The Canada Law Journal.

VOL. XXVI. FEBRUARY 17, 1889. NO. 3

A CORRESPONDENT draws our attention to Con. Rule 482, which he says embodies the most summary proceeding known to the Canadian practitioner. It reads thus: "On every appointment the party on whom the same is served shall attend such appointment *without waiting for a second*, or in default," etc.

IT is gratifying to see an improvement in the Ontario Reports, in this that the judges have got into the better way of shortening their judgments. It was once wittily said, we are informed, by the chief of the Q.B. Division, speaking of one of the judges at Osgoode Hall celebrated for the expenditure of many words in his judicial utterances, that the length of his judgments depended entirely upon the thickness of the pad of paper he began to write upon. We can fancy that his reporter often devoutly wished that he would be more economical in his stationery. We are indebted to some of the more recent appointments for giving a good example in this respect.

THE decision of the Common Pleas Divisional Court in *Canada Cotton Co.* v. *Parmalee*, noted ante p. 32, seems somewhat at variance with the decision of the Court of Appeal in *Haggin* v. *Comptoir D'Escompte de Paris*, 23 Q. B. D., 519, noted ante p. 8. It is true that the decisions are founded upon two different Rules, but the principle of the decision ought, it appears to us, to be the same in each case. In *Haggin* v. *Comptair D'Escompte de Paris* the question was whether a foreign corporation aggregate carrying on business in England could be served with a writ of summons in the same manner as an English corporation aggregate, and the Court held that it could, on the ground that a corporation may be said to be resident wherever it carries on business, in which respect it differs from a mere private partnership, as was pointed out in *Russell* v. *Cambefort*, 23 Q.B.D., 526, also noted ante p. 8. In *Canada Cotton Co.* v. *Parmalee*, the question was whether a foreign corporation doing business in Ontario was "within Ontario" within the meaning of Rule 935, and the Court held that it was not. In *Haggin* v. *Comptoir D'Escompte de Paris* the Court of Appeal was of opinion, as we have seen that a foreign corporation aggregate may be said to be resident wherever it carries on business, and if that is correct, then it would seem to follow that a

foreign corporation aggregate carrying on business in Ontario ought to have been held to be "within Ontario" within the meaning of Rule 935; probably the decision of the Court of Appeal was not before the Divisional Court, or it might have come to a different conclusion.

THE FIDUCIARY RELATION OF DIRECTORS TO SHAREHOLDERS.

A late writer on Joint Stock Companies says: "In America the cases involving a breach of trust by directors arise generally out of the management of corporations, and not in their formation. These cases frequently involve colossal transactions, and exhibit a scope, grasp, and ability for management and manipulation that excite the stockholder's admiration fully as much as his indignation. Corporations become insolvent, and stockholders lose their investments, while individuals become millionaires. Illegitimate gains are secured, and enormous fortunes are amassed, by the few at the expense of the defrauded, but generally helpless, shareholders. The expense, difficulties, and delays of litigation and the fact that the results of even a successful suit belong to the corporation and not to the stockholder who sues, all combine to baffle investigation and exposure, to discourage the stockholders, and to encourage and protect the parties guilty of the wrong."

Fortunately, for the reputation of Canada, such a commentary on the actions and policy of Canadian directors cannot yet be written. The wrongdoings of directors in this country partake more of the offence of *crassa negligentia*, than *mala fides*. It may be that congenial co-conspirators have not yet been gathered around the directors' tables in the Board rooms of our corporations: or it may be that our corporate organizations have not yet called forth men of the skill, audacity and talent of the quality that could systematize into recognized methods, schemes for diverting the profits, capital, and even the existence of the corporation, to the enrichment of the directors and their secret agents, as have been produced among our neighbors in the United States, and occasionally in England.

The most striking feature of our era of modern industrial development, is the organization, power, and wealth of joint stock companies for mercantile or financial undertakings. Since the South Sea Bubble of 1720, which was so disastrous to the reputation of some of the then chief ministers of the Crown, and members of Parliament, there have been cases of bubble companies and plundering promoters. The judicial records of England and the United States supply many actual and constructive cases of frauds perpetrated by directors, promoters, and their secret agents, under which a system of jurisprudence has become recognized as a distinct branch of "Company law." That branch of the law which deals with the fiduciary relations of directors to their shareholders has been largely promulgated under what is known as the "judicial process," rather than the legislative process, of law making. It is in great measure in a

formative state, and is being developed by the *mala fide* and *ultra vires* actions of the directors and officers of railway, mercantile, and banking corporations.

Before dealing with the duties and responsibilities of directors, it will be proper to consider the position they occupy towards the company and its shareholders.

