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The BARRISTER

A. C. MACDONELL, D.C.L., Editor.

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The Barrister.

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EDITORIAL.

What seems a strange case, occurred in Toronto a few weeks ago. All the papers contained blood curdling accounts of how a man had cut his wife's head open with an axe. The Mail and Empire reporter and a policeman found the daughter trying to carry the mother to assistance. A fearful wound was on her head. An ambulance conveyed her to the hospital, and the reporter and the officer went to the address the woman had given. There they found the husband, who was in a vile state of intoxication. He immediately told them, with apparent satisfaction, that he had given his wife "a clout over the head with the axe." A neighbor woman then told the tale of how he had chased the old woman with the axe in his hand when they had all fled from him. The daughter told how he had with the axe cut in the door where she (the daughter) was hiding, and how she had escaped him. The man was imprisoned, and when his wife at last recovered, he was brought into the Police Court. Here the woman goes on the stand and says he only hit her "with a little bit of a stick," and the prisoner is discharged and allowed again to be a fellow citizen of the people of Toronto. It is hardly necessary to give this case any editorial comment. The transparency of the whole affair of the woman's evidence is very apparent. Such cases as these are not unknown, and as they are a great menace to society should be dealt with vigorously.

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We quote with approval the following remarks of Chief Justice Charles B. Andrews of the Connecticut Supreme Court of Errors in a recent case instituted by the Fairfield County Bar of that State, to debar one Taylor, one of its members, for unprofessional conduct. The Chief Justice concludes his judgment in the following words:

"It is not enough for an attorney that he be honest. He must be that and more. He must be believed to be honest. It is

absolutely essential to the usefulness of an attorney that he be entitled to the confidence of the community wherein he practices. If he so conducts in his profession that he does not deserve that confidence, he is no longer an aid to the Court, nor a guide to his clients. A lawyer needs, indeed, to be learned. It would be well if he could be learned in all the learning of the schools. There is nothing to which the ingenuity of man has been turned that may not become the subject of his inquiries. Then, of course, he must be especially skilled in the books and the rules of his own profession. He must have prudence and tact to use his learning, and foresight and industry and courage. But all these may exist in a moderate degree, and yet he may be a creditable and useful member of the profession, so long as the practice is to him a clean and honest function. But possessing all these faculties, if once the practice becomes to him a mere 'brawl for hire,' or a system of legal plunder where craft and not conscience is the rule, and where falsehood and not truth are the means by which to gain his ends, then he forfeits all right to be an officer in any court of justice or to be numbered among the members of an honorable profession."

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The journalistic energy of some of our American exchanges is remarkable, and of course many excellent publications is the result. The Chicago Law Journal, always a valuable journal, is about to increase its usefulness by the addition of an index to all current legal literature. The vastness and comprehensiveness of the scheme will be realized when it is stated that it will include references to all articles, papers, correspondence, annoted cases and biographies appearing in the journals and reports published in America, England, Scotland and Ireland; and also such important articles in the leading scientific and literary periodicals as treat of matters pertinent to the practice of the law. The usefulness of such an index will be very great; and we shall take care that the future numbers of the Chicago Law Journal are carefully preserved.

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Our Virginia contemporary, "The Bar," has adopted as a standing paragraph on the cover the following appropriate sentences, which breathe a spirit that may well be the inspiration of a legal publication:

"Attorney and client are the terms of a relation. Human beings in all their variety of moral significance, when in need of a lawyer, match themselves up with lawyers of corresponding moral worth. Thus the bar must be most heterogeneous in order to supply the demand of the morally much diversified litigating public, and a lawyer who has practiced long enough to have his character known will finally have

a clientage on the whole suiting that character. A layman may not know, and very rarely does know, a lawyer's merit qua lawyer, but the character or reputation of his legal adviser he may fairly estimate. Experience justifies the belief that, with few lamentable exceptions, where there is any difference in moral status between lawyer and client, the former is the better of the two. Probably there is not at the bar to-day an experienced member of honorable standing who has not had at the bidding of the laity a high-priced chance to depart secretly from his record."

REPORTS OF CASES.

Recent Decisions Not Previously Reported.

Canadian Decisions.

Wigle v. Lypps.—Before Falconbridge, J.—The 20th May.—Reference under sec. 102 of ch. 44, R. S. O. 1887.—Scope of inquiry.—A. H. Clarke (Windsor), for defendants, appealed from report of Mr. Marcon, deputy clerk of the Crown at Sandwich, upon a reference to him, under sec. 102 of Judicature Act, R. S. O. ch. 44, in an action upon several promissory notes, to find the amount of indebtedness of defendants to plaintiff. The referee found that the defendants were liable for the full amount of all the notes but one. The defendants contended that the defendants were released by the dealings of the plaintiff with the Kingsville Preserving Company, who, defendants contended, were the principal debtors. The referee held that this defence was not open on the reference. Rodd (Windsor), for plaintiff, contra. Order made referring the action back to the referee for a specific finding upon the defence mentioned and for a finding as to the rate of interest, and to separate principal from interest, and to make other findings. if necessary. Costs reserved until after new report.

* * *

Re Small and St. Lawrence Foundry Co.—Court of Appeal. —May 20th.—Before Hagarty, C.J.O., Barton and Maclennan, JJ. — Arbitration — Renewal of lease—Evidence of value—Evidence of net products after payment of taxes, insurance, etc.—Judgment on appeal by executors and trustees of Doctor Small, deceased, from judgment of Meredith, J., dismissing with costs motion by trustees to revoke appointment of arbitrators named in a submission to arbitration to fix rent upon a renewal of a lease of two acres of land on King Street east in the City of Toronto. The trustees objected that the arbitrators refused to receive evidence of the net rental, produced by the land only, of properties fairly comparable with the block of land in question, as

going to show what rent should be; and that the arbitrators refused to allow trustees to show, as a proper method of arriving at net rental, the gross rental of the property and buildings in question, after deducting therefrom all outgoings, such as sinking fund, and interest on the value of the buildings, insurance, taxes, and any other outgoings of the property. Appeal dismissed with costs. Maclennan, J.A., dissenting. McCarthy, Q.C., for appellants. A. Hoskin, Q.C., and D. E. Thomson, Q.C., for respondents.

* * *

Canada Permanent Loan Co. v. Smith.—Divisional Court.—Before Armour, C.J., Falconbridge and Street, JJ.—27th May.—The Division Courts Acts—Sec. 145 and "Good Cause"—Discretion of Judge of an inferior Court.—A. R. Lewis, Q.C., for defendant, appealed from order of junior Judge of County of York, directing a new trial in a Division Court action. Counsel contended that "good grounds" required by sec. 145 of the Division Courts Act to be shown as a foundation for the order had not been shown; and that the discretion of a Judge of an inferior Court in such a case was, like that of a higher Court, legal discretion: Murtagh v. Barry, 24 Q. B. D. at p. 633. C. J. Leonard, for plaintiffs, contra. Appeal dismissed with costs.

* * *

McVittie v. O'Brien.—Before Falconbridge, J.—May 26th.—Ontario Voters' List Act, 1889—Action against clerk of municipality for neglect—Want of notice under R. S. O. ch. 73.—Judgment on appeal by defendant from order of Master in Chambers, in action against a clerk of a municipality to recover penalties for non-performance of duties under Ontario Voters' List Act, 1889, striking out 10th paragraph of statement of defence on the ground that it raised the defence of want of notice of action under R. S. O. ch. 73, and giving defendant leave to amend. The learned Judge is of opinion that Walton v. Apjohn, 5 O. R. 65, is clear authority in plaintiff's favour; nor does the omission of the words "shall be an action on the case as for a tort" in the revision in 1887 of R. S. O. 1887, ch. 73, sec. 1, affect the matter. Appeal dismissed and leave to plead statute refused. Costs to plaintiff in any event. Save as above, defendant may amend as he may be advised. W. H. P. Clement for plaintiff. Masten for defendant.

* * *

Couch v. Locked Wire Company.—Before Falconbridge, J.—May 28th.—Subscription for stock in company—Memoranda on back of certificate providing for refund in certain event—Entirety of contract.—F. A. Anglin, for defendants, appealed from judgment of Fifth Division Court in County of Oxford, in favour of plaintiff. The plaintiff subscribed and paid for two shares of stock in defendant company, and received a certificate for them under the corporate seal. Upon the back of the certificate was endorsed a memorandum signed by the president of defendants, agreeing that the amount paid for the stock should be refunded to plaintiff whenever he left the employment of defendants. E. F. B. Johnston, Q.C., for plaintiff, contra. The Court held that the contract was entire, and that the plaintiff was entitled to recover his money. Appeal dismissed with costs.

Re Young, Armstrong v. McDougall.—Before Boyd, C., Ferguson and Meredith, JJ.—5th June—Surrogate Court.—Admission to probate of testamentary papers witnessed by two persons of whom nothing is known.—Judgment on appeal by defendants from judgment of Surrogate Court of County of Wentworth, admitting to probate a paper writing purporting to be the will of Thomas Young, deceased, executed in the presence of two witnesses, concerning whom nothing whatever can be ascertained. Held, that the evidence is sufficient to justify the presumption that all statutory formalities have been observed. Post-testamentary statements in writings of a deceased person may be regarded by the Court to assist it in coming to a right conclusion. Apart from such statements, in this case the circumstances were sufficiently persuasive to warrant the granting of probate, but, taking correspondence as a whole, clear proof is well established. Judgment affirmed and appeal dismissed without costs. E. D. Armour, Q.C., for appellant. P. D. Crerar (Hamilton), for plaintiff.

