylesworth, Q.C., for the defendants.

Chancery Division.

Div'l Court.] [Feb. 15.

REGINA *v.* CONNOLLY AND MCGREEVY.

Conspiracy—Agreement—Overt acts—Acts of co-conspirators—Acts before date alleged in indictment—Engineer's report—Entries in books—Secondary evidence—Examination in civil action—Present to official—Fictitious tenders—Deceit—"Unlawful"—Right to reply.

L., C. & Co., a firm of contractors in Quebec, tendered to harbour commissioners for certain work, sending in three tenders, one in their own name and two in the names of others, with a common mistake as to price in all three. The work had to be done with the approval of the Government. The defendant, whose brother had been admitted to the firm as a partner without the payment of any capital, was both a member of Parliament and of the Harbour Commission. The three tenders, with others, were received and opened by the commissioners, McG. being present, and were then forwarded to the Government at the city of O., in Ontario. McG. went to O., and succeeded in obtaining from the Government engineer the particulars of the calculations and results of all the tenders sent in, of which he advised his brother by letters. When the mistake in the price was notified by the Government engineer to the three tenderers, one was withdrawn, one was varied, so as to make it higher than the others, and the firm's was allowed to remain as it was, with the manifest error, and so became the lowest tender, and was accepted. One Government engineer was given a situation and another received a valuable present.

As soon as the contract was signed promissory notes to an amount of many thousand dollars were signed by the firm and given to McG., and he also received money from his brother, whose only means of paying were his profits as a partner. On an indictment for conspiracy,

Held, that there is no unvarying rule that the agreement to conspire must first be established before the particular acts of the individual implicated are admissible; and, following *Mulcahy* v. *The Queen*, Ir. R. 1 C.L., at p. 36, the

letters written by McG. at O. were overt acts in furtherance of the common design, and admissible in evidence against all privy to the conspiracy; and that as the defendant C. was by his own admission privy to the large payment after it was made, it was a matter for the jury to say whether he was not a participator in the proceedings.

Held, also, that the transactions, conversations, and written communications between R. McG. (the partner) and his brother and the other members of the firm were receivable in evidence in the circumstances of the case. If at first not available against both defendants, they became so when the proof had so far advanced and cumulated as to indicate the existence of a common design.

Held, also, that evidence concerning contracts previous to the date mentioned in the indictment was properly received as introductory to the transaction in question.

Held, also, that letters written by a member of the firm in the name of an employee and purporting to be signed by him were also properly in evidence.

Held, also, that the report of an engineer was also properly in evidence, as the object of all that was done was to obtain a report in favour of the firm.

Held, also, that entries in the books of the firm were evidence against the defendant C. (partner in the firm), and that statements prepared therefrom by an accountant were good secondary evidence in the absence of the books withheld by the defendants.

Quære: How far they were evidence against the defendant McG., who was not a member of the firm?

Held, also, that the examination of the defendant C. in a civil action could be used against him on this trial.

Held, also, that the evidence of an expert in calculating results on *data* supplied and proper for an engineer to work upon was admissible.

Held, also, that evidence of a present being made to an engineer in charge of the work with the knowledge of one of the defendants was proper to be considered by the jury as casting light upon the relations between the firm and that officer.

Held, also, that the use of the fictitious tenders was a *deceit*, and if done to evade the results of fair competition for the contracts it was "unlawful."

Held, also, that although evidence was called by only one of the defendants it might have inured to the benefit of both, so the right to a general reply was with the counsel for the Crown.

Osler, Q.C., *Kerr*, Q.C., and *Hogg*, Q.C., for the Crown.

S. H. Blake, Q.C., and *Lash*, Q.C., for defendant Connolly.

Aylesworth, Q.C., for defendant McGreevy.

ROSE, J.] [March 14.

COOK *v.* SHAW ET AL.

Covenant in restraint of trade—Partial—Limited time—Reasonableness—Public policy—Good faith.