An incorporated company has no visible personality. It is defined to be an "invisible body which cannot manifest its will by oral communications." It can only be an acting person in its commercial transactions through its directors; and while so acting, its directors occupy the position of (1) Agents of the company in regard to its dealings with the public ,and as such are within the rules of the law of Principal and Agent. The directors are also (2) Trustees and managing agents for the shareholders of the corporate powers and business committed to them. In their representative character as agents of the company, they rarely incur personal responsibility in respect of contracts made by them on behalf of the company with third parties. But as trustees or managing agents for the shareholders, they are personally responsible for any breach of trust or duty which is cognizable by the law governing Trustees.

Originally the only pledge or security which beneficiaries had for the due execution of a trust, was the good faith and integrity of the trustee. But it was soon found that the pledge of his sense of honor, when placed in conflict with the trustee's self-interest, proved an extremely precarious security. There were no statutes defining and making obligatory good faith or integrity in trustees; but by the judicial process of legislation, those principles and rules of natural justice which are sometimes called rules of equity or public policy, were made applicable to trusts, so as to give validity to the trustee's original pledge ; and thereupon the courts assumed jurisdiction to enforce its specific performance. "The rules which govern fiduciary relations are equitable rules unknown to the English Courts of law. They are bottomed in the plain maxims of good sense and equity: *Aberdeen Ry. Co.* v. *Blaikie*, 1 Macq. H.L., 461. By an extension of the judicial process, directors of commercial corporations have, in matters affecting their shareholders, been brought under the law of fiduciary relations, and the term "director," has been interpreted as synonymous with that of "trustee."

Lord Romilly, M.R., thus states the law: "Directors are persons selected to manage the affairs of the company for the benefit of the shareholders. It is an office of *trust*, which, if they undertake, it is their duty to perform fully and entirely." And again: "Above all, on no principle could they derive to themselves directly or indirectly, any personal or pecuniary advantage:" *York and North Midland Ry. Co.* v. *Hudson*, 16 Beav. 491, 496. In another case the same learned judge said: "I look upon directors of a company as trustees for the benefit of the shareholders, and is it in that character and quality they accept office, with all its corresponding duties and liabilities. It sometimes happens that directors have individual interests conflicting with their duties as trustees of a company. In such cases they are bound to consider, before they accept the office of directors, whether they are prepared to make their duties as directors dominant over their personal interests, and to make their individual

interests subordinate to their duties and liabilities as trustees:" *Ex parte Bennett*, 18 Beav., 339.

These rules of law were enforced during the great railway mania in England, against such men as Sir George Hudson, the "Railway King," and Sir William Magnay and others.

In giving judgment against the latter, the Master of the Rolls remarked as to the former: "Hudson was held bound to give to his company, the benefit of a large contract entered into by him, for *iron* which had been used in the railway, and to account to them for the pecuniary profit which he had derived from it. *In fact*, (said Lord Romilly), *there is no mode by which any species of sale or dealing between the company and one of its directors can be made valid and effectual*, except by bringing the circumstances fully before a meeting of the shareholders, and first obtaining their sanction to the transaction:" 25 Beav., 586. The House of Lords gave a similar opinion in the Scotch case of *Aberdeen Ry. Co.* v. *Blaikie*, 1 Macq. H.L., 461, and held that a director of a company is a trustee, and as such is precluded from dealing on behalf of the corporation with himself, or with a firm of which he is a partner. So inflexible is the rule, said Lord Cranworth, that though the terms of the dealing are as good, or even better, than could have been obtained from any other quarter, no question of fairness or unfairness is allowed to be raised, if the beneficiaries object. The contrast is illegal in equity, upon general equitable principles: s. c. 2 Eq. Rep. 1281.

Some directors, from ignorance of the law, deal openly with their company; while others ingeniously cover the prohibited dealing in a cloak of apparent righteousness; but the "strong arm of the law" is always sufficiently muscular to tear the cloak and expose the hidden fraud. Secret gifts, or percentages, or commissions from persons having dealings with corporations; sales or purchases or contracts in the name of a secret agent, are all within the prohibition of the law. The general propositions we have discussed may be illustrated by the following decisions.

Directors contracting with company.—If a director of a company makes a contract with his company, and reserves a private interest, or subsequently becomes interested in any contract with a view of his participating in the profits, the shareholders may insist upon his accounting for the profits, or may disaffirm the contract *in toto*; and the same rule applies to directors of a company becoming members of another company with which they have made a contract, so as to share in the profits of such contract. It is a breach of duty in directors to assume obligations inconsistent with their trust, or to place themselves in a position where their personal interests will prevent them from acting for the best interests of those they represent as directors: *Gilman, etc., Ry. Co.* v. *Kelly*, 77 Ill., 426.

Purchase of Corporate Property.—Nor can a director purchase the corporate property at a sale under a mortgage, or execution, or at a sale for taxes, either in his own name or in the name of an agent. And third persons who may purchase the corporate property from such director, with notice, stand in no better position than the director himself. A director cannot be allowed to unite in

himself the two opposite characters of buyer and seller; nor purchase on account of another that which he sells on his own account: *Cook on Stockholders*, s. 653.