* * *

Wigle v. Village of Kingsville.—Before Falconbridge, J.—9th June.—Municipal Act—Lis pendens—Issue of debentures—Injunction.—Judgment on appeal by defendants from order of local Judge at Windsor dismissing application to vacate a lis pendens in action to quash a by-law of the defendants to provide mining or winning from the earth and supplying natural gas to the village of Kingsville, and to issue debentures to raise funds therefor, and for an injunction. Held, that in the exercise of the general power of the Court over its own process the lis pendens should be removed, leaving plaintiffs, if recti in curia, to move for an injunction if and when defendants begin to negotiate debentures. There is nothing to show that the by-law in question is a void proceeding. The Municipal Act provides an inexpensive and speedy method of testing validity of a by-law and a more costly one should not be adopted. See Vandevar v. E. Oxford, 3 A. R. 147. Appeal allowed and lis pendens vacated. Costs to defendant in any event. A. H. Clarke (Windsor), for defendants. Aylesworth, Q.C., for plaintiff.

* * *

Re Vivian.—Before Meredith, C.J., and Rose, J.—9th June.—Benefit certificate—Varying the mode of its distribution—Judicature Act 1895, sec. 60.—Sweet (Brantford) and Skeans for the widow of William Edgar Vivian. F. W. Harcourt for his infant daughter. Issue submitted to the Court, by order of Rose, J., before whom the question came up on a motion for payment out of Court, to determine whether the deceased had the right to vary a benefit certificate so as to divert a portion of the moneys from his daughter, in whose favor it originally was, and make it payable to his second wife, now his widow. Issue determined in favor of widow. Held, that the apportionment in her favor was valid. Held, also, distinguishing Re Wilson and County of Elgin, 16 P. R. 50, and notwithstanding sec. 60 of the Judicature Act, 1895, that the case was properly referred to a Divisional Court, and that such Court had power to hear it.

* * *

Doyle v. Nagle.—Before Falconbridge, J.—22nd May.—Will

—Devise of land naming a property not owned by testator—Testator's property adjacent—Identity of property.—M. Scanlon, for plaintiff, moved for judgment on the pleadings in an action for construction of the will of Owen McGovern, who died in 1894. The will was made in 1891, and, after directing that debts, etc., should be paid by executors, continued:—"The residue of my estate which shall not be required for such purposes, I give, devise, and bequeath as follows:—I give, devise and bequeath my son James, his heirs and assigns forever, the south-westerly quarter of lot No. 11, concession 4, in the township of Adjala. I give, devise, and bequeath to my said son James, his heirs and assigns forever, my farm, consisting of part of the west half of lot No. 12 in the 5th concession of the said township of Adjala . . . on condition that he shall pay all my debts, and the following legacies. . . ." The testator had no title to or interest in the south-west quarter of lot 11, but was seized in fee of the south-west quarter of lot 12, at the time of making the will, and at the time of his decease. The plaintiff contended that the testator died intestate as to the south-west quarter of lot 12. J. Hood (Barrie), for defendants James McGovern and Isabella Stogdale, contended that, upon the true interpretation of the will, the intention of the testator was to devise the south-west quarter of lot 12 to defendant James McGovern. Donald Ross (Barrie), for the other defendants. The Court held that by the will testator devised the land he did own to defendant James McGovern. Hickey v. Stover, 11 O. R. 106, distinguished. Hickey v. Hickey, 20 O. R. 371, followed. Judgment declaring accordingly. Costs of all parties out of the estate.

* * *

Lea v. Lang.—Divisional Court.—Before Boyd, C., Ferguson and Robertson, JJ.—22nd May.—Security for costs—Rule 1243—Costs of former action unpaid.—Judgment on appeal by plaintiff from order of Meredith, C.J., in Chambers, affirming order of Master in Chambers under Rule 1243, requiring plaintiff to give security for defendant's costs of the action, upon the ground that the costs of a former unsuccessful action brought by plaintiff, for the same cause and against the same defendant, remained unpaid. Plaintiff contended inter alia, that the former action, though brought in his name, was not authorized by him, and that the costs of it were payable by the solicitor who brought it. Held, that in an application under Rule 1243 there should be no discussion as to the incidence of the costs of a prior action, known to the plaintiff, when the proper steps to get rid of these costs have not been taken by the plaintiff prior to the launching of the second action. Appeal dismissed with costs, but plaintiff may have leave to elect whether to pay costs of the first action, and this application, or to give security. Plaintiff to have a month's further time to comply with the term as to security, if he elects not to pay the costs forthwith. N. F. Davidson for plaintiff. Aylesworth, Q.C., and F. J. Travers for defendant.

* * *

Re Trelevan.—Allen v. Trelevan.—Before Meredith, J.—8th June.—59 Vic. ch. 22, question as to its being retrospective—Administration in Master's office—Order requiring creditor to value

his security.—Shepley, Q.C., for Union Loan and Savings Company, made defendants in the Master's office, appealed from order of local Master in administration proceeding, directing the appellants, who proved a claim upon the covenant in their mortgage, to value their security. The administrator applied to local Master for order directing them to value their mortgage security, which was refused. The Act 59 Vic. ch. 22 (O.) was then passed applying the English Bankruptcy Act to cases of insolvent estates, and upon a further application to the local Master by the administrator, an order was made directing a valuation of the security pursuant to the Act. The final report has not yet been made. Counsel for appellants contended that the matter had been adjudicated upon, and that the Act was not retrospective, and certainly did not apply to estates being administered before its passing. C. J. Holman, for plaintiff, contra. Appeal allowed with costs.

* * *

Re Henry v. Paisley.—The Divisional Court.—Before Armour, C.J., and Falconbridge, J.—15th May.—Prohibition to Division Court—Clerical error in original summons—"Alias" summons with corrections—Defendant's acquiescence by appearing at J. S. and agreeing to same.—Judgment on appeal by plaintiff from order of Meredith, J. (reported at p. 136 of this volume of "The Barrister"), prohibiting proceedings by the 10th Division Court, in the County of York, to enfore a judgment against the defendant, J. R. Paisley, based upon an amendment of the summons and the adding of that defendant as a party, and upon appeal by defendant J. R. Paisley from the order so far as it refused defendant costs. The original writ was not amended before added defendant was served, but instead an "alias" was issued correcting the clerical error in the name, and was served upon defendant J. R. Paisley personally, and annexed to it was an affidavit setting out the particulars of the note upon which the judgment was recovered, and the Judge's order allowing the plaintiff to claim by way of alternative relief, the amount of the note, which is there fully described. Per Curiam:—The defendant had full notice of the particulars of the claim, and it is not a case of a summons served without any, and judgment by default upon it, but a mere question of the form in which the particulars were given, and is clearly not ground for prohibition. But, defendant, after being refused a new trial, appeared without protest on a judgment summons, and acquiesced in order for payment of $2 a month, and this motion is not made until two months after judgment. Under these circumstances discretion should not be exercised to grant prohibition, even if objections to proceedings warranted it. Appeal allowed with costs here and below. E. D. Armour, Q.C., for plaintiff. Shilton, for defendant A. R. Paisley.

* * *

Regina v. Brennan.—Divisional Court.—Before Meredith, C.J., Rose and MacMahon, JJ.—15th May.—Application for new trial in murder case.—Withdrawal from jury of question of manslaughter—Sec. 229 of Code.—Judgment on motion by prisoner for new trial upon case stated by Armour, C.J., before whom and a jury the prisoner was tried at Barrie upon an indictment for

the murder of Mr. Strathy, and convicted. Counsel for the prisoner contended that learned Judge at trial was in error in entirely withdrawing from the jury question of manslaughter; that there was evidence upon which the jury might have found manslaughter, if it had been left to them; that there was evidence of provocation upon which the jury might lawfully find manslaughter, if left to them; that the nature and mental condition of prisoner must be considered in determining whether there was provocation; and that it was not for the learned Judge to determine upon the evidence whether there was such provocation as might warrant a finding of manslaughter. It was also contended that the action of Mr. Strathy in putting prisoner out was not justifiable at all. Counsel for the Crown contended that the Judge was right in withdrawing the question of manslaughter from the jury, because the evidence did not show manslaughter within the language of sec. 229 of the code. Per Curiam:—It is impossible to say that there was no evidence to go to the jury. The question whether greater force was used than necessary by deceased in putting prisoner off his premises, or whether or not force was used, ought to have been left to the jury to consider, and if they found that deceased was not doing what he had the right to do, then there was evidence which they must have considered, as to whether such wrongful act amounted to provocation, and whether prisoner was actually deprived of power of self-control thereby. Upon reading the learned Judge's charge, it is clear that all consideration of the question of whether or not the facts reduced the crime from culpable homicide to manslaughter was withdrawn from the jury, and it is not necessary therefore to consider as to the question of the mental and nervous condition of the prisoner disclosed by the evidence. Appeal allowed and new trial directed. Lount, Q.C., for the prisoner. J. R. Cartwright, Q.C., for the Crown.