On a purchase of a manufacturing business by the plaintiff from the defendants, the latter entered into an agreement as follows: "The said parties of the

second part, in consideration of the premises for themselves and each of them, do hereby covenant and agree with the said (plaintiff) that the said (defendants) or either of them will not engage directly or indirectly in the manufacture or sale of said bamboo ware and fancy furniture, either as principal agent or as employee at any place in the Dominion of Canada for the term of ten years from the date hereof. This clause does not prevent (defendants) from engaging in the retail business of furniture and bamboo ware selling. It covers wholesale or jobbing business."

Held, that as the restraint of trade was partial only, being confined to manufacturing certain articles, and to selling them by wholesale or by jobbing, and for a limited time, and as there was no evidence on which it could be held to be unreasonable, and as the interests of the public were not interfered with, that the agreement was not contrary to public policy; and as good faith demanded that the defendants should be held to their solemn bargain, an injunction should be granted restraining them from violating its terms.

Hutcheson and *Fisher* for the plaintiff.

W. J. Code for the defendants.

FERGUSON, J.] [April 28.

GREENE *v.* CASTLEMAN.

Chattel mortgage—Affidavit of bonâ fides—Incorporated company—Officer of Agent—Authority—R.S.O., c. 125, s. 1.

Where a chattel mortgage was made in favour of an incorporated trading company, and the affidavit of *bonâ fides* was made by the secretary-treasurer, who was also a shareholder in the company, and had an important share in the management of its affairs, there being, however, a president and vice-president;

Held, that the affiant was to be regarded not as one of the mortgagees, but as an agent, and as no written authority to him was registered, as required by R.S.O., c. 125, s. 1, the mortgage was invalid as against creditors.

Bank of Toronto v. *McDougall*, 15 C.P. 475, distinguished.

Freehold Loan Company v. *Bank of Commerce*, 44 U.C.R. 284, followed.

George Kerr for the plaintiffs.

W. H. P. Clement for the defendant Castleman.

Common Pleas Division.

Div'l Court.] [Feb. 5.

EWING *v.* TORONTO STREET RAILWAY.

Street railway—Rate of speed—Right of way—Collision—Negligence.

The right of way which street railway cars have over the portion of the street on which the rails are laid is not an exclusive right, or a right requiring vehicles or pedestrians at all hazards to get out of the way at their peril; and notwithstanding the absence of any regulations as to speed, the cars must be run at such a rate as may be reasonable under the circumstances of each particular case.

The plaintiff was sitting on a wagon which was being driven on that part of the street occupied by the rails, and while going down a steep incline, a motor car and trailer coming along behind, by reason of the motorman not having proper control of the car, and of the excessive speed thereof, the wagon was run into, and the plaintiff injured.

Held, that the defendants were liable therefor.

Frank Denton for the plaintiff.

Osler, Q.C., and *Laidlaw*, Q.C., for the defendants.

Practice.

MACLENNAN, J.A.] [April 24.

PAUL *v.* RUTLIDGE.

County Court appeal—Delay in setting down—Stay of proceedings—Dismissal —R.S.O., c. 47, s. 46—Rule 836.

The fact that the appellant in a County Court appeal has obtained from the judge of the court appealed from, under R.S.O., c. 47, s. 46, a stay of proceedings to enable him to give security does not absolve him from the necessity of complying with Rule 836 by setting the appeal down for hearing at the first sittings of the court which commences after the expiration of thirty days from the decision complained of, although such sittings commences before the expiration of the stay.

And where judgment in a County Court was entered on the 17th of January, notice of appeal served on the 30th of January, a stay of proceedings for thirty days granted on the 12th of February, and security given on the 12th of March, but the appeal not set down for the March sittings of the Court of Appeal, an order was made dismissing it with costs, no sufficient excuse being given for the delay.

E. G. Graham for the appellant.

Langton, Q.C., for the respondent.

MANITOBA.

COURT OF QUEEN'S BENCH.

Full Court.] [April 4.

SLINGERLAND *v.* MASSEY.

Husband and wife—Interpleader—Married Women's Act—Crops claimed by wife as her separate property—Separate business carried on by wife—Distinction between hay and other crops.