Leases between Director and Company.—Nor can a lease between a director and his company be enforced. Where a firm of which a railway director was a member obtained a lease of a refreshment saloon from his company, and assigned it to a third party, and the company then removed their station to another locality, the assignee of the director's firm was held entitled to no relief. Giffard, V. C., said: The plaintiff can have no greater rights, and can stand in no better situation than his assignor; and it is perfectly clear from the statute, and the decisions in the House of Lords, that his assignor, having been a director of the company at the time of entering into the lease with the company, could not have maintained a bill for specific performance against the company: *Flanagan* v. *G. W. Ry. Co.*, 19 L.T.N.S., 345, s.c., L. R., 7 Eq., 116.

Commission for services.—Moneys paid over to two directors (chairman and vice chairman), of a bank, and to the manager (not a director), for services in promoting the amalgamation of their bank with another, were ordered to be refunded to the bank, subject, however,to deduction in the case of the manager, who was to be allowed a reasonable compensation for the loss of his office of manager: *General Exchange Bank* v. *Horner*, L. R. 9., Eq. 480.

Directors selling to the Company.—The promoters of a company who were also directors, purchased land and sold it to their company at an increased price, retaining the difference for themselves. Part of the purchase money was paid in debenture bonds. After the company had gone into liquidation, another director purchased, at a large discount from the first named directors, some of the debentures issued to them for the purchase money of the land. The director alleged that he knew nothing of the profit, or "salting," in the purchase; but the Court held that it must attribute to him, as a director, all the knowledge which by reasonable diligence he would have acquired, and that by reasonable diligence he might have found out all about the transaction, and that the debentures were corruptly and improperly issued. The Court then intimated that his claim should be disallowed unless he accepted the offer, which had been made at the hearing, of the amount actually paid by him for the debentures: *Ex parte Larking*, 6 Ch.D., 566. This judgment contains some sharp comments, which it would be beneficial to some directors to read. The same rule applies to the sale of any other kind of property to his company by a director, at a profit to himself: *Redmond* v. *Dickerson*, 9 N.J., Eq. 507.

Profits made by the Partner of a Director.—One Coleman, a director in a company, had a partner, Knight, who was not in any way connected with the company. The firm had a business transaction with the company, on which a profit was made by the partnership. The House of Lords held that the partners (director and non-member), were liable to make good to the company the profits received by the firm. Lord Chelmsford considered that the partner should be held to know the law, and dealt with his case thus: If Knight had been ignorant that the money which was brought into the partnership, was

money obtained by his partner by a dereliction of duty, and that it was in law the money of the company, he might have had a good defence. But he was acquainted with the whole transaction from first to last. He knew where the money which was brought into the partnership came from, and that it could not belong to his co-partner. With all this knowledge, his liability cannot be separated from that of Coleman: *Liquidators Imperial Mercantile Credit Association* v. *Coleman*, L.R., 6 H.L., 189.

A similar prohibitory law applies to the dealings of officers of a corporation, especially where the officer comes within the definition of "agent."

Secret Contracts.—A contract was made between two companies for the laying of a cable, in which there was a condition that the work should be approved of and certified by the engineer of the cable company, who was to be paid a commission of one and a quarter per cent. on the company's outlay. It was discovered that the engineer had a secret sub-contract with the construction company that he should lay the cable himself for a fixed sum. The Court set aside the contract, and ordered a refund of the moneys paid under it: *Panama, etc., Telegraph Co.* v. *India rubber, etc., Works Co.*, 32 L.T.N.S., 238, 517.

Purchases of corporate property.—The Courts of the United States have held that the disqualifications to as applicable to directors, attach to certain officers of the company, other than the president and directors, and that purchases by them of the corporate property at an execution sale, is a purchase for the benefit of the company: *Cook on Stockholders*, s. 653. T. H.

COMMENTS ON CURRENT ENGLISH DECISIONS.

The Law Reports for December are continued:

ACTION OF DECEIT—MISREPRESENTATION—FRAUD—COMPANY—MISREPRESENTATION IN PROSPECTUS.

Derry v. *Peek*, 14 App. Cas. 337, is the action which was known as *Peek* v. *Derry* in the Courts below, and the decision of which by the Court of Appeal, 37 Chy.D. 541, we noted ante vol. 24, p. 294. The action it may be remembered was brought by the plaintiff to recover damages against the directors of a company for misrepresentations contained in the prospectus, in consequence of which the plaintiff was induced to become a shareholder. The Court of Appeal overruling Stirling, J., held the plaintiff entitled to succeed, but the House of Lords after a very full discussion of the principles governing the case have reversed the judgment of the Court of Appeal and restored that of Stirling, J., their lordships holding that it was incumbent on the plaintiff in such an action to establish actual fraud, either by showing that the representation was made knowing that it was false, or without belief in its truth, or recklessly without caring whether it was true or false. And a statement made carelessly, though in the honest belief that it was true, is not fraudulent. The misrepresentation in this case was that the company was entitled to operate a tramway by steam power, whereas the right to do so depended on their obtaining the consent of the Board of Trade,

which consent the Board subsequently refused to give. Lord Herschell in his elaborate judgment points out that an action for deceit differs essentially from an action for a rescission of a contract on the ground of misrepresentation, in which latter case the proof of the untruth of the representation and that it was material is sufficient to warrant the company in rescinding the contract, although the representation may have been made *bona fide*.