* * *

Clarkson v. Ellis.—Before Armour, C.J., and Street, J.—15th May.—Fraudulent preference—Assignment of book debts—Payment of proceeds to discharge liabilities of the insolvent.—Judgment on appeal by plaintiff from judgment and findings of Rose, J., at trial, dismissing action with costs against defendant John F. Ellis, and in so far as same were in favor of defendant Newsome and upon appeal the defendant Newsome so far as he was directed to pay over moneys collected after issue of writ. Action is brought by plaintiff, assignee, for benefit of creditors of Robert B. Ellis and H. J. Keighley, trading as Ellis and Keighley, to have it declared that an assignment of 21st November, 1893, of certain book debts by Ellis and Keighley to defendants John F. Ellis and Newsome was void as against creditors, because of insolvency of assignors. The assignment of Ellis and Keighley to plaintiff was on 8th December, 1893. The defendants John F. Ellis and Newsome became sureties to the Ontario Bank for Ellis and Keighley, and claim to have paid the proceeds of the assigned debts in discharge of the bank's claim. Defendants contended that the moneys realized by collecting the book debts were not the proceeds of

any sale or disposition of property assigned within R. S. O. ch. 124, sec. 8. Per Curiam:—There is the clearest evidence of notice of insolvency to both J. F. Ellis and Newsome. The assignment has effect of giving a preference and intent must be presumed: 54 Vic. (O.), ch. 20, sec. 1, amending R. S. O. ch. 124, and presumption has not been rebutted. The promise of R. B. Ellis to withdraw assets from business to indemnify J. F. Ellis for his guaranty to the bank is a promise to prefer and cannot be set up as justifying the preference, and when it is sought to justify such preference upon a contract, as in this case, such contract must be one capable of being enforced:—Montgomery v. Corbett, recently decided by this Court; also Ex parte Buston, 13 Chy. D. 102; Ex parte Griffith, 23 Chy. D. 69. The immediate motive and intent of transfer is perfectly plain, and it should be declared void as an unjust preference. The amounts collected before action must be paid to plaintiff. Meharg v. Lumbers, 23 A. R. 51. Appeal of Newsome dismissed with costs; that of plaintiff allowed with costs. Defendants to account for and pay over to plaintiff moneys collected and pay costs of action. Wallac Nesbitt and R. McKay for plaintiff. Robinson, Q.C., and Kilmer for defendants.

* * *

Re Toronto, Hamilton and Buffalo Railway Co. and Brown.—Before Armour, C.J.—18th May. — Arbitration — Appeal under sec. 161 Railway Act—Objections on the appeal to rejection and reception of evidence during arbitration.—Judgment on appeal by E. Brown from an award of a majority of arbitrators and in alternative for order adopting minority award of one of arbitrators. The learned Chief Justice considers it very doubtful whether upon an appeal under sec. 161 of the Railway Act of Canada objections can be taken to reception or rejection of evidence. The remedy should be by motion to revoke submission, or some motion prior to award being made to compel or prevent such evidence, and such motion would not succeed unless misconduct could be established: Russell, 7th Ed. p. 200. In this case there has been no improper rejection of evidence by arbitrators, nor should the amount of award be interfered with. Appeal dismissed with costs. Lynch-Staunton (Hamilton), for appellant. D'Arcy Tate (Hamilton), for company.

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Koliski v. Lennox.—Robertson, J.—14th May.—Chattel mortgage —Action to set aside—Misunderstanding as to "5 per cent. per month" and "5 per cent. per annum."—Judgment in action tried at Toronto, brought to set aside a chattel mortgage for $100 with interest at five per centum per month, on the ground that the mortgagors, a Pole and his wife, both inadequately acquainted with the English language, thought the rate was five per centum per annum, and by their payments had nearly paid off the mortgage when the goods were seized and removed, and that only certain of their chattels were intended to be included in the mortgage. The learned Judge finds that plaintiffs did not fully understand the purport of the mortgage, nor was it explained to them; that they executed under the belief that the rate was per annum, not per month; and

that they intended to mortgage only a piano and two sets of furniture. Mortgage declared void. Damages for trespass assessed at $200. Goods to be restored, or, in default, $475 paid by defendant, or if within ten days defendant elects to have a reference as to value, same is to be to a referee. Costs of action, reference, and incident to injunction to be paid by defendant. Costs of order of Master in Chambers of 15th November, 1895, to be deducted from total costs. Injunction made perpetual. M. H. East and Galbraith for plaintiffs. W. H. P. Clement for defendant.

* * *

Re Evans and City of Hamilton—Master in Chambers.—22nd May.—Municipal Act, sec. 487—Scale of costs—Discretion of County Court Judge.—A. Logie, for Evans, moved under sec. 487 of the Municipal Act for direction fixing costs of arbitration, and on what scale costs are to be taxed. W. H. Blake, for City of Hamilton, contra. The County Court Judge of Wentworth having ruled that the costs should be taxed on the County Court scale, the Master declined to interfere. Order made for taxation of costs on that scale by Deputy Clerk of the Crown at Hamilton.

Re Thayer v. Ross.—Before Rose, J.—22nd May.—Prohibition to Division Court—Finding of fact at trial as to jurisdiction.—Judgment on motion by defendants for prohibition to the 1st Division Court in the County of York, in a plaint upon a promissory note dated at Toronto and made payable at Toronto, upon the ground that the particular Division Court had no jurisdiction because the note was not in fact signed by defendants at Toronto. Held, that when the question of jurisdiction depends upon a finding of fact, and the evidence before the Court shows the fact to be such as supports the jurisdiction, and defendant refrains from putting in any evidence to the contrary, the defendant is not entitled as of right to come into Court on a motion for prohibition and have a fact inquired into, contrary to the evidence given at the trial and to the finding of the Judge in the inferior Court. Motion refused with costs. R. McKay for defendants. Levesconte for plaintiffs.

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English Decisions.

South Staffordshire Waterworks v. Sharman.—Q. B. D.—Lord Russell of Killowen, C.J., Wills, J.—Times Law Reports, vol. xii. p. 402.—12th May.—Trover—Detinue—Finding of valuables—Owner of land—Rights of.—The defendant was employed by the plaintiffs to clean out their pool, called the Minster Pool, of which they were owners in fee simple. In the course of his operations, the defendant found many articles of interest, and among others two valuable rings. These the plaintiffs claimed, but the defendant, refusing, this action was brought in the County Court, where judgment was given for the defendant, but on appeal to this Court the decision was reversed and the plaintiffs got judgment for the rings. Lord Russell of Killowen said: "The plaintiffs are the freeholders of the locus in quo. They had the right to prevent anyone from coming on the land. Is it not correct to say that the locus in quo and its contents were under the control of the plaintiffs? The legal possession of the articles depends on the de-

facto possession—the power and intent to exclude unauthorized from the place where the article is. Where a jewel was cast into a public place it could not be said to be in de facto possession of any one. No one had power to exclude persons from a public place. Bridges v. Hawkeworth (21 L. J. Q. B. p. 75) stands by itself. There the shopkeeper had no intent to exclude the public, and the notes were never either in the custody of the shopkeeper or within the protection of the house. Where a person is owner of a house or land, and has the intention to exercise control over it, and to prevent unauthorized interference with it, and some article is found there by a servant or a stranger, the presumption is that it is in possession of the owner of the locus in quo.

* * *

Turner v. Bowley and Son.—Court of Appeal (Lord Esher, M.R., A. L. Smith and Rigby, L.JJ.)—Times Law Reports, vol. xii. p. 402.—12th May, 1896.—Practice—Nonsuit—No evidence to go to jury—Duty of Judges—Libel—Privilege.—The plaintiff sued for libel in a written character given by defendant, in answer to inquiry by third party, who was about to employ plaintiff. The defendants pleaded that the occasion was privileged, and it became necessary for the plaintiff to prove actual malice. The trial Judge seems to have had no doubt but that the occasion was privileged, and no evidence was offered of actual malice. Nevertheless His Lordship stated that the Court of Appeal has set its face against stopping cases in the middle and he therefore would let the case go to the jury. This was done and they found for the plaintiff in the sum of £50 damages. The defendants then brought this appeal for a new trial or for judgment. The appeal was allowed with costs and judgment ordered for defendants. The Master of the Rolls said the Court of Appeal's not liking cases to be stopped in the middle referred to proper cases only; and that when it is clear that there is no evidence to go to the jury, the trial Judge must have the courage of his convictions and withdraw the case from the jury.