This was an interpleader issue to determine the ownership of crops seized on lands rented by the plaintiff, a married woman, which she claimed as against the execution creditors of her husband. The husband had previously been engaged in farming on his own account and had failed, and afterwards the

plaintiff had leased two farms in her own name and had gone with her husband and family to live upon one of them, with the *bona fide* intention, as the learned Chief Justice found, of carrying on the farming business for her own benefit. The husband, however, looked after the farming operations, with the help of the children and a hired man, in much the same way as any farmer does, although there was evidence that his health was not so good and he could not do as much work as formerly. The learned Chief Justice entered a verdict for the plaintiff, and the defendants appealed.

The following amongst other cases were cited: *Lett* v. *The Commercial Bank*, 24 U.C.Q.B. 552; *Harrison* v. *Douglas*, 40 U.C.Q.B. 410; *Plows* v. *Maughan*, 42 U.C.Q.B. 129; *Irwin* v. *Maughan*, 26 U.C.C.P. 458; *Ingram* v. *Taylor*, 46 U.C.Q.B. 52; 7 A.R. 216; *Parenteau* v. *Harris*, 3 M.R. 329.

Held, following *Ady* v. *Harris*, 9 M.R. 127, and *Streimer* v. *Merchants Bank*, 5 W.L.T. 44, that although the wife was the tenant of the land, yet she had allowed her husband to occupy and raise crops on it, and that such crops, except the hay, must be treated as the property of the husband in an issue between execution creditors of the husband and his wife. The wife could not be said to have carried on the farming business separate and apart from the husband, nor could the crops produced upon the land by the labour and superintendence of the husband be said to be issues and profits of the land to which the wife would be entitled under section 5 of the Married Women's Act, any more than if she had sublet the land to a stranger.

As to the hay, however, the majority of the court (BAIN, J., dissenting)

Held, that it came under the description of issues and profits of the wife's separate estate, because it was the natural growth of the land of which she was tenant in good faith, and that the mere fact that the hay may have been cut by the husband in the course of the same farming operations, as to which there was no express evidence, would not be sufficient to transfer the property in the hay to him.

Appeal allowed, and verdict entered for defendants except as to the hay.

Howell, Q.C., for plaintiff.

Joseph Martin for defendant.

DUBUC, J.] [April 9.

CONBOY *v.* DOLL.

Wrongful seizure of goods by execution creditor—Measure of damages—Costs in case of verdict for $200 only.

This was an action of damages for wrongful seizure of the plaintiff's goods under an execution issued in a suit in which the defendant was plaintiff, and the plaintiff's husband was defendant. The defendant's attorney, in the presence of the defendant, instructed the sheriff to seize the goods in question, although the sheriff intimated to them his opinion that the goods belonged to the plaintiff. The sheriff, being urged to do so, seized the goods, consisting of a stock of jewelry, and placed a man in charge of the shop. The plaintiff claimed the goods, and after about two months an interpleader order was made, under which, in default of security being given by the plaintiff, the goods

in question were sold and the moneys retained by the sheriff. The result of the interpleader issue was that the plaintiff's claim was held good, and the proceeds of the sale were accordingly paid over to her. She then brought this action, claiming $200 damages for injury to her business and to her credit, and for the difference between the value of the goods and the amount realized at the sheriff's sale.

Held, that the defendant was liable, under the circumstances, for damages limited to the injury to the plaintiff's business sustained during the period between the seizure and the date of the interpleader order, and for the injury to her credit; but that she was not entitled to any damages in respect of the difference between the value of the goods and the amount realized by the sale.

Held, also, that although no evidence was given of any specific damage, the plaintiff was entitled to general damages, which should be estimated as a jury would do, having regard to the fact that although the shop was kept open during that period, and the business was carried on in much the same way as formerly, yet as the stock was under seizure and the sheriff was in possession, and the plaintiff could not bring new goods into stock for the purpose of replenishing it, and her credit in business must have been affected to some extent, the plaintiff was entitled to substantial damages, and his lordship entered a verdict for $200. As this is within the jurisdiction of the County Court, and plaintiff had no reason to expect that she would have recovered more, the court refused a certificate to entitle her to Queen's Bench costs, but gave a certificate to prevent the defendant setting off costs.