PRACTICE—SECOND ACTION FOR SAME MATTER—COSTS OF FORMER SUIT—STAYING PROCEEDINGS.

McCabe v. *Bank of Ireland*, 14 App. Cas., 413, is a decision of the House of Lords on a question of practice. The plaintiff had brought a former action against the same defendants for the same cause which had been dismissed with costs; without paying the costs, he commenced the present suit, whereupon the defendants applied to stay all proceedings until the costs of the former suit were paid, and the plaintiff made a cross motion to be permitted to prosecute the suit in *forma pauperis*. The Court below stayed the proceedings and refused the plaintiff's motion, and the House of Lords affirmed the decision.

STATUTE OF LIMITATIONS—PAYMENT OF INTEREST—EVIDENCE.

In *Newbould* v. *Smith*, 14 App. Cas., 423, the House of Lords affirmed the decision of the Court of Appeal, 33 Chy.D. 127, noted vol. 22, pp. 317, 413, but not for the reasons given by that Court, but on the ground that even assuming the entry of the payment of interest to be admissible, there was no evidence to connect the entry with the property in question. The importance of this case to mortgagees has already been dwelt on ante vol. 22, p. 307.

VENDOR AND PURCHASER—RESCISSION THROUGH DEFAULT OF PURCHASER—FORFEITURE OF DEPOSIT—DEFECT IN TITLE SUBSEQUENTLY DISCOVERED.

Soper v. *Arnold*, 14 Appeal Case, 429, was an appeal from the decision of the Court of Appeal 37 Chy.D. 96, noted ante vol. 24, p. 143, in which it was held that when a contract for the sale of land was rescinded after the title had been accepted, in consequence of the default of the purchaser, and his deposit was consequently forfeited, he had no right to recover the deposit on the ground of mutual mistake and failure of consideration, because, on a subsequent sale it turned out that the vendor's title was bad, owing to a defect which appeared on the face of the abstract delivered to the first purchaser. This decision was affirmed by the House of Lords.

STATUTE OF LIMITATIONS—ACTION TO RECOVER LAND—POSSESSION AS AGENT FOR UNKNOWN HEIR AT LAW—RATIFICATION BY TRUE OWNER—EVIDENCE.

Lyell v. *Kennedy*, 14 App. Cas., 437, may be considered to have at last terminated its well litigated course by the judgment of the House of Lords in favor of the plaintiff, whereby many interesting legal questions have been also passed upon. The defendant had acted as the agent of the owner of the lands in question during her lifetime, and on her death in 1867 continued to receive the rents and profits, and to pay them into the bank exactly as before, not informing the

tenants of his principal's death, but stating to several persons that he was acting as agent and receiver for the true heir whoever he might be. The defendant thus acted until 1880, when, more than twelve years having elapsed since his principal's death, he claimed the property on his own account. In 1881 the assignee of the heir brought this action. The House of Lords have now determined, reversing the decision of the Court of Appeal, 18 Q. B. D., 796, noted ante vol. 23, p. 247, and restoring the decision of Stephen, J., that the defendant having constituted himself agent for the heir he could not dispossess the heir so as to put him to his action, and that his acts as agent, though unauthorized, might be ratified by the true owner, and were ratified by the plaintiff bringing his action within a reasonable time after the heir was ascertained, and that the plaintiff was thereupon entitled to judgment for recovery of the land, and for an account of the rents and profits. Scotch parish registers, or certified extracts from them, receivable in Scotch Courts as evidence as being kept under the sanction of public authority, were held to be receivable in English Courts as to matters properly and regularly recorded in them; and proceedings in the Scotch Sheriff's Court were also held admissible as to matters of pedigree on the same principle on which answers and decrees in chancery have been admitted in the House of Lords in peerage cases, the facts of the pedigree not being in dispute but only incidentally stated in the proceedings.

COLLISION—DAMAGES, MEASURE OF—LOSS OF PROFITS—REMOTENESS OF DAMAGE.

In *The Argentino*, 14 App. Cas., 519, the House of Lords affirmed the decision of the Court of Appeal, 13 P. D., 191, noted ante vol. 25, p. 12, holding that in estimating damages occasioned by a collision, the loss of profit represented by the ordinary and fair earnings of such a ship as the injured vessel, having regard to the fact that a contract had been entered into for her to proceed upon another voyage, were not too remote, and flowed directly and naturally from the collision.

COMPANY—WINDING UP—CAPITAL PARTLY PAID UP—PREFERENCE SHAREHOLDER—SURPLUS ASSETS, DISTRIBUTION OF.