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Knight v. Symonds.—Court of Appeal (Lindley, Lopes and Kay, L.JJ.)—Times Law Reports, vol. xii. p. 401.—11th May, 1896.—Vendor and purchaser—Conveyance—Restrictive covenant—Specific performance—Equitable relief when Courts of Equity will not grant.—This was an appeal from the decision of Mr. Justice Romer in favor of the plaintiff. In 1852 a Mr. Finch bought an estate at Wimbledon from Lord Cottenden, and laid it out in building lots. He put it up for sale in lots at auction subjective to a restrictive covenant against carrying on any trade or business, the property being intended for private residences. There were some lots that did not sell, and next year these were sold with the same restrictive covenants to Messrs. Buckle & Philps, they entering into absolute covenants. Buckle & Philps laid out their property in a new sub-division and exacted from purchasers a restrictive covenant based in the main on the original one, but only prohibiting noisy, noxious, dangerous or offensive trades. The defendant was one of the purchasers from Buckle & Philps, but he had express notice of the original restrictions. However, in 1893, he erected and commenced to operate a public laundry. The plaintiff was an owner of one of the lots sold at the sale in 1852, and

sought to have the defendant restrained by injunction. The defence was that the character of the property had so completely changed that the covenants were not now enforceable. It seems that in the past on the identical lot defendant had some trades, and especially laundry business had been allowed to be carried on, but in such a quiet way as not to attract attention of the general residents. The Court dismissed the appeal with costs, and the judgment of the Court by Lord Justice Lindley concluded, after stating the facts, as follows: "When a Court of Equity is asked to enforce a covenant by specific performance or granting an injunction—in other words, where equitable as distinguished from legal relief is sought, equitable as distinguished from legal defences have to be considered. The conduct of the plaintiff may disentitle him from relief; his acquiescence in what he complains of, or delay in seeking relief, may of itself be sufficient to preclude him from obtaining it. Sayers v. Ballyer (28 Ch. D. 103) and Roper v. Williams (7 and Russ. 18) illustrates this. In both those cases the Court refused to enforce restrictive covenants at the instance of the particular plaintiffs. But, further, before granting equitable relief, Courts of Equity look not only to the words of a covenant, but to the object to attain which it was entered into; and if, owing to circumstances which have occurred since it was entered into, such object cannot be attained, equitable relief will be refused. This doctrine was laid down and acted upon by Lord Eldon and Sir Thos. Plumer in Duke of Bedford v. Trustees of British Museum (2 M. and K. 552), by Vice-Chancellor Wood in Peek v. Matthews (3 Eq. 515), and was recognized in German v. Chapman (7 Ch. D. 271). It is upon this ground that restrictive covenants, intended to preserve the character of land to be laid out and used in a particular way, will not be enforced if such land has already been so laid out and used that its preservation as intended is no longer possible. Such a state of things can seldom, if ever, have arisen except from a departure from the scheme by the vendor and purchasers from him, or for the acquiescence or laches of those entitled to enforce the observance of the covenants in question; but whatever the explanation of the altered state of things may be, if the object to be attained by the covenant be attained, equitable relief to enforce it will be refused. Nor do I understand the observations of Lords Justices Bowen and Fry to be opposed to this view of the laws. Their object evidently was not to discredit the cases I have referred to, but rather to guard against a loose application of the principle upon which they proceed. Some expressions of Lord Eldon in Roper v. Williams, and Duke of Bedford v. Trustees of the British Museum, led to the notion that if a restrictive covenant for the preservation of a building estate was not enforced in all cases, it could not be enforced in equity in any. But this notion was emphatically protested against by the Court of Appeal in German v. Chapman, and its error had been previously pointed out by Vice-Chancellor Wood in Mitchell v. Steward (1 Eq. 541, 547). The evidence in the present case shows that, except in a few instances of no real importance, the restrictive covenants entered into with the vendor when the property was sold

for building purposes have always been observed. There has been no departure from the original scheme worth mentioning. The case therefore falls within German v. Chapman, and not within Duke of Bedford v. Trustees of British Museum and Peek v. Williams."

* * *

Re Ward.—W. N. 58—101 L. T. 63—40 S. J. 501—31 L. J. 317.—Costs—Taxation.—If a solicitor sends his client a cash account accompanied by seven bills of costs amounting to £261, and showing a balance of £101 due to him, and the client sends a further cheque for £50, and the solicitor writes back that he does not intend to claim any further balance due to him, the client may obtain a common order of course to tax all or any of the seven bills, for the solicitor has been paid all he claims. (Court of Appeal, affirming North, J.)

* * *

Re Hancock.—Malcolm v. Burford Hancock.—101 L. T. 37—31 L. J. 301.—Power of appointment.—If a deed of 1872 settles stock in trust for A. for life with power to appoint one-fourth of the income to "his wife" for life, and with remainder in trust for his children as A. appoints; and by deed of 1885 A. appoints to his then wife; and by a later deed A. appoints to his three children absolutely, subject to his own life interest and the aforesaid appointment to his wife; and the first wife dies and A. marries again, and by deed of 1895 A. appoints one-fourth of the income to his second wife for life if she outlives him—is this appointment to the second wife valid? No. For even if it could be held that the power of appointment referred to any wife of A., he had appointed the fund to his three children irrevocably, subject only to the appointment in favour of the first wife. (Court of Appeal.)

* * *

Cole v. Pendleton.—101 L. T. 38—40 S. J. 480.—Cruelty to Children Act 1894, sec. 1.—A man who earns a pound a week, out of which he only gives three shillings to his wife for the support of herself and the children, cannot escape a conviction for cruelty to the children by reason of his neglect to supply them with food and clothing merely on the ground that the operation of the poor law provides a means whereby the children might have been fed and clothed and so saved suffering. (Russell, L.C.J., and Wills, J.)

* * *

Rees v. De Bernardy.—101 L. T. 85—31 L. J. 332.—Champerty — Unconscionable bargain. — A next-of-kin agent, having found out that two elderly and illiterate women in humble circumstances were entitled to several thousand pounds as heiresses, of a man who died intestate in New Zealand in 1863, got the women in 1893 to sign a document (without independent advice) by which he was to recover the property for them and take half of anything recovered. The property was in the hands of the public trustees in New Zealand, and the title of the women was not in dispute. In 1895 the personal representatives of the women sued to set the transaction aside. Held, that the agreement must be set aside as an unconscionable bargain. Further, the real agreement was not that defendant should give information on the terms of getting a share of anything recovered by the women themselves, but was champer-

tous, for the defendant was to assist in recovering the property for them. (Romer, J.)

* * *

Re Sharland.—Kemp v. Rozey.—No. 2.—31 L. J. 330—40 S. J. 514.—(1) Legacy.—What is the effect upon a will, giving a house and the furniture therein to A., of a codicil empowering B. to choose everything he might desire from the furniture in the house except certain specified things? B. may take all the furniture in the house (except the specified things), if he likes to do so, and leave nothing for A. (Court of Appeal, reversing North, J.)

* * *

Aaron's Reefs Co. v. Twiss.—101 L. T. 35.—Misrepresentation.—When a shareholder in a limited company repudiates liability on the ground of material misrepresentations contained in the prospectus, on the faith of which he applied for an allotment of shares, it is no answer for the company to show that no specific allegation in the prospectus has been proved to be false, if the prospectus conceals and misrepresents existing facts. (House of Lords.) The application for shares and allotment were in September, and in the following January the shareholder found out he had been deceived, and repudiated the shares, and declined to pay a call. The company forfeited the shares, and unsuccessfully brought an action for the call.

* * *

Cain v. Moon.—40 S. J. 500.—Donatio mortis causâ.—Delivery, words of gift, an expectation of death, and an intention on the part of the donor that the chattel shall revert to him in case of his recovery, are the essential features. But just as in an ordinary gift, the delivery may precede, or be contemporaneous with, or follow, the words of gift. In 1890 A. gave a banker's deposit note for £50 to B. to keep for her. In 1895 A. told B. that the bank note was for B. in case of A.'s death. A. died within a week. Held, that there was a valid donatio mortis causâ. Russell, L.C.J., and Wills, J.)

* * *

Re Lord Ongley.—Ottley v. Turner.—101 L. T. P. 37.—Legacy whether specific or proportionate.—If a testator bequeathes £20,000 in trust to invest and pay income to A. for life, and when A. dies in trust to convert into money and pay £2,500 to E.; the same sum to G.; £5,000 to P.; £5,000 to C., and the remainding £5,000 to testator's residuary estate; and when A. dies the proceeds of sale are much more than £20,000—are the total proceeds of sale to be divided proportionately? No. E., P., G. and C. are to have the specific sums left to them, and all the remainder falls into testator's residuary estate. (Court of Appeal, reversing Stirling, J.)

* * *

United States Supreme Court Cases.

The right of a passenger to be carried on the wrong coupon of a round-trip railroad ticket, where the coupons are detached by the conductor on the going trip, and the returning coupon, instead of the going coupon, is retained by the conductor, and the going coupon instead of the returning coupon is given to the passenger, which the passenger retains without discovering the mistake until he presents it to the conductor on the return trip, and then makes his explanation as to how the mistake occurred, was involved in the decision of the United States Circuit Court of

Appeals in Northern Pacific Railroad Company v. Pauson (70 Fed. Rep. 585).

In accord with the holding of the Courts generally, it was here decided that under such circumstances the passenger has the lawful right to be carried on his return trip on presenting the going coupon with the explanation; and, if expelled for not paying his fare, he is entitled to recover damages for the expulsion. The cases all proceed upon the broad ground that the passenger was wholly without fault, that he had done all that could reasonably be required of him to do, and that the railroad company by the mistake, carelessness or negligence of its agent was itself at fault. A select list of cases from many jurisdictions add value to the decision.—Michigan Law Journal.

* * *

It has been decided by the Court of Appeals of Kentucky, that when a husband had purchased land for his wife, under an agreement with her that she should give a mortgage to a third person to secure the husband in the repayment of the bond given by him for the price, and so avoid the Common Law rule prohibiting contracts between husband and wife, equity would give effect to the transaction, so as to enforce the equitable lien of the husband on the land for repayment of the purchase price paid by him: Eckermeyer v. Hoffmeier, 34 S. W. Rep. 521.

