Canada Law Journal.

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DIARY FOR OCTOBER.

1. Sat.....Wm. D. Powell, 5th C. J. of Q. B., 1816.
2. Sun.....*17th Sunday after Trinity.*
3. Mon.....C. C. term and sittings for trial of non-jury cases begin (except in York).
7. Fri.....Henry Alcock, 3rd C. J. of Q. B., 1802.
8. Sat.....C. C. term (except in York) ends. R. A. Harrison, 11 C. J. of Q. B., 1875.
9. Sun.....*18th Sunday after Trinity.*
10. Mon.....C. C. term begins.
13. Thur.....Battle of Queenston, 1812. Lord Lyndhurst died, 1863, ast. 92.

TORONTO, OCTOBER 1, 1887.

MR. JUSTICE GROVE has retired from the English Bench after sixteen years' service. Mr. Arthur Charles, Q.C., has been appointed his successor, and the appointment meets with general approbation. The new judge is in the prime of life, having been born in 1839.

NOT the least important change wrought by the Judicature Act is that which it has effected in the nature of the qualifications which it is now necessary for those to possess, who would aspire properly to fill the judicial office. Time was, when a man fairly versed in the common law and the criminal law might hope to make a reasonably good judge, and to satisfactorily discharge all the duties that he would be called on to perform in his judicial capacity, even though he might be supremely ignorant of the first principles of equity jurisprudence. So on the other hand a man well versed in equity, though ignorant of the practical workings of the common, and criminal, law, might nevertheless aspire to shine as a great equity judge. The subdivision of the law, formerly so acutely defined, no doubt had this advantage, that it permitted men to become more profoundly skilled in that particular branch of law to which they devoted themselves. Notwithstanding the recent fusion of law and equity, and the amalgamation of the courts, English jurisprudence is, in spite of all attempts at its simplification, still so vast and complicated a system, dealing as it does with all the intricacies arising from a highly civilized social system, that from its very nature, few men can hope to have the capacity to thoroughly master every branch of it in all its details. And yet this is the burthen which is now laid upon every man who aspires to judicial honours. Few men at the Bar, in the generation of lawyers now passing away, have adequately filled the rôle of first class "all round" lawyers, if we may use the expression—the late Chief Justice Moss perhaps alone excepted; and it is perhaps too much to expect that the coming generation will be more productive of such versatile intellects.

What then is likely to be the future of the Bench in this Province? Are we to expect to see men whose training has been exclusively confined to the principles of equity struggling, after they have attained the bench, to master criminal, and common law; or, on the other hand, men who have confined their attention to criminal law, groping their way through the mysteries of equity jurisprudence? It is to be hoped not. At the same time we may be sure that the Bench will be but a reflex of the Bar, and it will be necessary, if this result is to be avoided, for the members of the Bar to give up the system heretofore in vogue, of confining their attention to one particular branch of law. Those who aspire to the Bench must remember that the old sys-

tem has passed away, that if they would discharge the judicial office with effect, and so as to command respect, they must be familiar with every branch of law with which they may have to deal judicially; and that now to ascend the Bench with adequate knowledge of but one branch of law, is like a soldier going into battle with but one leg, or one arm.

There is danger that the attempt to widen the field of legal study may result in the acquirement of a shallower and more superficial knowledge of the subject than is attained by those who restrict their researches to a narrower field; and we may have a generation of lawyers more widely informed than their predecessors in the law as a whole, though less accurately versed in particular branches of the law. Whether this will be beneficial to the community at large, time alone can tell.

Another, and a serious matter affecting the future status of the Bench, is the question of remuneration. Ominous rumours have reached us that a high judicial functionary in the zenith of his powers and usefulness, is seriously contemplating retiring from the Bench, and resuming practice at the Bar, simply on account of the inadequacy of his official pay. Such a step, we do not hesitate to say, would be a public calamity, and even the bare possibility of such a proceeding is greatly to be deplored. The retention of the salaries of the judges at their present figure is justified, we believe, on the ground that it is found that men can be got who are willing to accept the office at the present remuneration. This is, however, really an argument for the reduction of the salaries to half their present amount, for we are quite sure if they were reduced by one half to-morrow, we could within twenty-four hours find respectable men to fill every vacant post at the reduced rate. We would not answer, however, for their judicial ability, nor guarantee that they would be the best men to make judges. It is notorious that the present salaries are not sufficient to tempt the most competent men; and if the leaders of the Bar, the men who have established reputations for learning and ability, cannot be tempted to take judicial office merely on the ground of the insufficiency of the pay, then it will inevitably come to pass that the Bench as a whole will become inferior in capacity to the Bar, to the grievous detriment of litigants, and the public interests.

IT is somewhat curious that although twenty-eight years have elapsed since our first Married Women's Property Act was passed, it was only the other day, for the first time, that the question came before the courts as to the effect of the existence of a marriage settlement on the operation of the Act.

It will be remembered that the Act of 1859 (C. S. U. C. c. 73) provided (section 2) that "every woman, who on or before the 4th day of May, 1859, married *without any marriage contract or settlement* shall and may, from and after the 4th May, 1859, notwithstanding her coverture, have, hold and enjoy all her real estate not then, that is on the 4th day of May, taken possession of her husband by himself or his trustee, and all her personal property not then reduced into the possession of her husband, whether belonging to her before marriage, or in any way acquired by her after marriage, free from his debts, etc., etc." It is obvious that a question might arise upon the construction of this Act, as to the effect of the words we have italicized. And yet, strange to say, notwithstanding all the litigation which has arisen under the Statute, the precise effect of these words seems never to have been called in question until the case of *Dawson* v. *Moffatt*, 13 O. R. 170. In

that case a contest arose between the creditors of a husband and his wife, who had married in 1842 with a settlement; as to the right of the wife to certain property purchased by her in 1876. It was claimed by the creditors, that the wife having married with a settlement the property in question, having been purchased by her after marriage, became the husband's property, and therefore his creditors were entitled to seize it for the payment of their debts. The property in question was a debt due to the husband which the wife had purchased from her husband's assignee in insolvency; the husband had subsequently sued for, and recovered the debt, which was at the time in court. The fund was unaffected by the marriage settlement. It was argued for the creditors, that the existence of the settlement deprived the wife of the benefit of the Act of 1859, but the learned Chancellor having regard to the provisions of section 19, and what he considered the scope of the Act, came to the conclusion, that the existence of the settlement did not prevent the application of the Act to property subsequently acquired by the wife, and not affected by the settlement.

The 19th section reads as follows: "Nothing in this Act contained shall be construed to prevent any *ante* nuptial settlement or contract being made in the same manner and with the same effect as such contract or settlement might be made if this Act had not been passed; but notwithstanding any such contract or settlement, any separate real, or personal property, of a married woman, acquired either before, or after marriage, and not coming under, or being affected by, such contract or settlement, shall be subject to the provisions of this Act, in the same manner as if no such contract or settlement had been made; and as to such property, and her personal earnings, and any acquisitions therefrom, such woman shall be considered as being married without any marriage contract or settlement."

We are disposed to think that the distinction between marriages which had taken place before the passing of the Act of 1859, and those which have taken place subsequent thereto, has been lost sight of in the case to which we refer. This point does not seem to have been taken at the Bar, nor was it referred to by the learned Chancellor, and yet it occurs to us, that in the application of the Act, there is a vital distinction between the two classes of cases.

It must be remembered that the Act of 1859 was the first step in the way of an attempt to alter the common law rights of husbands and wives. The hardships which the common law entailed were always open to mitigation by the contract of the parties, and marriage settlements were a very common way of securing to the wife separate rights of property. Now it is reasonable to conceive that the Legislature, in its attempt to give married women separate rights of property, would not pretend to interfere in the case of husbands and wives who had actually entered into contractual relations regarding their property: and in cases where an actual settlement existed between the parties, it might not unreasonably be thought to be a part of the agreement between them, that the wife's property, unaffected by the settlement, should pass to the husband as at common law. In such cases the parties had made their contract, and it is not unreasonable to think the Legislature should in such cases in effect say, We will not interfere,—and this in effect they seem to do, for the whole additional rights given by the 2nd section are predicated upon the fact that she, on whom they are conferred, has married "without a settlement." In such cases, the Legislature seeks to provide a

statutory settlement for married women who have no contractual settlement.