W. A. Macdonald, Q.C., for the plaintiff.

Aikins, Q.C., for the defendant.

DUBUC, J.] [April 9.

DES FORGES *v.* COATSWORTH.

Pleading in equity—Demurrer—Multifariousness—Want of equity—Sale of partnership estate by one partner—Dissolution of partnership—Practice as to setting down demurrer for argument.

Demurrer by defendant Reeves to the plaintiff's bill of complaint.

As a preliminary objection, defendant's counsel contended that the demurrer should be considered as admitted by lapse of time. It was filed on January 21st, 1893, and not set down for argument till March 9th, 1894, and under the English Rule 14 made before April 15th, 1870, and which would be in force in this Province, unless superseded or amended by our own rules or practice, a demurrer which is not set down within twelve days from the filing thereof is to be held as sufficient, unless in the meantime the plaintiff has taken some steps to amend his bill. The learned judge, however, held that this rule had been superseded by our G.O. No. 99, and the objection was overruled.

The grounds of demurrer were for multifariousness and want of equity. The bill alleged that there was a partnership at will existing between plaintiff and defendant Coatsworth, that it was agreed between them that the partnerships should be dissolved, and that on October 31st, 1892, the plaintiff gave notice to Coatsworth that the partnership would be dissolved from and after

November 4th, 1892, in case Coatsworth should purchase and pay for the plaintiff's interest in the said partnership. Also that Coatsworth agreed to purchase plaintiff's interest and to pay for the same, but that he had neglected and refused to do so, and that on the said November 4th, 1892, Coatsworth assumed the entire control and management of the said business without the consent and in defiance of the protest of the plaintiff, and had since made a sale to his co-defendant Reeves of the plaintiff's share and interest in the said partnership business, without the plaintiff's authority or consent, and had not paid plaintiff the value of his said interest; that Reeves was now in actual possession of the said business, and is carrying it on upon the partnership premises, and that he purchased the business with full knowledge of the plaintiff's rights; and the plaintiff asked that the said sale to Reeves should be declared to be fraudulent and void as against him, and that the partnership might be dissolved and accounts taken, and that he be paid the value of his share and interest.

Reeves contended that he had no interest in the dissolution of partnership and the taking of accounts, and that Coatsworth had no interest in setting aside the sale to Reeves, and that therefore the interests of the two defendants in the several kinds of relief asked for, being entirely different, the bill was bad for multifariousness. He also contended that the bill was bad for want of equity, and that Coatsworth had a right to sell the business to him, it not being set up that the sale was for an inadequate consideration.

Held, that although the interests of the defendants were in some respects different, yet they related to the same matter, viz., the share or interest of the plaintiff in the partnership business, and the plaintiff could not get the full relief to which he was entitled under the circumstances alleged without having both Coatsworth and Reeves before the court.

Held, also, as to the objection for want of equity, that as the sale of the plaintiff's interest in the business to Coatsworth had never been carried out, Coatsworth could not make a valid sale of the partnership business and assets to Reeves without the authority and consent of the plaintiff, and this objection was overruled.

Demurrer overruled with costs.

Hough, Q.C., for the plaintiff.

Crawford, Q.C., for defendant Reeves.

TAYLOR, C.J.]
BAIN, J.] [April 17.

IN RE ELECTION FOR BEAUTIFUL PLAINS.

FERGUSON, PETITIONER, *v.* DAVIDSON, RESPONDENT.

Election law—Bribery—Agency.

The respondent's election was declared void on account of the bribery of a voter by one Dinwoody. Dinwoody was a person regularly employed by one of those most prominent on the respondent's committee, and was working in the committee rooms prior to the election, just as any other member of the committee.

Held, that he must be considered to be an agent of the respondent, and that the respondent was liable for any corrupt practice committed by him.

The only personal charge which was pressed against the respondent was on account of his having paid money for the hire of teams to bring voters to the Court of Revision of the Voters' List, held shortly before the election took place, and after the respondent had declared himself a candidate. He had treated this expenditure as part of his election expenses in furnishing the statement of such after the election.