Birch v. *Crapper*, 14 App. Cas., 525, was reported in the Court below as *In re Bridgewater Navigation Co.*, 39 Chy.D., 1, noted ante vol. 24, p. 523. The only point decided by the House of Lords is the question as to the proper distribution of the surplus assets of the Company. The undertaking of the company was sold under an act which made no provision for the distribution of the purchase money, and the articles of association contained no provision on the subject. There were two classes of shareholders, one class preference shareholders, whose shares were fully paid up; the other class were ordinary shareholders, whose shares were not fully paid up. In the Courts below it had been held that the surplus assets were distributable among these two classes of shareholders in proportion to the amounts paid on their respective shares; but the House of Lords has reversed this decision, and has adjudged that the surplus is divisible among all the shareholders, not in proportion to the amount paid up, but in proportion to the shares held by them respectively.

PRACTICE—SPECIAL LEAVE TO APPEAL TO PRIVY COUNCIL.

The only point for which it will be necessary to notice *St. John's* v. *Central Vermont Railway Co.*, 14 App. Cas., 590, is one of practice. The appellant had obtained special leave to appeal to the Privy Council on the ground that the appellant desired to raise a particular question of great and general importance, and on the argument of the appeal the Judicial Committee refused to permit the the appellant to contend that no such question arose, and that the case turned upon a question of fact, on which the Court below was in error.

STATUTE—CONSTRUCTION OF—BONA FIDE PURCHASER.

Mutual Provident Society v. *Macmillan*, 14 App. Cas., 592, is a decision of the Judicial Committee upon the construction of a Statute of New South Wales. The act in question enacted that a declaration made by an attorney that he has no notice of the revocation of his power by death or otherwise, is conclusive proof of non-revocation, when made to a *bona fide* purchaser for valuable consideration without notice. The Judicial Committee (affirming the Colonial Court) held that a general verdict against a purchaser in an action to recover the property, was justified by evidence to the effect that the purchaser had cause to suspect, and did suspect, the truth of the declaration.

GENERAL AVERAGE—JETTISON—RIGHT TO CONTRIBUTION—REMEDIES OF OWNERS ON GOODS JETTISONED—LIEN ON GOODS SALVED.

Steel v. *Scott*, 14 App. Cas., 601, is an important contribution to the exposition of the maritime law relating to jettison. In this case the Judicial Committee lay down the following principle: That when goods are jettisoned the right of contribution for the loss of such goods as against the owners of goods salved does not extend to those by whose fault the safety of the ship has been imperilled and the jettison rendered necessary. Thus when the ship was stranded through the negligence of the master, it was held that the owners of the ship are not entitled to general average with innocent owners of the jettisoned cargo; unless their ordinary relations to the shippers have been varied by contract. Their Lordships also hold that each owner (other than those in default) of jettisoned goods becomes a creditor of ship and cargo salved, and that he has a direct claim against the owners of the ship and cargo respectively, for a *pro rata* contribution towards his indemnity which he can recover by direct action, or by enforcing through the ship master, who is his agent for that purpose, a lien on each parcel of goods salved to answer the proportionate liability. It may be well to note that the proposition laid down by Parsons in his Law of Insurance, vol. 2, p. 285, and in his Law of Shipping, vol. 1, p. 211, to the effect that when the jettison is rendered necessary through the default of the ship master, there is no claim for contribution, but that the owners alone are liable to make good the loss, was disapproved by their Lordships as not being supported by authority.

RIPARIAN RIGHTS—RAILWAY COMPANY—EXPROPRIATION OF LANDS—RIGHT OF ACTION.

In *North Shore Railway Co.* v. *Prior*, 14 App. Cas., 612, the Judicial Committee on appeal from the Supreme Court of Canada, discuss the rights of riparian proprietors, along whose river frontage a railway company constructs an embankment for its railway without making compensation, and holds that the company in question were liable to damages to the riparian proprietors, and that the making of openings through the embankment was no answer to the claim for indemnity—and following *Parkdale* v. *West*, 12 App. Cas., 602, that as the company had not taken the steps necessary under the statute to vest in them the power to do the thing for which compensation would have been payable under the Act, the parties injured were entitled to sue for damages and for the removal of the obstruction, and that, if the removal of the obstruction was not ordered, damages for a permanent injury to the land would be recoverable.

PRACTICE—SPECIAL LEAVE TO APPEAL FROM THE SUPREME COURT OF CANADA.

The only case which remains to be noted is *Montreal* v. *Seminaire de St. Sulpice*, 14, App. Cas. 660, in which an application was made to the Privy Council for special leave to appeal from a decision of the Supreme Court of Canada—exempting the respondents from the payment of a tax specially assessed by the appellant corporation. This their Lordships refused to grant, because the exemption was allowed under a statute which did not appear to have been erroneously construed, and although the case was of great public interest and raised an important question of law, yet there did not appear to be any sufficient doubt as to the correctness of the decision complained of to justify leave being granted.