But then comes the 19th section which is said to modify the literal wording of the 2nd section. But we think, if carefully considered, it will be found that that section is clearly and indubitably intended to be confined to cases in which the marriage takes place after the Act of 1859. The first clause of the section obviously applies to future marriages, and the whole of the rest of the section refers to "such contract or settlement," *i.e.*, as we are disposed to think a "contract or settlement" made after the Act.

In the case of *Dawson* v. *Moffatt*, the marriage took place in 1842, and so far as the case turned upon the operation of the Married Women's Property Act, of 1859, we should think it ought to have been decided as though that Act had not been passed.

SELECTIONS.

ACCEPTANCE OF RISK FROM BREACH OF STATUTORY DUTY.

The case of *Baddeley* v. *Granville* has now been fully reported in the September number of the *Law Journal*, and fully sustains the statement of Wills, J., that it is of great importance. It removes one class of cases, at all events, beyond the reach of the controversy as to the effect of knowledge of the risk, in relation to the bearing of the maxim *volenti non fit injuria*, and negatives the application of *Thomas* v. *Quartermaine*. This, indeed, was a result foreshadowed by the judgments of Bowen and Fry, L.JJ., in that case, but their observations were *obiter*, while opposed to the opinion of the learned Master of the Rolls. "There may," said Bowen, L.J., "be concurrent facts which justify the inquiry whether the risk, though known, was really encountered voluntarily. The injured person may have had a statutory right to protection, as where an Act of Parliament requires machinery to be fenced." "Knowledge," said Fry, L.J., "is not of itself conclusive of the voluntary character of the plaintiff's actions; there are cases in which the duty of the master exists independently of the servant's knowledge, as when there is a statutory duty to fence machinery." Such a case was *Baddeley* v. *Granville*. There it appeared that a rule made under the Coal Mines Regulation Act, 1872, provided that a brakesman should be constantly present at the pit's mouth when men were going down the shaft. The plaintiff's husband was killed by reason of the absence of the brakesman during the night; but it was the usual practice at the mine, as the deceased knew, not to have a brakesman at the pit's mouth during night. Did *Thomas* v. *Quartermaine* apply, establishing that when an action will *prima facie* lie under the Employers' Liability Act, 1880, it is an answer if the servant has voluntarily taken upon himself the risks which proved fatal? Wills and Grantham, JJ., were of opinion that the maxim *volenti non fit injuria*, on which *Thomas* v. *Quartermaine* proceeded, had no application here, the injuries having been directly caused by the breach of what was equivalent to a statutory duty on the part of the manager and owner of the mine. The application of that doctrine, observed Mr. Justice Wills, "is to be watched with great care in each individual case;" there was the deliberate expression of opinion by two of the judges of the Court of Appeal that it did not apply in the case of a direct breach of a statutory obligation; and further, he added, "there is a great deal to be said on public grounds in favour of that view. In the first place a statutory obligation should be incapable of being got rid of in the future. In respect of the results of past breaches persons may come to what agreements they please. But there ought not to be any encouragement to a deliberate engagement between A. and B. that B. shall take no action for the future breach by A. of a law which is for the protection of B. I do not know whether that would be an illegal agreement as be-

ing against public policy. But it seems to me that it is contrary to public policy when the supposed agreement, in consequence of which the principle *volenti non fit injuria* arises and has to be applied, comes to anything like this, that the master agrees to employ the servant on the terms that the servant will waive breaches by the master of a statutory obligation, and will in that sense, and to that extent, connive at his disregarding a statute, the obligations of which are imposed for the benefit of others as well as of the parties to the agreement. A great deal is to be said in favour of the opinion that where an accident arises from the breach of a statutory obligation the maxim *volenti non fit injuria* ought not to apply. In the present case I follow that opinion, and hold that there having been a breach of a statutory obligation the maxim *volenti non fit injuria* does not apply, and that the case is taken out of the rule laid down in *Thomas* v. *Quartermaine*." But, see the maxim applied in such a case in *Senior* v. *Ward (infra)*.

We should add, however, that "contributory negligence" may be a defence in case of breach of a statutory duty: *Senior* v. *Ward*, 1 E. & E. 385, 28 L. J. Q. B. 139; *Caswell* v. *Worth*, 5 E. & B. 385, 25 L. J. Q. B. 121; *cf. Britton* v. *G. W. Cotton Co.*, L. N. 7 Ex. 130, and *Holmes* v. *Clarke*, 7 H. & N. 937. "But the doctrine of *volenti non fit injuria*," as Bowen, L.J., put it in *Thomas* v. *Quartermaine*, "stands outside the defence of contributory negligence, and is in no way limited by it." But the mere knowledge of the plaintiff under the circumstances in *Baddeley* v. *Granville* would not have established such a defence, any more than the knowledge of the plaintiff in *Thomas* v. *Quartermaine*. Would there have been contributory negligence, then, if Baddeley had merely trusted that the banksman was on duty, and had worked on without examining for himself as to the risk incurred? *Senior* v. *Ward (ubi supra)* and *Woodley* v. *Metropolitan Ry. Co.* (2 Ex. D. 384) may be referred to; but a case of more resemblance is *M'Inally* v. *King and others* (24 Sc. L. R. 15). In that case, where it appeared that labourers had been engaged in undermining a bank of clay in a quarry when the clay slipped down and killed one of them, the Scottish Court of Session held—on a proof that it was the duty of the employer, according to the practice of the work, to have a watchman to warn the workmen of signs of a fall, but that none had been set, and in consequence the accident had happened—that the deceased was not guilty of negligence contributing to the accident in having trusted that a watch would be set, and worked on without examining for himself as to the risk. "In regard to the question of contributory negligence on the part of the deceased," said Lord Young, "the men who were working here were labourers, and the alleged contributory negligence comes to this, either that they ought to have enough intelligence to see for themselves when they came to a dangerous part of the operation and set a watch for themselves, or else that they should take care not to go on too long without seeing that the foreman did his duty. The usual case of contributory negligence is one of a man rushing into danger and risking his life against all the laws of ordinary prudence, but that is not the case here. I rather think that the deceased was entitled to assume that the foreman Miller had done his duty and sent up a man to watch. Miller was not in ignorance of the state of matters at this face, and I think it accords with the evidence that Miller's duty from the first was to have had some one on the top to watch for signs of danger. I do not think that the deceased was reckless of his own safety in that he went to work without seeing that there was a man on the top watching." It is indeed, in very different circumstances that the doctrine of contributory negligence finds a basis for reasonable application; and no doubt, as it was put in the same case, while employers are bound to take reasonable precautions for the safety of their men, they are not obliged to make provision for the safety of their workmen when they rush into dangers of their own making. *Cf. M'Evoy* v. *Waterford Steamship Co.*, 18 L. R. Ir. 159; *Martin* v. *Connah's Quay Alkali Co.*, 33 W. R. 216. Nor is the defence of contributory negligence done away with by the Employers' Liability Act; for, this statement no longer resting on a mere *semble* in *Stewart* v. *Evans* (49 L. T. N. S. 138), we have now Bowen, L.J., in *Thomas* v. *Quartermaine*, saying:

„ These two defences, that which rests on the doctrine *volenti non fit injuria* and that which is popularly described as contributory negligence, are quite different, and both, in my opinion, are open to an employer, if sued under the Employers' Liability Act of 1880."—*Irish Law Times.*

ESTOPPEL AND INTERPLEADER.