* * *

The Circuit Court of Appeals, Seventh Circuit, has lately held, that it is not error to charge the jury, in an action for a libel published in a newspaper, that the greater extent of circulation makes the libel of a journalist more damaging, and imposes special duties as to care to prevent the risk of such mischief, proportionate to the peril: Enquirer Co. v. Johnston, 72 Fed. Rep. 443.

* * *

The Circuit Court of Appeals, Fifth Circuit, has recently decided a novel question in the law of libel. It holds that since a cause of action for libel, founded upon publications made in the course of judicial proceedings, does not accrue until the final determination, in favor of the party libelled, of the proceedings in which the publication is made, the statute of limitations does not begin to run against that cause of action until then: Masterson v. Brown, 72 Fed. Rep. 136.

* * *

The Supreme Court of Missouri, Division No. 1, has held, in a recent case, (1) That when there is a dispute over the rights of contending factions of an unincorporated church to the use of the church property, an injunction will lie at the suit of the faction entitled to the property to restrain trespasses thereon by the other faction; (2) That the deacons or trustees of an unincorporated church, governed wholly through its congregation, who are authorized as the constituted authority of the church to control the use of its property, conveyed to trustees in trust for the church, have authority to exclude those members who refuse to recognize the authority of the regular organization; and (3) That if members of the congregation are improperly excluded by the deacons from the use of the church property, they must apply to the courts for redress, or appeal to the congregation. They cannot resort to acts of trespass to gain entrance to the church: Fulbright v. Higginbotham, 34 S. W. Rep. 875.

The Supreme Court of South Carolina has recently rendered a very sensible decision to the effect that if the name of a witness is signed to the execution of a will by another, at the witness' request, and in her presence and that of the testator, the attestation is sufficient, though the person whose name is signed as a witness does not touch the pen; provided that the witness, though able to write, is temporarily so far incapacitated that she writes with difficulty, and is in the habit of using an amanuensis: In re Crawford's Will, 24 S. E. Rep. 69.

THE ORIGIN AND EFFECT OF THE WRIT OF CERTIORARI.

Accepting the definition which, in England, text-book learning tenders; which high judicial sanction and authority have crystallized, the certiorari is a prerogative writ issuing out of the Crown side of the Court of Queen's Bench (since the passage there of the Judicature Act attached to, and forming a department of the Queen's Bench Division of the High Court of Justice) to bring before the Court, for the purpose of determining their ex facie their origin or the regularity of the transactions upon which they have been founded, all proceedings of inferior bodies—whether fulfilling some province connected with the administration of justice or not—which partake of a judicial character.

In this conception of its office and exigency, the writ operates to remove proceedings of Justices of the Peace, both in and out of Sessions, and of subordinate judicial officers, generally, as well as those which emanate from, or have been adopted by, Town Councils, Commissioners of Health, Sewers, Tithes, etc. With reference to this latter branch of the proposition, the familiar provision of our Municipal Act, of which there would seem to be no English counterpart, has the effect, no doubt, of displacing the remedy by certiorari, in so far as the impugning of by-laws or resolutions of a municipality is concerned, like institutions of statutory creation here, being,—as to judicial action they may initiate,—exposed presumably to the system of attack which prevails in England. In re Richardson and Police Commisioners of Toronto, 38 Q. B. 621.

In an endeavor to apprehend the exact scope of the certiorari in this country, as it may affect those discharging purely civil duties, the dogmatic temper cannot confidently be indulged. A claim to the extension of the principle of superintendency of the doings of functionaries with limited powers to a resolution of License Commissioners was judicially, and more than midly, challenged in McGill v. License Commissioners of Brantford, 21 O. R. 665.

So decided has been the tendency of the Courts to regard, so unalterable their disposition to maintain the writ as a process beneficial to the subject, that we find them time and again declaring that nothing short of the most unequivocal language of denial can be held to restrain its is-

sue. So unmistakable and so clear are the words of deprivation required to be that a direction that the lower tribunal "shall hear and finally determine" is inefficacious to compass this result, such curtailment of privilege, as it bears upon the theory of certiorari, being without force beyond the realm of matters of fact. (2 Hawk. P. C. cap. 27, sec. 23). Nor will express words forbid the writ where there has been an absence or excess of jurisdiction in the individual or body, for investigating the course of whose procedure a complainant may crave it as the primary instrument.

In England, the latest and most authoritative judgment in support of this doctrine is that of Ex parte Bradlaugh, 3 Q. B. D. 509; while our own reports evidence a formidable collection of cases going to reinforce it. Regina v. Wallace, 4 O. R. 127, is as pronounced an authority perhaps as any. In this connection it might be remarked that the distinction between a certiorari and a right of appeal has been long acknowledged to be that the last lies only where expressly conferred, whereas the former is available unless explicitly taken away.

But the conclusion can hardly be escaped that this understanding of the preservation of the writ to an aggrieved party, despite its withdrawal in terms, has lost much of its significance and interest from the numberless decisions which have been evoked by the litigation arising out of "The Canada Temperance Act." Under that enactment, which all along unreservedly withheld the certiorari, at Osgoode Hall the position was alike strikingly and persistently illustrated that an ordinary tenable ground for entreating the writ sufficed to obtain it. A request to the Court to weigh or to pass upon the sufficiency of the evidence constituted almost the sole instance of an appeal to its discretion where the refusal of the writ might be safely foretold; and any practitioner who has paid moderate attention, even, to the subject, must have recognized that argument upon this head has been quite as staunchly withstood in cases where the title to the writ remained undisturbed as where it had been interfered with by statute.

The writ will, of course, be allowed where there has been no incriminating evidence whatever, no legitimate proofs of guilt before the magistrate; or where some element or circumstance essential to jurisdiction fails to be disclosed, as, for example, in the prosecution of an apprentice for a violation of his articles of apprenticeship upon which was omitted to be established the contract to serve. (Re Bailey and Collier, 3 E. & B. 607; Regina v. Beard, 13 O. R. 608).

The certiorari operates as a supersedeas from the time of its delivery, though a recent decision, Regina v. Woodyatt, 27 O. R. 113, shows that an attachment for alleged disobedience to its mandate will not be granted, except upon personal service upon the magistrate, although the proper person to serve to obtain the customary fruits of the application may have been the Clerk of the Peace.

Turning from the broader question of the principles invoked in arriving at the justice or propriety of its issue, to a discussion of the procedure surrounding the application for the writ, there are points of comparison between the plan in vogue in England and that which has,

since the formation of the Courts of Queen's Bench and Common Pleas, obtained here, upon which it is both interesting and profitable to dwell. In England, the motion, if made during the sittings, comes before the Divisional Court, and, during vacation, before a Judge, and consists of an application, in the one case, for a rule nisi, and, in the other, for a summons to show cause. A discretion is conferred, in view of special circumstances, to permit of its going ex parte, or, upon the return of the rule, to make the order to quash absolute in the first instance. Six days' notice of the application is provided for.

Bearing in mind the various stages through which the proceeding to quash by way of certiorari has to run here, one cannot resist the belief that the scheme is both tardy and cumbrous, and that one at least of the steps which form it is superfluous. Would it not be much more expeditious, and, at the same time, less costly to dispense with the preliminary application in Chambers, and, accommodating the practice to that employed in England, launch the initial motion before a Divisional Court? Or, if this feature must be retained, why not invest the Divisional Court with the power to make the rule absolute in the first instance, irrespective of consent by the parties, reasonable notice of the application, and of the objections proposed to be urged, having of course been previously given to the opposite side.

Another wholesome feature of the English practice, that might be appropriately incorporated into our machinery, is the bestowal upon the Court where cause has been shown to the rule to show cause, of the right to direct that the order to quash should be made absolute, without insisting on this, from the defendant's standpoint, discouraging restriction as to the recognizance.

It is a well-rooted axiom that the Attorney-General, pursuing this method of questioning a summary conviction, is not trammelled, in his approach to the Court, by the observance of the conditions of previous notice to the magistrate, and entry into a recognizance, or the alternative of a money deposit which our practice sanctions, to which a defendant must always submit.

Through the adoption of the Crown Office Rules, 1886, which govern the procedure in England, should occasion offer, a curious conflict is invited over the question whether the provision which secures immunity from this discouraging restriction as to a recognizance to that official alone —which, to use the wording introduced, imposes upon all applicants for a writ of certiorari "*other than the Attorney-General acting on behalf of the Crown*," the necessity of entering into the recognizance—endangers the efficacy of our own enactment, which repealed the section of the Act of George II., of which the Crown Rule in question is, with the exception of the clause italicized, a close reproduction. It had been long ago decided, in Regina v. Murray, 27 Q. B. 134, that a prosecutor in a summary matter before a justice, was exempt from compliance with the requirement as to antecedent notice; and the section of the Canadian Statute which has been substituted for the prescription of the Imperial Act plainly cannot.

in the light of the construction put upon the provision respecting notice, be deemed to apply to the case of a prosecutor. As the direction, however, assumes the guise of a Crown Rule—does not possess the uncompromising and vigorous force of a Statute, our own law would scarcely be thought to be superseded by it.

E. E. A. D.

OSGOODE HALL NOTES.

By a vote of 9 to 6 the Benchers of the Law Society have decided not to allow Miss Clara Brett Martin, who has just passed her final examination in law, to be called to the Bar. Conditional upon the consent of the Law Society, the Legislature a year ago passed an Act allowing women to practice as barristers. On June 5th the Benchers discussed the question at length, and decided not to consent to the Act.