Held, that although this payment, not being included in the list of permitted expenditures under section 216 of the Election Act, was forbidden by that section, yet it was not a corrupt practice within the meaning of section 214.

Remarks as to the nature of the report necessary to be made by the court under section 248 of the Election Act as amended by Statute 55 Vict., c. 12, s. 11, in order to save the election.

Semble: It is very questionable whether even a single act of bribery can be treated as of a trivial or unimportant character.

Howell, Q.C., and *Wilson* for the petitioner.

Hagel, Q.C., and *Phippen* for the respondent.

KILLAM, J.] [April 25.

ATCHESON *v.* MUNICIPALITY OF PORTAGE LA PRAIRIE.

Municipal law—Liability for damages—Ditch constructed along highway between two municipalities—Unauthorized work.

This was an action against the defendants to recover damages for improper and negligent construction of a ditch, whereby the plaintiff's lands were overflowed with water and his crops damaged. The plaintiff's lands were in an adjoining municipality, and the ditch was constructed along the highway between the plaintiff's lands and the defendants' municipality. The provisions of the Municipal Act relating to highways between adjoining municipalities require the joint action of the two in any work upon the same, and no such action had been taken. The council of the defendant municipality had not passed any resolution or by-law or motion providing for the construction of the ditch in question. The municipality was divided into two wards, the east ward and the west ward, and the evidence showed that there was a committee of the council for each ward, and that these committees decided upon the expenditures of the appropriations for public works in their respective wards, the appropriations being divided proportionately to the assessments of the respective wards. There was no evidence of any by-law, rule, or resolution of the council adopting such a course of procedure, except two resolutions, each authorizing the treasurer to pay out moneys for ward appropriations on the orders of the chairmen of the ward committees. There did not appear to have been any direct authority from the council to the committee in connection with the work in question, nor any formal report upon it by the committee, and the ditch appeared to have been constructed wholly by authority of the committee of the west ward. Two payments were proved to have been made by the council to men who dug the ditch, and for the work in question. These

cheques were shown to have been given on the authority of the chairman of the ward committee.

Held, that this was not sufficient evidence of the adoption of the work by the council.

Held, further, that the work was wholly *ultra vires* of the council of the municipality, and that the municipality was therefore not liable for the acts of its agents wholly beyond the scope of their authority.

The learned judge found that the ditch had been negligently and improperly constructed, but that the defendants were not liable, and entered a non-suit.

Cooper, Q.C., for the plaintiff.

J. D. Cameron and *James* for the defendant.

KILLAM, J.] [April 25.

JOHNSTONE *v.* HALL.

False representation—Damages for—What constitutes a "clean" farm—Measure of damages.

This was an action to recover damages for fraudulent representations, whereby the plaintiffs were induced to lease the farm of the defendant at a very high rental. The representations proved were that it was a good farm, and well ploughed; that it was dry, and clear of noxious weeds, and that it was a "clean" farm. The learned judge found as a fact that, except for the weeds and a small wet spot, the farm was a good farm; but he found that in the summer before the lease was entered into a great many weeds grew on the farm, of which defendant was aware. Plaintiffs sowed the land with seed purchased from defendant, which had been grown upon it the year before, and probably contained seeds of weeds. The only point as to which the judge deemed it necessary to reserve judgment was as to the proper measure of damages which the defendant should be ordered to pay.

Held, that, upon the evidence, the representations made were false and fraudulent in the sense necessary to entitle the plaintiff to recover, and that the rules as to the proper measure of damages in such a case is the one adopted by the English Court of Appeal in *Peck* v. *Derry*, 37 Ch.D. 591, namely, to ascertain the difference between the price paid and the actual value to the plaintiff at the time of the contract. The market value is not to be considered in such a case; and if, notwithstanding the existence of weeds to an injurious extent, the bargain had been profitable to the plaintiffs, they would have been entitled to no damages; and, on the other hand, even if the crops had been destroyed by some other cause, the plaintiffs would still have been entitled to receive the same amount of damages.

In accordance with this principle, the true question was held to be, Was the farm when taken worth the rental which the plaintiffs agreed to pay; and if, by reason of the existence of the seeds and roots of weeds, it was worth less, how much less was it worth?