The case of *Richards* v. *Jenkins*, 56 Law J. Rep. Q. B. 293, reported in the June number of the *Law Journal* Reports, is likely to be of use in considering some of those questions of delicacy which often arise in interpleader issues. It concerns mainly the application of the doctrine of estoppel to questions of title to personalty arising in interpleader. The doctrine is one which of late years has made rapid progress, and no doubt has, especially in its application to the commercial transactions of life, added to the weapons of justice and facilitated business. In the hands of great and far-seeing judges no harm is done by its use, but there is, perhaps, some danger that in weaker hands it may degenerate into a means for undermining the positive and strict rules which are the foundation of the law of property. It is, therefore, as well that in the strict form of proceeding known to the law of personal property by way of interpleader the doctrine of estoppel should be considered as barred. The form of the issue "whether the property is the property of A as against B" is as narrow as it well can be, and probably the narrower it is the better.

The case arose out of the seizure by a County Court bailiff of certain machinery and plant which had been left by the claimant on a brickfield leased by him to the execution debtor. The lease was for twenty-five years from 1879. In 1884 the claimant had become bankrupt, but as the goods were in the possession of the execution debtor, and the bankrupt gave him no information in regard to them, the trustee did not make an attempt to take possession of them. The appearance of the bailiff, however, drew the bankrupt from his position of masterly inactivity: he became plaintiff in the interpleader issue, and the County Court judge decided in his favour on the authority of the case of *Carne* v. *Brice*, 18 Law J. Rep. Exch. 28. That was an interpleader issue between a married woman and the execution creditor of her husband, the goods seized being part of her separate estate. In that case the Court of Exchequer declined to allow the wife to give proof of the fact that the husband had become bankrupt, and that therefore the goods were not his. The County Court judge appeared to think that the decision governed this case, and that the effect of it generally was to prevent the *jus tertii* being set up in interpleader, but the effect of it in fact was only to prevent the *jus tertii* being set up in favour of the claimant, and it discountenanced the idea that the claimant could succeed merely by showing that the goods were not the execution debtor's. This view of the County Court judge led to a judgment in favour of the wrong person. The view taken by the Divisional Court (55 Law J. Rep. Q. B. 435) was in favour of the right side, but according to the Court of Appeal proceeded on the wrong ground. The Divisional Court held that the possession of the bailiff was the possession of the execution creditor, and therefore that the onus of proof lay on the claimant to show that the possession, which was *prima facie* evidence of title, was not in accordance with the true title. This the claimant was unable to do, because whatever was proved to be his he at the same time showed to be his trustee's. The Court of Appeal held that the theory of the possession of the bailiff or sheriff being the possession of the judgment creditor is unsound. The Master of the Rolls points out with much force that the moment of time at which the title is to be ascertained is the moment before the seizure, and that the possession after that is a possession for the law and not for either of the parties. On consideration this seems clear. The possession of goods by the sheriff can no more affect the rights of the parties to the goods than the possession by the Bank of England of money paid into court can affect the rights of parties to it. The point of time on which the rights of the parties centre is necessarily the seizure. But for the interpleader there would be an action of trespass, and in that action the question of right in the goods would have to be considered in reference to the moment of

seizure, and not subsequently. The Master of the Rolls proceeds to show that in this case the possession at the time of the seizure was in the execution debtor, and that the onus lay on the claimant to show that this possession was, in fact, his. He could not do so by reason of the bankruptcy, and the question then arose whether the execution creditor was not estopped from making use of the bankruptcy. On this point the Master of the Rolls assumes that as between the claimant and the execution debtor there was an estoppel, but points out that the estoppel created no interest in the goods, but simply prevented the execution debtor from saying the goods did not belong to the claimant and did not bind the judgment creditor. The reason given for this rule is that the execution creditor does not claim through or under the execution debtor, but claims through or under the law.

The correctness of this decision may be tested by supposing how the case would stand if no interpleader had been ordered. The claimant would then be plaintiff and the sheriff defendant in an action for trespass to goods. The sheriff would justify the seizure by showing that the goods were in the possession of the judgment debtor. Upon that the plaintiff would have to show that the possession of the execution debtor was his possession, and he would have to show it by evidence good against the sheriff. The Court of Appeal decide that the law of estoppel is strictly a law of evidence, and can only be set up against the person estopped and those claiming under him in the strict sense of the word, and that the sheriff is not one of these. The decision is important, as it gives the execution creditor goods under an execution which his debtor could not have given to him in payment of his debt by agreement; but in applying the law of estoppel the conflicts of justice must be considered, and at least the execution creditor is no worse off than if an action had been brought against the sheriff.—*The Law Journal.*

GUARDIANSHIP OF INFANTS.

One of the first cases, if not the first case demonstrating the utility of the Guardianship of infants Act, 1886 (49 & 50 Vict. c. 27),* recently came before Mr. Justice Kay. The Act has effected considerable alteration in the law, and has given to the court increased powers to deprive a father of the custody of an infant child, and to deliver the child to its mother. Under the previous law there was a limit of age up to which the mother could obtain the custody of her child. This age was at one time seven and afterwards sixteen years, but under the recent Act there is no such limit of age. Moreover, the consideration upon which the court is to act have been altered by the new statute, which provides (sect. 5) that three things are to be regarded, viz., the welfare of the infant, the conduct of the parents, and the wishes of the mother as well as of the father. In *Re S. Witten* (an infant) the application was mainly grounded on the alleged misconduct of the father. A man of 53 years of age, he was accused of having formed an improper connection with a young girl of six-and-twenty, who was under his tuition in medicine. The father wholly denied impropriety, said that he had adopted the lady in question, and that he never acted towards her in any other way than a father ought to act towards his daughter. It appeared, however, that the father had lost a position of trust in charge of a mission in consequence of being unable satisfactorily to meet this same charge of impropriety; that the wife had for the same reason commenced proceedings for a judicial separation, but had allowed them to be withdrawn on terms proposed by her husband in writing, which, however, he ultimately refused to carry out; and finally, that the young lady in question was still living with the father, having changed her surname to "Witten." Mrs. Witten, the mother of the infant, had heard that her husband intended in about two months to go to Morocco with their child and the young lady whose conduct was impunged, and to live there permanently. This being so, Mr. Justice Kay had no hesitation at all in acceding to the mother's application for the custody of the child, who is ten

* See 50 Vict. c. 21 (O.).

years old. His lordship hoped that the father's relations with Miss Dick were innocent, but said it was certainly rather difficult to believe it. But whether they were innocent or not, what was the conduct of a man who had completely destroyed the character of this girl by his association with her, as she herself had admitted on affidavit, and who had driven his wife by his conduct and association with this girl to take divorce proceedings against him, and was now putting pressure on his wife by taking from her this boy ten years old, the child of their marriage, and keeping him in his own house where he was living with Miss Dick? If the relations were as innocent as possible such conduct on the part of a married man was inexcusable — conduct which must give rise in the mind of any unprejudiced person to the gravest possible suspicion of his fidelity to his wife, and conduct which was in every way entirely indefensible. The boy must at once be delivered into the custody of his mother, and the father was bound to pay the cost of the application. Further, the judge declined to allow the boy to go to any house where Miss Dick was living, but said he might reside with his father for a fortnight in the summer and a week in the winter holdays, in any house in which that lady was not, and to which she did not come. If she attempted to asssociate with the boy in any shape or way his lordship would at once interfere. It may well be doubted whether such an application as this would have been successful, or so completely and easily successful, without the Legislation of 1886.—*Law Times.*

RECENT ENGLISH DECISIONS.

The *Law Reports* for September comprise 19 Q. B. D. pp. 277-356; 12 P. D. pp. 167-184; 35 Chy. D. pp. 611-736; and 12 App. Cas. pp. 283-470.

ADVERTISING HOARDINGS—AGREEMENT CREATING TENANCY—LIABILITY TO BE RATED.