The Law Reports for January comprise 24 Q.B.D., pp. 1-140: 15 P.D., pp. 1-15, and 43 Chy.D, pp. 1-98.

CHARGE UPON THE LAND—LOCAL IMPROVEMENTS—STATUTE OF LIMITATIONS (37 & 38 VICT., C. 57) S. 8 (R.S.O., C. 111, S. 23).

Hornsey v. *Monarch Investment Society*, 24 Q.B.D., 1, deserves attention. By statute certain paving expenses, which had been incurred by a municipal body, were made a charge upon the premises in respect of which they were incurred. The Court of Appeal (Lord Esher, M.R., and Lindley and Lopes, L.JJ.), affirming the Divisional Court (23 Q.B.D., 149) held, that these expenses became a charge upon the completion of the works, and that the period of limitation in respect of such charge under the Real Property Limitation Act (37 & 38 Vict., c.57) s. 8, (R.S.O., c. 111, s. 23) began to run from that date, and not from the date of the apportionment of such expenses among the frontagers. It was contended that the words "present right to receive the same" in this statute are equivalent to "present right to enforce payment of the same," but it was pointed out by the Court that such a construction would put it in the power of the municipal body to delay the application of the Statute of Limitations to any time they pleased; and that notwithstanding no apportionment had been made, they had a present right to

receive and, if they considered enough had been tendered, to give a discharge therefor.

PROMISSORY NOTE PAYABLE ON DEMAND—NEGOTIABLE INSTRUMENT—MORTGAGE BY WAY OF FURTHER SECURITY OF DEBT SECURED BY NOTE—TRANSFER OF NOTE AFTER RECEIPT OF AMOUNT DUE THEREON—INDORSEE FOR VALUE WITHOUT NOTICE—RE-ISSUE OF NOTE, WHAT AMOUNTS TO.

In *Glasscock* v. *Balls*, 24 Q.B.D., 13, an attempt was made to defeat the claim of a *bona fide* indorsee for value of a promissory note payable on demand, under the following circumstances: The note was given by the defendant to one Wayman, and as a further security for the debt represented by the note, he also gave him a mortgage on certain property. Wayman transferred the mortgage to one Hall, and received from him sufficient to pay the debt due on the note. He afterwards transferred the note to the plaintiff for value, as security for a debt due by him to the plaintiff. On the part of the defendant it was argued that the case was within *Bartrum* v. *Caddy*, 9 Ad. & E. 275, as being a re-issue of the note after it had been paid out of the proceeds received from the transfer of the mortgage. But the Court of Appeal (Lord Esher, M.R., and Lindley and Lopes, L.JJ.) were of opinion that the plaintiff could not be said to have taken a note over due, because there was no proof of any demand of payment having been made under it, and therefore, being an indorsee for value, he was *prima facie* entitled to recover, and that *Bartrum* v. *Caddy* did not apply because the note had not been paid, and secondly, the note could not be said to have been re-issued after payment, because it never came back to the power or control of the maker. The appeal from the decision of Lord Coleridge, C.J., was therefore dismissed.

PENAL ACTION—OMISSION TO COMPLY WITH STATUTORY DIRECTIONS.

Smith v. *Wood*, 24 Q.B.D., 23, was an action to recover penalties for delivering coal short of weight. The statute imposing the penalty required the sacks to be weighed both "with and without the coal therein;" this method of weighing had not been followed, and it was consequently held by the Court of Appeal (Lord Esher, M.R., and Lindley and Lopes, L.JJ.), affirming the judgment of Q.B. Divisional Court, 23 Q.B.D., 380, that the plaintiff was not entitled to recover.

EXPROPRIATION OF LAND BY RAILWAY CO.—COMPENSATION—"LAND INJURIOUSLY AFFECTED"—OBSTRUCTION OF LIGHTS—MEASURE OF DAMAGE.

Re London, Tilbury & S. E. Railway Co., and Gowers Walk Schools, 24 Q.B.D., 40, was an arbitration arising out of the expropriation of land by a railway company, in consequence of which the owner of neighboring lands claimed compensation for "lands injuriously affected" by the expropriation. The claimant, being the owner of certain buildings with ancient lights, pulled them down and erected a new building on their site. The position of some portions of the windows in the new building coincided with that of portions of the old windows, while others of the new windows occupied wholly different positions. Before any prescriptive right to the access of light to the new windows had been acquired, a railway company, in pursuance of their statutory powers, erected a

warehouse which obstructed the lights in the claimants' new building. Upon a case stated by the arbitrator, Mathew and Wills, JJ., were of opinion that the claimant was entitled to compensation in respect of the whole of the windows so obstructed, including the windows and portions of windows which did not coincide with any of the ancient lights. In this case the Act under which the compensation was claimed provided that "in exercising the power given to the company by the special Act . . . . the company shall make to the owners and occupiers of, and all other parties interested in any lands taken or used for the purposes of the railway, or injuriously affected by the construction thereof, full compensation . . . for all damage sustained . . . by reason of the exercise of the powers . . . vested in the company."