Damages were allowed on this principle at one dollar per acre for the cultivated land for each of the two years for which plaintiffs took the land, making, in all, $496.

Held, also, that the expression "clean farm" does not mean a farm absolutely free from weeds; it should be construed as describing a farm on which there were not weeds in such quantities as to be materially injurious to the crops. In any stricter sense the expression would seem to be one of those exaggerated statements which give no cause of action.

The defendant counterclaimed $160 for rent due under the season.

Held, that he was entitled to this amount, and that the defence of fraud could not avail against it, for the contract was still in force, and plaintiffs had the use of the land, and the bringing of the action for damages was itself an affirmance of the contract.

Cooper, Q.C., for plaintiffs.

Anderson for defendant.

Flotsam and Jetsam.

THE *Philadelphia Telegraph* is responsible for the following: "Judge Wallace, afterwards Chief Justice of California, examined ex-Speaker Reed for admission to the Bar. It was in 1863, when the Legal Tender Act was much discussed in California, where a gold basis was still maintained. Wallace said: 'Mr. Reed, I understand that you want to be admitted to the Bar. Have you studied law?' 'Yes, sir; I studied law in Maine while teaching.' 'Well,' said Mr. Wallace, 'I have one question to ask: Is the Legal Tender Act constitutional?' 'Yes,' said Reed. 'You shall be admitted to the Bar,' said Wallace. Tom Bodley, a deputy-sheriff, who had legal aspirations, was asked the same question, and he said 'No.' 'We will admit you both,' said Mr. Wallace; 'for anybody who can answer off-hand a question like that ought to practise law in this country.'"

THE advice of Judge Pryor, of New York, to the jurors in a recent case, to read the newspapers, reminds us of an incident in the life of the late Gen. A. C. Niven, when he was defending a man indicted for murder in the adjoining county of Orange, fifteen or twenty years ago. The General reversed the usual practice, and rigorously excluded, by challenge, every man from the jury who had not read the papers containing the full account of the killing, declaring that he wanted only intelligent men on the jury. He won the case and cleared the man. In this county, some four years ago, counsel in a case examined and re-examined jurymen, as they were called, until they succeeded in getting a jury who swore they had neither read nor heard anything about the matter in issue, one member asserting that he took no papers, had never taken any, and didn't want to take any, and that he had never read anything about the case, although it had been published and commented on in every paper in the county. The jury decided the case by beating the side whose lawyer had made the most persistent efforts to get a jury of know-nothings.—*U.S. Ex.*

DAMNUM ABSQUE INJURIA;

OR,

THE BEAVER'S DYING KICK.

(See *Grand Trunk v. Beaver*, *ante* p. 214; and see *ante* vol. 29, p. 580.)

Alas! alas! I won my cause
In both the courts below,
But now at last in Court Supreme
I've got a "knock-out" blow.
It seems that I've been wrong alway
In all that I have done,
And now I've got to pay straightway
Most dearly for my fun.
When asked to hand my ticket up,
'Twas wrong to say, "I can't";
When asked to pay a second time,
'Twas wrong to say, "I shan't!"
'Twas wrong to think myself abused
When dumped out of the train,
'Twas wrong, quite wrong, when I refused
To smother up my pain.
'Twas wrong, quite wrong, I find too late,
To get into a fury,
And try the company "to slate"
Before a tender jury.
Now all my grief, and hopes of gain
For cuffs and kicks endured,
I'm told are both misspent and vain,
And really quite absurd;
And in compendious legal phrase,
My case at last 's boiled down,
"*Damnum absque injuria,*"
The court said, with a frown—
"The *damnum* you have suffered, sir,
Is *ab injuria*,
And for such *damnum*, you must know,
Defendants need not pay."

A PATENTEE recently protected a small domestic appliance. Some time afterward a too enterprising antiquary, ransacking the tombs of Egypt, turned up a similar appliance, which he considers to have been in use three thousand years ago. This discovery, in the opinion of an expert, vitiates the letters patent recently granted, inasmuch as the invention for which protection was therein granted was not new and original.—*Law Gazette.*