Taylor v. *Pendleton*, 19 Q. B. D. 288, though not perhaps likely to be of much practical importance here, is deserving of a briet notice. The question was one arising on an assessment for poor rates. The parties assessed were advertising agents who had contracted with the owner of land for the privilege of erecting an advertising hoarding for a yearly rent with the privilege of removing a wall, the agreement to remain in force three years and be afterwards terminable by twelve months' notice, but if the owner should be obliged to give less than twelve months' notice he was to refund £20. By another agreement the owner agreed to let, and the advertising agents agreed to take another advertising station at a yearly rent for seven years, and the agent agreed to pay rates and taxes. The question for the court was whether these agreements amounted to a tenancy, or a mere license. The court (Wills and Grantham, JJ.) were unanimously of opinion that a tenancy was created in the land actually occupied by the hoardings, and that the lessees were, in respect of their tenancy, liable to be rated.

PRACTICE—COMPULSORY REFERENCE—OFFICIAL REFEREE—C. L. P. ACT, 1854, s. 3—(R. S. O. c. 50, s. 189)—DISCRETION.

The point decided in *Knight* v. *Coales*, 19 Q. B. D. 296, is that under sec. 3 of the C. L. P. Act, 1854 (R. S. O. c. 50, s. 189), the court or a judge has jurisdiction to refer compulsorily the whole matter in dispute in an action, if any part of the matter in dispute consists of matters of mere account which cannot conveniently be tried in the ordinary way; and that under the Judicature Act the reference may be directed to an official referee. Such a reference having under such circumstances been directed by Huddleston, B., and his order being affirmed by a Divisional Court, the Court of Appeal, though not prepared to say that they would have made such an order, nevertheless refused to interfere.

MEDICAL PRACTITIONER — UNREGISTERED ASSISTANT, RIGHT OF REGISTERED PRACTITIONER TO RECOVER FOR SERVICES OF—MEDICAL ACT, 1858, 21 & 22 V. c. 90—(R. S. O. c. 142, s. 43).

Howarth v. *Brearley*, 19 Q. B. D. 303, is a decision under the Medical Act, 1858. A qualified medical practitioner, duly registered under the Act, established a branch practice under the management of his brother, who was not so qualified or registered, and held no apothecaries' certificate. The action was brought by the assignee of the registered practitioner to recover charges for medical

aid and advice rendered and medicines supplied to the defendant by the brother alone, without consulting the registered practitioner. But it was held by Lord Coleridge, C.J., and Denman, J., that the plaintiff was not entitled to recover. Denman, L.J., says at p. 307:

> Looking at the Act, I think that a registered practitioner cannot give a roving authority to an unqualified person to practise in his name without consulting him or taking his advice, and then sue for the services rendered by the unqualified person. It would be entirely contrary to the purpose and intention of the Act.

ECCLESIASTICAL LAW—CONTEMPT.

Those who take any interest in the ecclesiastical litigation of the old country will find the case of *Ex parte Cox*, 19 Q. B. D. 307, worth reading. This was an application for a *habeas corpus* made by a clergyman imprisoned for disobedience to the order of the official principal. The applicant had been found guilty of ritualistic offences under the Church Discipline Act, and an order had been made for his suspension *ab officio* for a period of six months. During this period he officiated in breach of the order. Afterwards, and after the expiration of the six months, he was imprisoned under a writ *de contumace capiendo*. The court, Lord Coleridge, C.J., and A. L. Smith, J., held that the imprisonment was illegal, as the period of suspension under the order had expired; the order of suspension was no longer in force, and as the statute 53 Geo. III. c. 127, s. 1, authorized the issue of the writ *de contumace*, not by way of penalty for disobedience, but merely for enforcing the execution of the sentence pronounced by the court, as was determined by the previous authorities, it was held that it was too late after the period of suspension had expired to issue the writ. The prisoner was therefore discharged. The attempt to regulate such matters as the dress and posture of ministers of religion by process of law, enforced by imprisonment, seems a little out of date on this side of the Atlantic.

CONTRACT—SURETYSHIP AND GUARANTEE—PROMISSORY NOTE—CONSIDERATION.

Crears v. *Hunter*, 19 Q. B. D. 341, was an action on a promissory note in which one of the joint makers set up want of consideration. The note was given under the following circumstances:—The defendant's father had, before the defendant came of age, borrowed a sum of £200 from the plaintiff, promising that when his son came of age he would become surety for the debt. In 1877, after the defendant came of age, the plaintiff procured the defendant and his father to sign the promissory note sued on, whereby they jointly and severally promised to pay to the plaintiff or order "the sum of £200, being money lent, with interest on the same from Martinmas last past half yearly at the rate of five per cent. per annum." There was no evidence as to anything being said by the parties in relation to the signing of the note. Interest had been paid on the note, sometimes in the defendant's presence. It will be noticed that the note in terms did not provide for any extension of time for payment of the debt, and it was contended by the defendant that the mere expectation of forbearance, even though realized, was not sufficient consideration. But the Court of Appeal (Lord Esher, M.R., and Lopes and Lindley, L.L.J.) overruled the Divisional Court and affirmed the judgment of A. L. Smith, J., that if, as was found to be the fact by the jury, the note was signed by the defendant in order that the plaintiff might give time to his father, and the plaintiff did give time, that was a good consideration. Lord Esher, M.R., says at p. 345:

> It was argued that the request to forbear must be express. But it seems to me that the question whether the request is express or is to be inferred from the circumstances is a mere question of evidence. If a request is to be implied from the circumstances, it is the same as if there were an express request. The question is, therefore, whether there was sufficient evidence in this case to enable the jury to infer that the understanding between the plaintiff and defendant was that, if the plaintiff would give time to the father, the defendant would make himself responsible.

ESTOPPEL—STATEMENT BY DEBTOR OF HIS AFFAIRS—BANKRUPTCY.

Roe v. *The Mutual Loan Fund*, 19 Q. B. D. 347, is a case illustrative of the law of estoppel. The plaintiff gave a bill of sale on his furniture to the defendants to secure an advance. Before the payment of the first instalment due under the bill of sale the plaintiff filed a petition in bankruptcy, and in his statement of affairs returned the defendants as secured creditors. The defendants sold the furniture under their bill of sale, and the proceeds being insufficient to pay their debts, they

proved for the residue. A composition of 2s. 6d. in the pound was, on the report of the official receiver sanctioned by the court, and paid to the creditors, including the defendants, but without prejudice to any claim the plaintiff might have in regard to the seizure and sale of the furniture. The plaintiff subsequently brought an action for the wrongful seizure of the goods, alleging that the bill of sale was invalid. Pollock, B., on a hearing on further consideration gave judgment in favour of the plaintiff; but the Court of Appeal (Lord Esher, M.R., and Lindley and Lopes, L.L.J.) reversed his decision, holding that the plaintiff having in the bankruptcy proceedings treated the bill of sale as valid, and obtained thereby an advantage to himself, could not afterwards allege that the bill of sale was invalid. With regard to the payment of the composition "without prejudice," Lopes, L.J., says:—"The letter of the solicitors was relied on, but it cannot assist the plaintiff because the words 'without prejudice' are not consistent with the plaintiff's conduct."

PRACTICE—DISCOVERY—PRODUCTION OF DOCUMENTS—PROFESSIONAL PRIVILEGE—LETTERS TO SOLICITOR—EXAMINATION FOR DISCOVERY.

Passing now to the cases in the Probate Division, *Re Halloway*, *Young* v. *Halloway*, 12 P. D. 167, is the first that claims our attention. The plaintiff sued to recall a probate on the ground that the testator was not of sound mind, and that the will was obtained by undue influence of the defendants, two of whom were the executors, and the third universal legatee. After the commencement of the action four anonymous letters relating to the matter in dispute were received—two by the plaintiff, one by her solicitor, and another by her counsel in the action. Butt, J., on the application of the defendants, ordered all the letters to be produced, but the Court of Appeal (Cotton, Lindley and Bowen, L.L.J.) varied this order by confining it to the letters sent to the plaintiff, and exempting from production those sent to her legal advisers. These, the Court of Appeal held, stood on the same footing as information obtained by the legal advisers by their personal exertions for the purpose of the suit. Another point in the case was as to the right of the plaintiff to ask the following questions for the purposes of discovery. 3. "What sums of money have you and each of you received from the deceased (1) by way of payment for services rendered; (2) by way of loan; (3) by way of gift; and also whether the universal legatee had since the death of the testator made over any and what part of the property to the other defendants?" These questions the defendants declined to answer as being irrelevant. But the Court of Appeal affirmed the order of Butt, J., directing the questions to be answered, limiting interrogatory three to a period of three years.