Only half of the Benchers, however, were present, there being 30 members of the society.

Miss Martin, as a result, can only practice as a solicitor. There is only one other woman on the books of the Law Society, Miss Powley, who is studying law in Port Arthur.

The Benchers threw out the petition for call filed by Miss Clara Brett Martin. The meeting of convocation was not very well attended. Miss Martin says she will now invoke the aid of the Local House and secure a compulsory Act from them.

* * *

The Osgoode Tennis Club has been reorganized for the season; the Hon. President is Mr. Charles Moss, Q.C.; Mr. Geo. S. Holmested is President, and Mr. S. Medd, Secretary. The club play daily at 4 p.m., and on Saturday afternoon. It is the intention to hold a number of friendly games with local clubs.

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The Law School will not re-open until the fourth Monday in September, viz., Monday, September 28th.

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The Benchers will, on September 30th, meet and elect four lecturers for the Law School. The lecturers will hold office for three years; $1,500 per year is the salary. All information can be had from the principal, Mr. Hoyles.

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The Toronto City Council asked the Benchers to throw open the Osgoode Hall lawn to the general public during the summer months. The Benchers decided to refuse the application, and the boys of St. John's Ward will have to do all their breathing some place else.

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The following is a complete return of the Law School results as announced this month: In the third year 45 passed, as follows (in order of merit): H. E. Sampson (gold medal), H. T. Bowles, O. A. Langley, P. White, L. H. Bowerman, J. F. Kilgour, J. W. Payne, A. E. Knox, H. E. Chopin,

P. E. Mackenzie, R. A. L. Defries, M. A. Secord, J. D. Shaw, J. P. Smith, D. A. Macdonald, O. E. Klein, L. J. Reycraft, C. A. Stuart, E. J. Butler, W. R. P. Parker, J. M. Laing, C. B. Pratt, J. E. Macpherson, Miss C. B. Martin, J. D. Phillips, E. J. Deacon, P. E. Wilson, G. H. Thompson, J. E. McMullen, H. H. Bicknell, F. J. McDougall, E. C. Kenning, W. W. Richardson, J. Lorne McDougall, F. C. S. Knowles, F. W. Tiffin, J. L. Killoran, M. J. O'Reilly, Goldwin L. Smith, J. L. Island, A. B. Pottinger, S. T. Medd, E. F. Lazier, L. V. O'Connor, F. B. German. Mr. Sampson was the only one of the final year class that obtained honors.

RESPONSIBILITY FOR THE EVILS OF LITIGATION.

There has always been a conviction, more or less strong, throughout the world, that litigation is an evil, and that some odium attaches to the lawyers in the cause. As the bystanders see it, a legal contest always results disastrously to one side, and not knowing anything of the circumstances, they generally entertain the opinion that the unsuccessful lawyer had given advice that turned out to be bad. In a general way it is certainly true that going to law means a loss to some of the clients and a gain to all of the lawyers. There can be no reasonable misunderstanding of this. The uncertainties of the results and the pitfalls along the way, are also known to all. The experience of others is passed around from mouth to mouth; and no man should be found complaining over unsuccessful litigation except where he has been wronged by his lawyer to an extent amounting to professional negligence. No doubt, on being retained, uncomfortable thoughts sometimes pass through a lawyer's mind. As an honest man, he cannot help remembering the ruin that has often resulted in his own knowledge from litigation. He has often the advantage of an identical experience. But he has already exhausted every possibility to get a settlement, and yet the parties will have a writ issue. He is as certain as he can be that nothing is to be gained, and that his client's portion shall be empty victory and a lot of costs. Though the course of a lawyer in such circumstances might seem to point towards a refusal to undertake such proceedings, the best wisdom of honourable men leads the other way. When men thirst for law they will have it, and the ills resulting from the evil potion will be as speedily cured by a conscientious lawyer as by the unscrupulous into whose hands the client would likely have fallen had he been allowed to drift there.

The world never for a moment thinks it possible that a client could be responsible for the evils of litigation. The blame is laid either on the lawyer or on the law. The client himself in his own heart seldom or never blames himself. But lawyers could tell another tale. It is surprising how the most intelligent man will tell his lawyer half the story, and will blandly say when the other half comes out in the

court room, "Oh! I thought I told you that." And the bulk of your clients will tell you one story in your private room, but in the witness box they will lose their heads and allow themselves to have a new version cross-examined out of them. Considering the matter in fairness also demands that we should consider the good that results from law, the triumphs that it achieves and the justice that it dispenses as well as its evil. On the whole, the effects of law are the triumph of right over wrong. The rights of property are made as secure as things can be on earth; and though to secure this end evil sometimes has to ensue, yet the good is the greatest. We think the experience of most law offices is that if evil does follow from legal proceedings, there is seldom an odium on either the law or the lawyer but is the result of clients' foolishness, stupidity or crookedness.

LEGAL MAXIMS.

We conclude in this number the legal maxims, with translations, which we commenced in our last number:

23. Lex non cogit ad impossibilia. (The law never urges to impossibilities.)

24. Lex semper intendit quod convenit rationi. (The law must be taken to intend what is reasonable.)

25. Lex spectat naturae ordinem. (The law takes into account the natural succession of things.)

26. Modus et conventio vincunt legem. (Persons may contract themselves out of their legal liabilities.)

27. Non dat qui habet. (A man cannot give what he has not got.)

28. Non omnium quæ a majoribus constituta sunt ratio reddi potest. (A reason cannot be given for everything that our ancestors were pleased to ordain.)

29. Nullum simile est idem nisi quatuor pedibus currit. (Similarty is not analogy unless it runs on all fours.)

30. Omne majus continet in se minus. (The greater includes the less.)

31. Omnia præsumuntur contra spoliatorem. (Every presumption is made against anyone who spoils.)

32. Omnia præsumuntur rite et sollenitur esse acta. (It is presumed that all the usual formalities have been complied with.)

33. Omnis ratihibitio retro-trahitur et mandato priori æquiparatur. (A ratification is taken back and made equivalent to a previous command.)

34. Optima est lex quæ minimum relinquit arbitrio judicis, optimus judex qui minimum sibi. (The best system of law is that which leaves the least to the discretion of the Judge; the best Judge is he who leaves the least to his own discretion.)

35. Optimus legis interpres est consuetudo. (Custom is the best interpreter of law.)

36. Potior est conditio possidentis. (There is a great advantage in being in possession.)

37. Qui facit per alium, facit per se. (He who does a thing by another does it himself.)

38. Quæ hæret in litera hæret in cortice. (He who harps on the mere letter of a written in-

strument does not get at the pith of the matter.)

39. Qui non improbat, approbat. (Not blaming is equivalent to praising.)

40. Qui prior est tempore, potior est jure. (The law favors the earlier in point of time.)

41. Qui sentit commodum, sentire debet et onus. (Benefit and burden ought to go hand in hand.)

42. Quicquid plantatur solo, solo cedit. (Whatever is planted in the ground becomes part of the ground.)

43. Quilibet potest renunciare juri pro se introducto. (A man may waive a right established for his own benefit.)

44. Quod ab initio non valet, in tractu temporis non convalescet. (Time will not cure what is wrong from the beginning.)

45. Quod fieri non debet factum valet. (What ought never to have been done at all, if it has been done, may be valid.)

46. Quod subintelligitur non deest. (What is to be understood, is as good as if it were there.)

47. Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est. (When the language of a written instrument is perfectly plain, no construction will be made to contradict the language.)

48. Res inter alios acta alteri nocere non debet. (A man ought not to be prejudiced by what has taken place between others.)

49. Res judicata pro veritate accipitur. (The decision of a Court of Justice is assumed to be correct).

50. Respondeat superior. (A man must answer for his dependents).

51. Salus populi suprema lex. (The welfare of the state is the highest law.)

52. Sic utere tuo ut alienum non lædas. (Make such a use of your own property as not to injure your neighbour's.)

53. Simplex commendatio non obligat. (A man is not obliged to cry stinking fish.)

54. Solivitur secundum modum solventis. (Payment is to be made as the prayer pleases.)

55. Spondes peritiam artis. (If your position implies skill, you must use it.)

56. Ubi jus, ibi remedium. (Where there is a right there is a remedy.)

57. Verba chartarum fortius accipiuntur contra proferentem. (The language of an instrument is to be taken strongly against the person whose language it is.)

58. Verba generalia restringuntur ad habilitatem rei vel personam. (General words are to be tied down and interpreted according to their context.)

59. Vigilantibus non dormientibus jura subveniunt. (To get the law's help a man must not go to sleep over his own interests.)

60. Volenti non fit injuria. (The man who is the author of his own hurt has no right to complain.)

CANADIAN LEGAL HUMOR.

At Barrie Assizes once an Irishman had given his evidence in chief, and Mr. McC. was slowly advancing towards him for cross-examination. As the counsel arranged his gown and cleared his

throat, the witness begins to realize what is in store for him; and at last, overcome with apprehension, he turned to the Judge and flung out the following: "Yer Honour, every word I have been saying is the God's truth, and if I say anything different when Mr. McC. is talking to me it will be a bloody lie."

Mr. B. B. O——, Q.C., is minutely describing to the Court of Appeal the way a certain house was raised.