SHIP—CHARTER PARTY—CONSTRUCTION OF GUARANTEE AS TO SHIP'S CAPACITY.

In *Carnegie* v. *Conner*, 24 Q.B.D., 45, Huddleston and Mathew, JJ., were called on to construe a charter party which provided that the ship should "load a cargo of creosoted sleepers and timbers" and contained the following clauses: "Charterer has option of shipping 100,—200 tons of general cargo;" and "owners guarantee ship to carry at least about 90,000 cubic feet or 1,500 tons dead weight of cargo." They were of opinion that the latter clause did not mean that the ship would be able to carry about 90,000 cubic feet of the description of cargo which the charterer was under the previous clauses entitled to tender, but was merely a warranty of the carrying capacity of the ship.

PRACTICE—NEW TRIAL—EXCESSIVE DAMAGES—LIBEL.

Praed v. *Graham*, 24 Q.B.D., 53, shows how extremely difficult it is to induce the Court to grant a new trial on the ground of excessive damages in an action of tort. In this case the action was for libel contained in a letter to the plaintiff's wife; the Jury gave a verdict for £500. The Divisional Court refused a new trial on the ground of excessive damages, and the Court of Appeal (Lord Esher, M.R., and Lindley and Lopes, L.JJ.) upheld the decision, considering that it is only when the Court can come to the conclusion that the damages are so excessive that no twelve men could reasonably have given them, they ought not to interfere with the verdict merely on the ground of the damages being excessive.

PRACTICE—APPEAL—STAYING EXECUTION FOR COSTS—DISCRETION OF COURT—RULE 880—(ONT. RULE 804).

The *Attorney General* v. *Emerson*, 24 Q.B.D., 56, the Court of Appeal (Lord Esher, M.R., and Lindley and Lopes, L.JJ.) denied that there was any practice of the Court that it would always grant a stay of execution for costs pending an appeal, unless the solicitor to receive them would give an undertaking to refund them in case the appeal proved successful, but that the imposition of that term was in the discretion of the Court. In this cause, it being made out to the satisfaction of the Court as to one of the defendants, that there was great danger that the appellant could not recover any costs from him, the Court stayed the execution unless the undertaking was given. Under Ont. Rule, 804, the respon-

dent would appear to be entitled to security for costs, before execution therefor could be stayed.

COMPANY—EXECUTORS REGISTERED AS SHAREHOLDERS—FORGED TRANSFER—NOTICE OF TRANSFER—ESTOPPEL.

Barton v. *London & North Western Railway Co.*, 24 Q.B.D., 77, is a case which shows the responsibility a joint stock company incurs in registering transfers of stock, to see that the transfers on which it assumes to act are genuine. In this case stock was registered in the names of Thomas Barton and Ann Barton as executors of Samuel Barton. Thomas Barton on various occasions executed transfers of shares without the knowledge of Ann Barton, whose name he forged, as well as that of the witness. The transfers were registered. He accounted for the dividends from time to time and so the fraud remained undiscovered. In the case of the last of the forged transfers, notice was sent to Ann Barton that a transfer had been lodged, and unless the company heard to the contrary from her it would be registered. She was persuaded by Thomas Barton that it was all right and took no notice. Sometime afterwards Thomas Barton absconded and the frauds were discovered. The present action was brought by Ann Barton to compel the company to restore her name and Thomas Barton, to the register as being still the owners of the shares, on the ground that the transfers were null and void. For the defendants it was claimed that the executors were not joint owners of the stock, but as executors each had power to dispose of it, and that the transfers executed by one alone were therefore good; and that as to the last of the forged transfers, Ann Barton was estopped from disputing its validity; but the Court of Appeal (Lord Esher, M.R., aud Lindley and Lopes, L.JJ.) were unanimously of opinion that the shares being registered in their joint names, the executors thereby became joint shareholders in their individual capacity notwithstanding they were described in the register as executors, and consequently the shares could only be transferred by a transfer executed by both. As regarded the question of estoppel, the Court thought that there was no estoppel because the plaintiff was claiming a legal right and not merely equitable relief.

TRADE MARK—FALSE TRADE MARK—APPLICATION TO GOODS—INTENT TO DEFRAUD—MERCHANDISE MARKS ACT 1887 (50 & 51 VICT., C. 28, S. 2, S-S. 1). (R.S.C., C. 166, S. 9).

Storey v. *The Chilworth Gunpowder Co.*, 24 Q.B.D., 90, was an information for unlawfully applying a false trade mark to goods contrary to the statute (see R.S.C., c. 166, s. 9). The circumstances of the case were as follows:—The respondents were gunpowder makers, and entered into a contract with the Government to supply powder. Owing to an accident they were unable to make the powder themselves, and in order to carry out their contract they bought German-made powder and put it into barrels supplied by the Government and put labels on the barrels containing their own trade mark. The powder thus delivered was equal in quality to powder of the respondents' own make, but no indication was given that the powder was really German-made. Upon a case stated by magistrates, Lord Coleridge, C.J., and Mathews, J., were of opinion that

the respondents had committed an offence within the Act, and that they had acted with intent to defraud and were liable to be convicted.