LEGITIMACY—PATERNITY OF CHILD BORN IN WEDLOCK—PRESUMPTION OF LEGITIMACY.

The only other case in the Probate Division is *Bosvile* v. *The Attorney-General*, 12 P. D. 177, in which the important question is discussed whether the presumption that a child born in wedlock is legitimate may be rebutted, and if so under what circumstances, and by what evidence. The suit was one for a declaration of legitimacy. The plaintiff had been born 276 days after the last opportunity of intercourse between the husband and wife. Immediately after this last opportunity, the wife had eloped with a paramour, with whom she subsequently lived in adultery, and there was evidence in the wife's conduct tending to show that she regarded the child as the offspring of her paramour. The judge at the trial directed the jury that it was for them to say whether on the whole evidence given on behalf of those who asserted illegitimacy, the conviction had been brought home to their minds that the husband was not the father of the child; and he read to them the opinion of Lord Lyndhurst in *Morris* v. *Davies*, 5 Cl. & F. 163. The jury found the child was illegitimate; and the Divisional Court (Lord Coleridge, C.J., and Butt, J.) held that the direction was right, and, that the verdict was not against evidence.

PRACTICE—CONCURRENT ACTIONS—ACTION IN COLONY, AND ENGLAND—COUNTERCLAIM.

Turning now to the cases in the Chancery Division, *Mutrie* v. *Binney*, 35 Chy. D. 614, is the first that demands attention. The facts of the case were a little peculiar. B., of London, and M. and C., of Honduras, carried on business in partnership at Honduras, under the style of Guild & Co. B. and N. carried on business in partnership in London also

under the name of Guild & Co. The Honduras firm employed the London firm as their agents, under an agreement that B.'s share in the Honduras firm should be placed to the credit of the London firm of Guild & Co. The Honduras partnership was dissolved, and a decree granted in Honduras for taking the partnership accounts. Before those accounts were fully taken, M. and C. brought this action in England against the London firm for an account of the dealings between the two firms, alleging the defendants to have made improper profits in their agency. The defendants denied having made improper profits, and by counterclaim claimed to have the accounts of the Honduras firm taken. This counterclaim North, J. struck out; but the Court of Appeal (Cotton, Lindley and Lopes, LL.J.) were of opinion, that though if M. and C. had not brought their action the defendants would not, after obtaining a decree in Honduras, have been allowed to carry on another action in England for the same purpose, still as the two actions were so closely connected that neither could be finally wound up independently of the other, the defendant ought to be allowed to prosecute his counterclaim so as to be in a position to ask at the trial of this action for such a decree as might be right, having regard to the then position of the Honduras action; and on N.'s undertaking to be bound by the proceedings in the Honduras action the order of North, J. was discharged.

COMPANY—WINDING-UP—DISTRESS FOR RENT ACCRUED AFTER WINDING-UP ORDER — MORTGAGE WITH ATTORNMENT CLAUSE — COMPANIES ACT, 1862, ss. 87, 163 (R. S. C. c. 129, ss. 16, 17).

In re Lancashire Cotton Spinning Co., Ex parte Carnelly, 35 Chy. D. 657, was an application under the Winding-up Act by mortgagees having an attornment clause, for leave to distrain for rent, accrued after the winding-up order, under the following circumstances: The company in liquidation had mortgaged their property to the mortgagees, the mortgage containing a clause whereby the mortgagors attorned tenants to the mortgagees at an annual rent of £1,595. The company having been ordered to be wound up, the official liquidator remained in possession of the mortgaged property for more than a year in order, if possible, to sell the business of the company as a going concern. He paid the expenses of keeping the property in repair, but did not actually work the mills thereon. The mortgagees acquiesced in this arrangement as best for all parties. The motion was for leave to distrain for the rent thus accrued since the winding-up order. But the Court of Appeal affirmed the decision of North, J., refusing leave, on the ground that it appeared that the occupation of the liquidator was for the benefit of the mortgagees as well as the company: and it would appear that in the opinion of the court, a mortgagee with an attornment clause seeking to distrain for his interest after a winding-up order is in a less favourable position than a landlord seeking to distrain for rent; and that in order to obtain such leave, it is in any case needful to establish that the rent has accrued under such circumstances, that it ought to be paid as part of the winding up proceedings. The Court of Appeal at the same time express grave doubts as to the correctness of the construction of sec. 87 (R. S. C. c. 129, s. 16) as determined *In re Exhall Coal Mining Co.*, 4 D. J. & S. 377, and doubted whether the court had in any case power to authorize a distress after a winding-up order had been made.

RAILWAY COMPANY—SUBSCRIBING COMPANY'S FUNDS TO PUBLIC OBJECTS—ULTRA VIRES—INJUNCTION.

In *Tomkinson* v. *South Eastern Ry. Co.*, 35 Chy. D. 675, a motion was successfully made by a stockholder of the defendant company to restrain the company and its officers from paying out of the moneys of the company a sum of £1,000, which, at a meeting of the stockholders, the directors were by resolution authorized to subscribe towards the erection of the Imperial Institute. It was sought to justify the payment on the ground that the establishment of the Institute might benefit the company by causing an increase of passenger traffic over their line. But Kay, J. pronounced the proposed expenditure *ultra vires*, and granted the injunction.

PAROL AGREEMENT—PART PERFORMANCE—EASEMENT—INJUNCTION—STATUTE OF FRAUDS.

In *McManus* v. *Cooke*, 35 Chy. D. 681, the applicability of the equity doctrine of part-performance to other contracts than those for the purchase and sale of land, of which specific performance may be decreed, is elaborately discussed by Kay, J. The plaintiff and the

defendant were owners of adjoining houses, and being about to rebuild, entered into a verbal agreement that the plaintiff should pull down a party wall and rebuild it lower and thinner, and that each party should be at liberty to make a lean-to skylight, with the lower end resting on the party wall. The plaintiff rebuilt the party wall, and erected a lean-to skylight on his side of it, as agreed; the defendant also erected a skylight on his side, but instead of a lean-to, so shaped it, as to obstruct the access of light to the plaintiff's premises more than the lean-to would have done. The action was brought to restrain the defendant from permitting his skylight to remain in its present position, or from erecting any structure contrary to the alleged agreement. The plaintiff relied on his performance of the agreement, as entitling him to specific performance of the agreement by the defendant. Counsel for the defendant argued that the doctrine of part performance was confined to sales of interests in land, and that what was claimed by the plaintiff was a mere easement, which was not an interest in land; but Kay, J., after reviewing the authorities, at p. 697, deduces from them the following propositions:

(1) The doctrine of part performance of a parol agreement which enables proof of it to be given, notwithstanding the Statute of Frauds, though principally applied in the case of contracts for the sale or purchase of land, or for the acquisition of an interest in land, has not been confined to those cases. (2) Probably it would be more accurate to say it applies to all cases in which a Court of Equity would entertain a suit for specific performance, if the alleged contract had been in writing. (3) The most obvious case of part performance is when the defendant is in possession of land of the plaintiff under the parol agreement. (4) The reason for the rule is that where the defendant has stood by, and allowed the plaintiff to fulfil his part of the contract, it would be fraudulent to set up the statute. (5) But this reason applies whenever the defendant has obtained, and is in possession of, some substantial advantage under a parol agreement, which, if in writing, would be such as the court would direct to be specifically performed. (6) The doctrine applies to a parol agreement for an easement, though no interest in land is intended to be acquired.

Applying these principles to the case before him he granted the injunction as prayed.

TRADE MARK—INFRINGEMENT OF TRADE MARK—ACTIO PERSONALIS MORITUR CUM PERSONA.