The C.J.O.—"And, Mr. O——, on what do you say they raised it?"

Mr. O——, "They raised it, my lord, on four jacks."

One scintillating flash of intelligence passed between the counsel and the Chief Justice, but some of the Judges did not seem to understand.

*

Sergeant Arabin, presiding at a criminal trial, said to the jury, when allusion had been made to the inhabitants of Uxbridge, "I assure you, gentlemen, they will steal the very teeth out of your mouth as you walk through the streets. I know it from experience." — From Law Students' Journal.

*

The natural gallantry of His Lordship Judge Ferguson has given him a strong aversion to any man who could offer violence to a woman. A good story illustrates his feelings. Mrs. Jones having slapped little Johnny White's ears, little Johnny White's father slapped Mrs. Jones' ears. The Joneses brought action for assault, and Judge Ferguson was the presiding Judge at the trial. Mr. Jones was giving some evidence during the trial, and though not asked the question, he managed, as witnesses will, to drop a remark or two to relieve his highly incensed feelings. One was that had he been present he would have "swept the roadway with White." When addressing the jury, His Lordship referred to this part of the testimony as follows: "Mr. "Jones, gentlemen, has told us "that had he been present he "would have swept the roadway "with the defendant. Of course, "by this Mr. Jones meant that "he would have done this if he "was able to do it. But whether "he was able or not, gentlemen, I "think it would have been well "for Mr. Jones to have first "paused and considered whether "it would not be a foolish act to "soil Her Majesty's highway "with a man who openly admits "in his evidence that he struck "a woman."

JUDGES AND THEIR DUTIES.

We are sorry to note a very considerable amount of criticism, even verging upon fretfulness and severity, in some of our English legal contemporaries, directed against the Judges of the Courts of that country, the burden of the complaint being that they neglect their duties, fail to clear their dockets; or that, when they do act with energy, they do it in spurts, so to speak; rush back to their duties with a sudden vehemence, and find the Bar unprepared with their causes by reason of previous postponements. Many

of our American Judges are open to severe criticism of the same kind. A crying evil on the part of our State Appellate Courts has been the habit of taking submissions of cases and holding them under advisement for years. We could point out instances of this abuse which seem almost incredible. This abuse became so great that the framers of the last constitution of California inserted a provision therein to the effect that the Judges should not be allowed their pay, unless they would certify that they had no case under advisement which had been submitted to them for three months.[1] In the face of this provision, the Judges of the Supreme Court of California have been in the notorious habit, in order to qualify themselves to draw their salaries, of handing down causes for re-argument, or of requiring counsel to re-submit them, thus intentionally evading the constitutional provision. Certainly, the example of Judges thus violating, for their personal ends, a constitution which they have taken an oath to support, is not edifying. In contrast with such practices is the gratifying example of the Supreme Court of the United States. That body is composed for the most part of old men. Its records are generally large, and the work which is imposed upon the Judges is heavy. Nevertheless, if we except a few notorious cases, it is a truthful statement to say that the Court has been in the habit of disposing of cases generally within three or four weeks after argument or submission. In addition to this, the known habit of consultation of the Court is such that it brings to bear upon every case the mind of every member of the Court. The principal duty of Judges is to decide the causes before them as rapidly as is consistent with the careful consideration of the rights of each and every suitor. Long delays are, in many cases, tantamount to denials of justice.—From the American Law Review.

[1] We are merely citing the substance—we do not pretend to give the exact language.

CORRESPONDENCE.

One of our readers, an esteemed County Court Judge, writes us as follows:

Sir,—In last issue of Barrister you mention Lord Tendtenden's hesitating between the Bar and the Church. Perhaps it would amuse your readers to know how his determination was made. He consulted Judge Baker on the subject. The Judge quoted to him a decision published in one of the year books, in which one of the Judges said it was actionable to call a counsel a damned fool, but it was not actionable to call a parson damned fool, parceque vor pentetre bon parson et damned fool.

Yours, etc.,

C. R.

Sarnia, May 5, 1896.

THE LAW SOCIETY'S STANDING COMMITTEES.

The standing Committees of the Law Society of Upper Canada for 1896-97 (appointed by Convocation, on Monday, 18th May, 1896, and to hold office until the first Saturday of Easter Term, 1897), are as follows:—

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By Rule 29 the Treasurer is ex officio a member of all Standing Committees.

BOOK REVIEWS.

Bills, Notes and Cheques. By J. J. Maclaren, Q.C., D.C.L., LL.D. Second Edition. The Carswell Co., (Ltd.)

The second edition of this valuable work is to hand, fresh from the press. The first edition was published in 1892, and contained all the important decisions up to January, 1892, numbering in all about 2,300. Before the 1st June, 1893, the first edition was out of print, and it became necessary to issue a second edition. Dr. Maclaren, in preparing the second edition, has given due regard to the fact that the Imperial Act of 1882 has been adopted by most of the Australasian Colonies. In the Courts of these colonies have arisen some points of interest that have not presented themselves for decision to either our own or other Courts, and the decisions on these points find a place in the new edition of this work. Since 1892 Parliament has changed the statutory holidays, and the Acts affecting such changes are treated of, but the most valuable feature of the book from a practitioner's

standpoint is the fact that the notes on the Act have been brought up to date. About 250 new decisions are to be found in the new edition, thus making the work the most accessible and the most modern digest in this branch of the law.

LEGITIMACY OF CHILDREN BORN IN WEDLOCK.

The rule that children born while the relation of husband and wife exists between parents are legitimate, notwithstanding circumstances that might render them otherwise, is strongly sustained by the Courts of this State. In the case of Seabury, as executor, appellant, vs. Hiram Smith et al., respondents, recently decided in the Appellate Division of the Second Judicial District of the Supreme Court of this State, reaffirms the doctrine in Haynes v. McDermott, 91 New York, and the exceedingly interesting case of Canjolle v. Ferrie (a whole law library in itself), 23 New York, 90. Judge Davis, in delivering the prevailing opinion, says:

"I have been unable to find any authority in this State on a question of legitimacy which requires the heir and the acknowledged and conceded child to prove an act of marriage as a requisite to maintain his legitimacy. The presumption and charity of the law are in his favor; and those who wish to bastardize him must make out the fact by clear an irrefragible proof. . . . . The doctrine derived from the leading cases on the question of legitimacy is that a person born in a civilized nation is legitimate, and is a binding presumption of law until fully rebutted. The law presumes morality, and not immorality; marriage, and not concubinage; legitimacy, and not bastardy."

There is a very ancient case which sustains this principle of the legitimacy of a child born in wedlock, in an opinion pronounced by King John, one of the early sovereigns of England.

The case is Robert Faulconbridge v. Philip Faulconbridge, 1st Shakespere, 334. The parties to the case were sons of Sir Robert Faulconbridge, deceased, and his wife, Lady Faulconbridge, Philip was the older brother. By the laws of England he was entitled to the entire estate of Sir Robert, to the exclusion of his younger brother, Robert, who, notwithstanding their relationship, insisted that he was the lawful heir of his father, Sir Robert. His claim was founded on the alleged illegitimacy of Philip, who was, in fact, only his half-brother, begotten by Richard Cœur de Lion. There were exceedingly strong grounds to sustain the allegation of Robert, though it struck heavily at the reputation of his mother, Lady Faulconbridge.

The case finally came before King John, then the reigning sovereign of England, for adjudication. Philip, in contesting the claim of Robert, did not deny his illegitimacy, but rested his defence on the fact that he was born in the lawful wedlock of Sir Robert and his mother, and therefore the lawful heir of Sir Robert. Summoning the parties before him, King John proceeded

with the hearing of the case. The trial was brief, and the judgment of the Court speedily followed the trial, which we give as presented by the reporter who never had an equal in the world's history. The case was opened by placing Robert on the stand, who was examined by the King himself, as follows:

King John—Who art thou?
Robert—The son and heir of Sir Robert Faulconbridge.
King John—Pointing to Philip—Is he the elder, and art thou the heir?
You came not of one mother then, it seems.
Philip—Most certain of one mother, mighty King.
That is well known; and, I think, one father;
But for the certain knowledge of that truth
I refer you to heaven and to my mother;
To settle that doubt, as all men's children may,
I myself have no reason for what I say.
It is my brother's plea.
King John—Why, being younger born, doth
He lay claim to thine inheritance?
Philip—I know not why except to get the land,
But once he slandered me with bastard,
King John—to Robert—Sirrah, again I ask
What doth move you to claim your brother's land?

To this question Robert relates all the circumstances on which his plea of the illegitimacy of Philip was founded, alleging that King Richard, "when large length of seas and shores between his father and his mother lay," took advantage of that distance, and this same lusty gentleman was begotten. This Sir Robert knew, and on his death bed willed Robert all his estate. Robert further alleges that his mother never denied her intimacy with King Richard. He closed his argument with this appeal:—

"Then, good my liege, let me have what 's mine.
My father's land as was my father's will."

The King, addressing Robert, pronounces judgment in the case as follows:—

"Sirrah, your brother is legitimate;
your father's wife
Did after lawful wedlock bear him;
And if she did play false, the fault was hers;
Which fault lies on the hazard of all husbands
That marry wives. Your brother was in
Lawful wedlock born. And your father's
Eldest son. And therefore your father's
Eldest son must have his father's lands.
This concludes the case."

LEGAL STUDIES.