The simple point determined by Chitty, J., in *Oakey* v. *Dalton*, 35 Chy. D. 700, was, that an action to restrain the infringement of a registered trade mark with the usual claim for an account of profits and damages is not within the rule *actio personalis moritur cum persona*, but being brought in respect of an injury to the property of the owner of the mark, may be continued by his executors after his death.

DISCOVERY—PRODUCTION OF DOCUMENTS—FRAUD—TRUSTEE.

In re Postlethwaite, *Postlethwaite* v. *Rickman*, 35 Chy. D. 722, was an application to compel production for the purpose of discovery. The action was brought for an account of profits in respect of a purchase of trust property, the plaintiff alleging that the sale was secretly made for the benefit of R., one of the trustees, with the connivance of T., another trustee who was a solicitor. The representatives of R. claimed privilege from production for letters from T. to R., and for T.'s bill of costs, on the ground that the communications were made by T. acting as solicitor to R. in his private capacity. But North, J., ordered the documents to be produced because the communication passed between two trustees, and because the solicitor and his client were charged with fraud. The latter ground is one which appears to us to be open to abuse. There may be cases where a plaintiff, by stating his case honestly, according to the facts, would not be entitled to the production of documents in the defendant's possession, but by dishonestly stating a case of alleged fraud, he may, according to the cases, procure production of documents he would otherwise not be entitled to, and having secured the benefit of the production, he may amend his statement of claim and strike out the fictitious allegations of fraud. One would think some *prima facie* proof of the existence of the alleged fraud should be required to be given, before documents, otherwise privileged, should be ordered to be produced on that ground.

WILL—BEQUEST—FUTURE ILLEGITIMATE CHILDREN, BEQUEST TO.

In re Hastie's Trusts, 35 Chy. D. 728, Stirling, J., discusses the law relating to bequests in favour of illegitimate children. A testator who had been for some years illicitly cohabiting with one Martha Eliza Macdaniell, by whom he had four illegitimate children, made his will whereby he gave a trust fund "in trust for my four natural children by M. E. M., viz.

I. C., E. C. and J. H., and all every other children and child which may be born of the said M. E. M., previous to, and of which she may be pregnant, at the time of my death, share and share alike." Besides the four children mentioned in the will, there were three other children born of M. E. M., after the date of the will and before the testator's death. A contest having arisen as to the fund in question, between these two classes of children, it was held by Stirling, J., that the word "children" was *prima facie* confined to legitimate children, but where, as in this case, there were upon the face of the will indications that the testator intended to include illegitimate children, they will be included. With regard to the validity of the bequest in favour of after born illegitimate children,—though admitting that a bequest to the testator's future illegitimate children would have been void for uncertainty, because it would have involved inquiries as to his access or non-access, and the access or non-access of other persons to the mother, which the law forbids;—yet as the objects of this bequest were to be identified merely by their maternity, the objection of uncertainty did not arise; and adopting the reasoning of James, L.J., in *Occleston* v. *Fullalove*, 9 Chy. 147, he decided that such a bequest could not be void on grounds of public policy, because the will does not take effect until the testator's death.

CONTRACT TO MAKE GOODS EQUAL TO SAMPLE—SALE BY SAMPLE—CAVEAT EMPTOR—WARRANTY OF MERCHANTABLENESS, IMPLIED—LATENT DEFECT.

Proceeding now to the Appeal Cases, the first to be noted is *Drummond* v. *Van Ingen*, 12 App. Cas. 284. This was an appeal to the Lords from the Court of Appeal on a question of mercantile law. The respondents, who were cloth merchants, ordered of the appellants who were cloth makers, worsted coatings, which in quality and weight were to be equal to samples previously furnished by the appellants to the respondents. The respondents' object was, as the appellants knew, to sell the coatings to clothiers and tailors. The coatings supplied corresponded in every respect with the samples, but owing to a latent defect which existed in both, the goods were unmerchantable for purposes for which goods of the same general class had previously been used in the trade. This latent defect was not discoverable in the samples by due diligence upon such inspection as was ordinary and usual upon sales of cloths of that class. The appellants sued the respondents for the price, and having failed before the courts below, now appealed to the House of Lords; but their lordships held (affirming the Court of Appeal) that upon such a contract there was an implied warranty that the goods should be fit for use in the manner in which goods of the same quality and general character ordinarily would be used. Lord Macnaghten concisely lays down the principle on which the case was decided at p. 295, thus: "that a manufacturer who agrees to supply goods to order, knowing the purpose for which they are required, thereby impliedly undertakes to supply goods fit for the purpose in view."

DISCOVERY—ACTION TO RECOVER LAND—PURCHASE FOR VALUE WITHOUT NOTICE.

In *Ind* v. *Emmerson*, 12 App. Cas. 300, the House of Lords affirmed the decision of the Court of Appeal, 33 Chy. D. 323, which was noted *ante* p. 28, as *Emmerson* v. *Ind*. Their lordships do not, however, adopt the reasoning of the Court of Appeal, but proceed rather on the ground that the defence of "purchaser for value without notice" was only formerly available in equity as a protection from discovery when the plaintiff was applying to the auxiliary jurisdiction of the Court of Chancery in aid of an action of law, and was not so available where the plaintiff was seeking relief in the Court of Chancery even in cases where the latter had concurrent jurisdiction with the courts of law, and that as there was now, since the Judicature Act, but one court, the reason on which the plea of purchaser for value was allowed as a bar to discovery no longer exists.

DIVORCE—BASTARDIZING CLAUSE.

In *Howat's Divorce Bill*, 12 App. Cas, 312, a clause in a divorce bill tending to bastardize a child to which the wife had given birth during the marriage,—notwithstanding there was access at the natural period of conception of the child,—was ordered to be struck out, the child being unrepresented.

LECTURES OF COLLEGE PROFESSOR TO HIS CLASS—INJUNCTION—RESTRAINING PUBLICATION.

Caird v. *Sime*, 12 App. Cas. 326, was an appeal from a Scotch court. The plaintiff was a professor in a Scotch university, and had

delivered a course of lectures to his class; a student attending the class had taken shorthand notes of the lectures which the defendant published. The present action was brought to restrain the publication. Considerable difference of opinion appears to have prevailed among the Scotch judges, as to whether the delivery of the lectures was not such a publication of them as to deprive the plaintiff of any right of property therein. Six of them held that he had still a right of property in them, while five held that he had not, and two others, that even if he had, the defendant was not interfering with it. The House of Lords, however, determined that the delivering of the lectures was not equivalent to publication, and that the appellant was entitled to restrain the defendant from publishing them. From this decision, however, Lord Fitzgerald dissented, considering that the plaintiff occupied a public position, and that his lectures as soon as delivered became public property.

BONUS DIVIDEND—CAPITAL OR INCOME—TENANT FOR LIFE AND REMAINDERMAN.

Bouch v. *Sproule*, 12 App. Cas. 385, is the *finale* of a case noted *ante* vol. 21, p. 331, as *In re Bouch*, *Sproule* v. *Bouch*. The point in controversy arose between a tenant for life and remainderman as to whether certain bonus dividends and new shares purchased therewith, were to be regarded as income or accretions of capital. Kay, J. decided they were capital, and the Court of Appeal reversed his decision, and now the House of Lords have reversed the Court of Appeal and restored the judgment of Kay, J. The principle deducible from this case appears to be this, that where a company having no power to add to its capital declares a dividend out of surplus profits, such dividend must be deemed income; but where the company has power to increase its capital, and a bonus dividend is declared as a part of a scheme for effecting such increase, then the bonus must be regarded as capital.

LIMITED COMPANY—COMPANY PURCHASING ITS OWN SHARES—ULTRA VIRES.

In *Trevor* v. *Whitworth*, 12 App. Cas. 409, the House of Lords also reversed a decision of the Court of Appeal. A limited company incorporated under the Joint Stock Companies Acts with the objects (as stated in its memorandum) of acquiring and carrying on a manufacturing business, and any other businesses and transactions which the company might consider in any way conducive or auxiliary thereto, or in any way connected therewith. The articles authorized the company to purchase its own shares. The company having gone into liquidation, a former shareholder made a claim against the company for the balance of the price of his shares sold by him to the company before the liquidation and, not wholly paid for. But the House of Lords (reversing the Court of Appeal, and disapproving of the reasoning of that court *In re Dronfield Silkstone Coal Co.*, 17 Chy. D. 76) held that such a company had no power under the Companies Acts to purchase its own shares, that the purchase was *ultra vires* and the claim must fail.

QUEENSLAND CONSTITUTION ACT, 1867, ss. 23, 24—SEAT IN COUNCIL VACATED (B. N A. ACT, s. 31, ss. 1.)

Attorney-General v. *Gibbon*, 12 App. Cas. 442, is an adjudication by the Privy Council upon the construction of the Queensland Constitution Act of 1867, which provides that if any legislative councillor shall for two sucessive sessions fail to give his attendance, without permission, his seat shall thereby became vacant. The respondent, who was a councillor, absented himself during the whole of three sessions, having previously obtained permission for a year, which period of time, in the event, covered the whole of the first and part of the second session. Their lordships held that the seat was vacated, and that the permission did not cover two successive sessions.

TRADE MARK—RIGHT TO EXCLUSIVE USER—INFRINGEMENT.

In *Somerville* v. *Schembri*, 12 App. Cas. 453, the Judicial Committee of the Privy Council on an appeal from the Court of Appeal of Malta, held that by the general principles of commercial law, as soon as a trade mark has been so employed in the market as to indicate to purchasers that the goods to which it is attached are the manufacture of a particular firm, it becomes to that extent the property of that firm, and its infringement by others may be restrained. Thus in the case in hand, the appellant's firm were makers of cigarettes, which became favourably known under the trade mark "Kaisar-i-Hind," and it was held that the use of that trade mark by others for

soap, pickles, hats, etc., could not impede the acquisition of an exclusive right to it as a trade mark for cigarettes, and that the respondents should be restrained from using for cigarettes a copy of the mark with colourable variations, such copy being likely, even if not intended, to deceive purchasers into the belief that such cigarettes were manufactured by the appellants' firm.

PRACTICE — CRIMINAL PROCEEDINGS — CONVICTION SET ASIDE BY PRIVY COUNCIL—ORDER STRIKING OFF ROLLS REVERSED.

In re Dillet, 12 App. Cas. 459, is the concluding case in the appeal reports, and is somewhat remarkable as being an appeal to the Judicial Committee in a criminal case from the Supreme Court of Honduras, brought by special leave of the Privy Council—happily for British justice—on grounds that are not often assigned as reasons of appeal. The appellant was a solicitor, and, it appeared, had incurred the displeasure of the Chief Justice of Honduras, who directed him to be indicted for perjury, and on the trial of the case secured his conviction by directions to the jury, which were, as the Privy Council found, improper and grievously unjust to the appellant; and thereafter, as a consequence of his conviction, made an order striking him off the rolls. The appeal was brought both from the conviction and the consequent order striking him off the rolls, and both the conviction and the order were reversed.

REPORTS.

ONTARIO:

DIVISION COURT.

GEORGE F. THOMPSON v. THE OTTAWA TEMPERANCE COFFEE HOUSE COMPANY (LIMITED).

Creditor—Deed of composition — Dividend sheet — Liability.

The plaintiff, Thompson, a coal merchant, sued the company for $95, the value of coal supplied. The defendants acknowledged the debt, but pleaded that the plaintiff had bound himself to take payment therefor in small monthly instalments.

It was proved at the hearing, that in March, 1887, the coffee house company, finding that they owed about $2,000, authorized their president to make the best terms possible with the creditors. As a result, creditors to the amount of nearly $1,800, signed an agreement in the nature of a deed of composition. By the terms of this deed the creditors promised not to sue or molest the company, provided, and so long as a monthly dividend was regularly paid them. A dividend sheet was prepared by the treasurer in accordance with the terms of the agreement. The plaintiff creditor, Thompson, refused to sign the agreement of composition; but signed three monthly dividend sheets and received the dividends in cash. The plaintiff then brought suit to recover the debt less the amount of cash received from the treasurer of the company as dividend.

Dr. R. J. Wicksteed, for the company, contended that although the plaintiff had in words refused to sign the composition agreement, he had, in fact and in deed, adopted it by signing the dividend sheets. The composition deed, and its schedules—the dividend sheets—could not be separated; although there was no direct reference in either to the other. The dividend sheet was an accessory to the agreement. *Accessorium sequitur naturam rei cui accedit.* (Abbott's Law Dictionary, Verbo *Accessory*). The plaintiff knew of the signing of the agreement by a large majority in value of the creditors. He deliberately signed the dividend sheets prepared in accordance with its terms. There was no other agreement between the company and its creditors. All this the plaintiff had admitted. Signing the dividend sheet—an inseparable accessory to the deed of composition—was a more important and binding act than was the signing of the deed.

Following the dicta of Judges Ashurst and Buller in *Heathcote* v. *Crookshanks* (2 East), this agreement of composition between the company and its creditors is not binding in law without the acceptance of the less sum stipulated for. The creditors are always entitled to their whole demand until the agreement has been followed up by actual acceptance. The agreement was a *nudum pactum* unless they afterwards accepted the certain proportion. *E converso*, the creditor accepting the proportion—accepting the advantage of the dividend, should bear the burden or restraint imposed by the agreement. (*Qui sentit commodum debet sentire et onus.*

Held, by W. A. ROSS, J., that a connection be-

tween the dividend sheet and the deed of composition had not been sufficiently established. The plaintiff, signing the dividend sheet, did so only as a means of getting a portion of what was due him. Judgment for plaintiff.

J. P. Fisher, for the plaintiff.

R. J. Wicksteed, for defendants.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

CHANCERY DIVISION.

Proudfoot, J.] [Sep. 5.

WELLS V. NORTHERN RAILWAY CO.

Railways—User—Subway—Consolidated Railway Act, 1879, *s.* 27.

The plaintiff was the owner of certain lands, a right of way over which had in 1854 been sold by J. G., the then owner, to the defendants' railway. The defendants built their railroad along this right of way in 1858, and where the road crosses a depression in the ground a trestle bridge was built and a subway left under. From 1862 to the few months before this action was brought, the plaintiff and those under whom he claimed enjoyed the undisputed use of this subway. The defendants were now filling it in, in order to make a solid track across the depression, and refused to give any compensation for it to the plaintiffs, and the plaintiff asked for damages for the obstruction of the subway, and to have it reopened. The defendants pleaded not guilty, and referred to the Consolidated Railway Act, 1879, sec. 27.

Held, that the evidence in this case showed such an enjoyment as of right of the subway, and such an open and continuous user thereof, that the plaintiff was entitled to assume that there was a reservation of it in the deed of conveyance from J. G. to the railway, or was entitled to claim the easement under the Prescription Act. He could not prevent the filling up of the trestle work but was entitled to damages for his property in the easement, which damages should, if the parties could not agree, be ascertained under the Railway Act.

Ritchie, Q C., and *R. Boultbee*, for the plaintiff.

S. H. Blake, Q.C., for the defendants.

Boyd, C.] [Sep. 13.

RE HALL.

Advancement—Intestacy—Hotchpot—R. S. O. ch. 105, *s.* 41, 43.

J. H. died intestate, and among his assets were found a promissory note for $500, made by his son in his favour. This son of J. H. predeceased him and died intestate, leaving a child who claimed to share under the Statute of Distributions in the estate of J. H. with the children of J. H. The question was whether he was bound to bring the $500 into hotchpot so as to equalize the shares coming to him and the children of J. H.

Held, that the writing required by R. S. O. ch. 105, secs. 41, 43, to evidence an advancement under those two sections may be either an expression by the intestate that the donation is by way of advancement, or an acknowledgment to the same effect by the child; but in this case the only writing was the note, and that imported that the original dealing was one of loan or debt between the parties, and as such did not satisfy the Statute, and the grandchild of J. H. was not required to bring the amount of that note into hotchpot.