One of the most eminent of American lawyers in early days wrote a course of legal study addressed to students and the profession, published in Boston in 1836. In this course may be found the following resolutions:

I am resolved (Deo juvante)

1. To have a scheme of life.
2. To have a scheme of study.
3. To live temperately.
4. To rise early.
5. To apply myself to study.
6. To oppose indolence and never to postpone to the morrow the duty of to-day.
7. To take exercise.
8. To adhere to my hours for sleep.
9. To be moderate in my amusements.
10. To note my daily deficiencies and endeavor to correct them.
11. To avoid rigidly all studies on the Sabbath.

12. To preserve my health of body and mind by a careful observance of all physical necessities and comforts.

13. To be moderate, but never mean, in my expenses.

14. To guard my mind from idle thoughts and sensual images.

15. To reflect carefully, on the first of January in every year, on my past neglects and to form all necessary resolutions.

16. To give due attention to my religious duties.

17. To give due attention to my classical studies.

18. To avoid useless knowledge, and at the same time to be very sure that it is useless.

19. To avoid, at least during my novitiate, political disputations, religious polemics, all ephemeral causes of excitement, and all merely fashionable and light reading.

20. To dress fairly in fashion, but never beyond my means, and studiously to shun foppery.

21. To avoid intimate association with young men of doubtful principles.

22. To pay cash for everything, and rather to deny myself a present gratification than to be a debtor.

23. To regard as absurd and dangerous the opinion of some, that men of distinguished talents are never capable of much application.

24. To avoid all eccentricity and to root out every idiosyncrasy.

25. To cultivate practical knowledge and a business tact, but to be sure I am well grounded in the theory.

26. To subdue my imagination if too wild; to strengthen my judgment if apt to be false, and to improve my memory if naturally dull.

27. To rely mainly on my industry, however great be my talents.

28. To take care of the unavoidable fragments of time, and to see that they are few as possible.

29. To keep constantly in view the essential distinction between reading and studying, two things often confounded; and that as to elementary books especially the safest rule is "Multum legendum non multa."

These resolutions may be found as efficacious in these days as they were a half century ago.

PHYSICIANS' LIABILITY FOR MALPRACTICE.

The following points with regard to a physician's liability in suits for malpractice are given in the General Practitioner:

1. A physician is guilty of criminal malpractice when serious injury results on account of his gross ignorance or gross neglect.

2. A physician is guilty of criminal malpractice when he administers drugs, or employs any surgical procedure, in the attempt to commit any crime forbidden by statute.

3. A physician is guilty of criminal malpractice when he wilfully or intentionally employs any medical or surgical procedure calculated to endanger the life or health of his patient, when he wilfully or intentionally neglects to adopt such medical or surgical means as may be

necessary to insure the safety of his patient.

4. A physician is civilly responsible for any injury that may result to a patient under his care, directly traceable to his ignorance or his negligence.

5. A physician is expected by the law to exhibit in the treatment of all his cases an average amount of skill and care for the locality in which he resides and practices; further than this he is not responsible for results, in the absence of an express contract to cure.

6. A physician is not relieved of his responsibility to render skilful and proper treatment or reasonable care and attention by the fact that his services are gratuitous.

7. A physician is not obliged to undertake the treatment of any case against his will, but having once taken charge, he cannot withdraw without sufficient notice to allow his patient to procure other medical assistance.

8. A physician having brought suit and obtained judgment for services rendered, no action for malpractice can be thereafter brought against him on account of said services.

9. A physician is relieved of responsibility for bad results in connection with the treatment of a case when there can be proved contributory negligence on the part of the patient.

PHYSICIANS' DUTY OF SECRECY.

Considerable discussion of this topic has been provoked by the case of Kitson v. Playfair, fully reported in the London Times of March 23rd and the days following. This case, however, did not involve the point, for the defendant pleaded privileged communication in an action of libel and slander, and the jury found malice in fact. In a proper form of action the question then is: What right must a plaintiff rely upon to recover from a physician for the disclosure of a professional secret? The nature of the relation between physician and patient seems to be similar to the relation between principal and agent, bailor and bailee. Except for clearness, it is immaterial by what name it is known; whether, as is frequently done in agency, it is spoken of as a status, or whether some other term is applied to it. Under all circumstances, the fundamental nature of the right remains. It does not arise merely from the physician's being a member of society, and is not a duty owed to the public generally, and, therefore, it is not strictly proper to call its violation a tort; nor can it be said to be a duty assumed by contract, for though there may generally be a consideration, consideration is not essential, and when present would be of but slight importance in measuring the duty assumed. The foundation of this duty has very aptly been called an "undertaking." See article on "Gratuitous Undertakings," 5 Harvard Law Review, 222. It is one of the recognized rights, so much discussed of late, the breach of which does not belong to either of the great classes of tort or breach of contract.

What is "undertaken" is a question of fact. It is clear that a physician "undertakes" to use

that degree of skill which modern practice demands under the circumstances, and also such skill as may reasonably be expected of him from his individual record. Is there more? Does he "undertake" to keep secret whatever he discovers or is told while acting professionally? It would seem so. This is an obligation clearly recognized in the ethics of the profession, and it would seem to be a legal duty to the patient. Judge Cooley treats a breach of this duty as one of the wrongs in confidential relations (Cooley on Torts, 2nd ed., 619). It is submitted that the liability of the physician in De May v. Roberts, 46 Mich. 160, must rest on his "undertaking" to act in a professional manner. While it is true that the physician is not privileged from testifying, this does not show there is no legal duty of secrecy, for the law simply does not allow the "undertaking," if it extends so far, to interfere with the ascertaining of truth in a judicial inquiry. It is needless to comment on the oft-attacked rule that physicians and the clergy are not privileged. As long as it exists, however, it must be a good defence for the physician in any action for the disclosure of a communication. The exact limits of this "undertaking" can only be ascertained when the question actually comes up. Whether, as some physicians claim, disclosure can be made as necessity requires, the physician being the judge of the necessity, though the secret is the patient's, will then be determined. In determining this question, it would seem that aid should be sought in the testimony of physicians and others having special knowledge. —From Harvard Law Review.

GENERAL NOTES.

Birthday Honors.

The English Law Journal (23rd May last) says:—"There is little in the Birthday Honours list of special interest to lawyers as a class. Mr. Lewis M'Iver, M.P., upon whom a baronetcy has been conferred, was called to the Bar at the Middle Temple in 1878; and Mr. Edward Leigh Pemberton, who has been made a C.B., was called to the Bar at Lincoln's Inn in 1847, and was legal assistant Under-Secretary at the Home Office from 1885 to 1894. But the five colonial Judges to whom knighthoods have been given are the only lawyers in the list whose connection with the law can be described as active. Sir George Arthur Parker was appointed a Judge of the Madras High Court in 1887. Sir William H. L. Cox became Chief Justice of the Straits Settlements in 1893. Sir Henry Spencer Berkeley received the appointment of Chief Justice of Fiji in 1889. Sir William John Anderson was raised to the office of Chief Justice of British Honduras in 1890. Sir William Ralph Meredith was made Chief Justice of the Common Pleas, Ontario, in 1894.

* * *

The American Bar Association.

The next meeting of this learned body will be held at Saratoga Springs, New York, on the 19th, 20th, 21st, and 22nd of August next. The American Bar, through this representative body,

are to be honored this year by the presence of Lord Russell of Killowen, the Lord Chief Justice of England, who will deliver the annual address. He will probably bring with him several prominent members of his Bar. The occasion will consequently be one of especial interest. We bespeak the presence of as many of our English and Canadian brethren as can attend, and we assure them that they will receive a hearty welcome.—American Law Review.

* * *

Limiting Fees in Damage Actions.

A bill has been introduced in the New York Legislature to limit the fees of lawyers in damage cases to one-tenth of the amount recovered, instead of the one-third to one-half of the judgment which now usually goes to the lawyers. It is said that this bill was inspired by the Brooklyn trolley car companies and other corporations who suffer from damage suits, and is intended to discourage the lawyers who are continually on the lookout for opportunities to stir up damage suits. A contingent fee of ten per cent., in view of the expenses often necessary in preparing for trial and in obtaining expert testimony, would be too little inducement for the majority of the present damage case lawyers.—Law Student's Helper.

* * *

Instructions to Land Buyers.

(Lines over 300 years old, copied from the rolls in the Manor Court Office, Wakefield, England.)

First see the land which thou intend'st to buy
Within the sellers' title clearly lye,
And that no woman to it doth lay claime
By dowry, joynture, or some other name
That may incumber. Know if bond or fee
The tenure stand, and that from each feoffee
It be released, that th' seller be soe old
That he may lawfull sell, thou lawfull hold.
Have speciall care that it not mortgag'd lye,
Nor be intailed upon posterity.
Then if it stand in statute bound or noe,
Be well advised what quitt rent out must goe,
What custome service hath been done of old
By those who formerly the same did hold.
And if a wedded woman put to sale
Deal not with her unless she bring her male,
For she doth under covert barron goe,
Although sometimes some traffique soe (we know).
Thy bargain made and all this done,
Have speciall care to make thy charter run
To thee, thy heirs, executors, assigns,
For that beyond thy life securely binds.
These things foreknown and done, you may prevent
Those things rash buyers many times repent;
And yett when as you have done all you can,
If youle be sure, deal with an honest man.

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