The difference between the law of England and that of Ontario as to advancement commented upon.

J. R. Roaf, for the administrator of J. H.

J. Hoskin, Q. C., for the infants.

Divl. Ct.] [Sep. 10.

SAUERQUIST v. THE ONTARIO BANK.

Deposit receipt—Fradulent receipt of the money—Lapse of time without depositor notifying bank (depositee)—Onus of notice—Estoppel.

The plaintiff—an ignorant man—deposited $650 with defendants on September 24, 1884, handed the deposit receipt which he got to S. S. for safe keeping, and went away to work on a railway. He returned in April, 1885, when S. S. told him he had drawn the money on the receipt and promised to pay him back.

Plaintiff, not knowing that he had any rights against the bank, did nothing further, and S. S. left the country in the August following, being heavily in debt. In the December following plaintiff was advised that he had rights against the bank, and he consulted a solicitor who promised to attend to it but did nothing. In April, 1886, he consulted another solicitor, when a demand was made on the bank and refused, and action brought. The demand was the first intimation plaintiff gave the bank of what had been done. In an action against the bank for the amount, it was

Held (reversing ARMOUR, J.), that the delay was not suggestive of collusion or any unfair dealing on the part of the plaintiff. No legal duty was cast upon the plaintiff to advise the bank that it had been deceived in or after April, 1885. His failure to claim his money or sue the bank at that time did not operate against him so long as his claim was not barred by the Statute of Limitations.

There was no negligence on his part which caused or contributed to the fraud so as to raise an estoppel. As there was no duty cast upon the plaintiff to notify the bank, one of the essential elements of estoppel by conduct was absent. *The Merchants' Bank* v. *Lucas*, 13 O. R. 520, distinguished.

Ritchie, Q.C., for the plaintiff.

Falconbridge, Q.C., for the defendants.

REVIEWS.

FOURTH ANNUAL REPORT OF THE DIRECTORS OF THE CANADA LAND LAW AMENDMENT ASSOCIATION.

We have been favoured with a copy of the Fourth Annual Report of the Canada Land Law Amendment Association. The work accomplished by this Association furnishes a strong argument in favour of the value of organization as a means for carrying out reforms. The principal object of its formation was to secure the introduction into this Province of the Torrens system of registration of titles, and certain other amendments of the law of real estate, having for their end the facilitating that system of registration, and generally bringing the law of real estate more into harmony with the law of personalty.

Though the Association has not accomplished all that it set itself to do, it may nevertheless be congratulated upon having succeeded in making very considerable progress. It has induced the Government of this Province to pass the Devolution of Estates Act, which has to a great extent abolished the legal distinction between realty and personalty, and it has also procured the passage of Acts which, in a modified and limited manner, introduce the Torrens system of registration. Furthermore, through the agitation of this Association, the Torrens system has been introduced, together with the modification of the law of realty which they advocated, into the North-West Territories and the Province of Manitoba. Such an amount of solid work accomplished in so brief a space of time—for the Association has only been in existence a little over four years—speaks volumes for the energy with which the objects of the Association have been promoted. To have virtually revolutionized the law of real estate in so vast a tract of country in so short a space of time, is certainly something to boast of. At the same time it is perhaps premature to speak as to the results of the changes which have thus been brought about.

We understand that in Toronto and Manitoba the Torrens system of registration of title is found to work well and smoothly. Some little friction was to be expected at first, but we believe that practice and experience are daily rendering the system more easily understood, and no doubt its benefits will, as time rolls on, be made more and more apparent when the unimpeachability of the registered title comes to be generally known.

How far the Devolution of Estates Act successfully carries out the views of the Association we do not know; we are inclined to think it will require a good many judicial decisions before its precise effect will be made plain. Possibly some amendments will be found necessary. We are not by any means satisfied that the nature and effect of the changes in the law of real estate which this Act makes or purports to make, have been as thoroughly "thought out" as they ought to have been, but time will tell; and though tinkering the law on this or any subject is much to be deprecated, yet tinkered it will be, as often as occasion requires, by our annual law-repairing machine.

Some of the suggestions contained in the report are worthy of the best consideration of the Government, particularly the feasibility of reducing the expense of bringing land under the Land Titles Act; and the application of the surplus fees of the registry offices towards developing the new system of registration.

FLOTSAM AND JETSAM.

WHAT are "necessaries" for a legal "infant"? This is a question of perennial interest to tradespeople, and more particularly, it would seem, to tailors and outfitters. Well, it is no longer enough for a tradesman to consider whether the goods he supplies to young Hopeful are in their nature necessary or suitable to his social status; he must satisfy himself, and be able to satisfy the court, that they are actually necessary to his customer. In the recent case of *Johnstone* v. *Marks*, a tailor supplied £40 worth of outfit to a minor, who lived with his father, but he did not address to the father any inquiries on the subject. When he sued for the price, the judge refused to admit evidence to show that the infant was well supplied with clothes which his father had otherwise provided; but the Court of Appeal held that the ruling of the judge was wrong, and that the real question was, not whether goods supplied were "necessaries" in their nature or in the abstract, but whether they were actually, and as a practical question, necessary to the infant supplied. Here the father had fully supplied the needs of the infant, and therefore the supplies he foraged for himself were not "necessaries." Tradesmen, nquire.—London *Weekly Despatch*, August 7, 1887

Law Society of Upper Canada.

OSGOODE HALL.

CURRICULUM.

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

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

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

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

5. The Law Society Terms are as follows:

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

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

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

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

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

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

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

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

10. The Solicitors' examination will begin on the Tuesday next before each term at 9 a.m. Oral on the Thursday at 2.30 p.m.

11. The Barristers' examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2.30 p.m.

12. Articles and assignments must not be sent to the Secretary of the Law Society, but must be filed with either the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

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

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

15. A Student-at-Law is required to pass the First Intermediate examination in his third year, and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second year and his Second in the first six months of his third year. One year must elapse between First and Second Intermediates. See further, R.S.O., ch. 140, sec. 6, sub-secs. 2 and 3.

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

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

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

19. No information can be given as to marks obtained at examinations.

20. An Intermediate Certificate is not taken in lieu of Primary Examination.

FEES

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

BOOKS AND SUBJECTS FOR EXAMINATIONS.

PRIMARY EXAMINATION CURRICULUM FOR 1887 1888, 1889 AND 1890.

Students-at-law.

CLASSICS.

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

1888.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. IV.
- Cæsar, B. G. I. (1-33.)
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. I.

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

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

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

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

MATHEMATICS.

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

ENGLISH.

A Paper on English Grammar.
Composition.

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

HISTORY AND GEOGRAPHY.

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

Optional Subjects instead of Greek:—

FRENCH.

A paper on Grammar.
Translation from English into French Prose.
1886, 1888, 1890 } Souvestre, Un Philosophe sous le toits.
1887, 1889 } Lamartine, Christophe Colomb.

or, NATURAL PHILOSOPHY.

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

ARTICLED CLERKS.

In the years 1887, 1888, 1889, 1890, the same portions of Cicero, *or* Virgil, at the option of the candidates, as noted above for Students-at-Law.
Arithmetic.
Euclid, Bb. I., II., and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-Keeping.

RULE RE SERVICE OF ARTICLED CLERKS.

From and after the 7th day of September, 1885, no person then or thereafter bound by articles of clerkship to any solicitor, shall, during the term of service mentioned in such articles, hold any office or engage in any employment whatsoever, other than the employment of clerk to such solicitor, and his partner or partners (if any) and his Toronto agent, with the consent of such solicitors in the business, practice, or employment of a solicitor.

First Intermediate.

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

Three scholarships can be competed for in connection with this intermediate by candidates who obtain 75 per cent. of the maximum number of marks.

Second Intermediate.

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

Three scholarships can be competed for in connection with this intermediate by candidates who obtain 75 per cent. of the maximum number of marks.

For Certificate of Fitness.

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

For Call.

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

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

Copies of Rules, price 25 cents, can be obtained from Messrs. Rowsell & Hutchison, King Street East, Toronto.