MARRIED WOMEN—CONTRACT—MARRIED WOMEN'S PROPERTY ACT 1882 (45 & 46 VICT., C. 75, S. 1, S-S. 3)—(R.S.O., C. 132, S. 3, S-S. 2).

Leak v. *Driffield*, 24 Q.B.D., 98, we have already referred to in our columns, see vol. 25, p. 614. As we there pointed out, it is another of those judicial decisions under the Married Women's Property Act which under pretence of construing it, virtually repeals it or renders it inoperative in an important particular. The action was brought upon a contract made with a married woman to recover the price of goods sold and delivered to her. It appeared that upon her marriage certain property was settled upon her for her separate use, with a restraint upon anticipation, the income of which she spent in the purchase of clothes for herself and children, and that at the date of the contract she had no other separate property free from restraint upon anticipation other than the clothes so purchased. Mathew and Wills, JJ., (the former with reluctance!) came to the conclusion that the foundation of a married woman's liability on her contract is the possession by her at its date of free separate property, with respect to which she might reasonably be deemed to have contracted, and that she could not reasonably be deemed to have contracted with respect to the clothes of herself and children and therefore that she was not liable!

Correspondence.

ATTACHMENT OF DEBTS.

To the Editor of THE CANADA LAW JOURNAL.

Is an assignment of a judgment or chose in action valid as against a primary creditor when attaching summons is served on the garnishee before notice to him of the assignment?

The assignee of the primary debtor relies upon *Grant* v. *McDonnell*, 39 U.C.R. 412, which is apparently the latest case in point and which sustains his contentions—but although decided in 1876 the statutes of 1872 are not referred to in the report of it. On the part of this primary creditor it is submitted that since 35 Vict., cap. 12, consolidated in cap. 122, R.S.O., equitable assignments of choses in action are a thing of the past—and all assignments of choses in action are governed by the statute which expressly requires notice to be given.

Your views upon this question would no doubt be greatly appreciated by others of your subscribers besides,

W. H. B.

London, Jan. 29, 1890.

THE REVISED STATUTES OF ONTARIO.

To the Editor of THE CANADA LAW JOURNAL:

SIR,—Were it not that from the earliest moment of our student days we had become accustomed to look at the price of law books with a degree of awe, and calculated how many weeks' salary (did we get any) it would take to purchase those necessary ones which we could not borrow, we would probably consider it a fraud to be compelled to pay for a law text-book from three to five times what it ought to cost. But what I am aggrieved at is that, notwithstanding the great principle which meets us at every turn, that "*Ignorantia legis neminem excusat*," we have, in order to be able to peruse the Statutes of our land to pay the sum of six dollars. But to whom goes this amount extracted from the not over-filled pocket of the impecunious student, or the barrister or solicitor as yet not overburdened with this world's goods? It cannot surely go to increase the revenues, either directly or indirectly, of a Province boasting of its surplus. It cannot be that the aforesaid Province gets a royalty on the law of the land. Perish the thought! But, then, where does the profit of four dollars go, on books costing about two? We are again reminded of the Roman Emperor who engraved the laws in immense characters on the top of a lofty pillar. The pillar undoubtedly could be seen, so could the laws—if they had had telescopes. Could they complain? Can we?

LAW STUDENT.

IMPRISONMENT FOR DEBT.

To the Editor of THE CANADA LAW JOURNAL:

SIR,—The letter of Mr. Durand in your last number having called my attention to the subject of judgment summonses in Division Courts, it has occurred to me that perhaps a discussion as to the advisability of revising, if not repealing, the enactments referred to might now be opportune. The imprisonment of a debtor, provided for by sec. 240, is in *theory*, as you say, for *fraud*, *contempt*, etc., and not for *debt*. But it is, I believe, generally understood, and sec. 244 would certainly give countenance to the idea, that "imprisonment for debt" is in reality the term best applicable in the premises. I think I may safely say that in nine cases out of ten, the examination of a judgment debtor under the enactment in question results only in annoyance, irritation, or humiliation of the debtor, and waste of time and money on the part of the creditor, besides a useless occupation of the time and attention of the judge, for which matters of more importance seem never to be lacking.

Apart from all considerations as to whether this method of applying legal "thumb-screws" to indigent debtors smacks of barbarism, would not the well-known uselessness of the proceedings in most cases suggest the advisability of repealing the enactment, and thus freeing our Province (the Banner Province of the Dominion!) from the stigma of "imprisonment for debt" in reality as well as in name?

Would it not be well to obtain from the county judges and the profession generally their views upon this matter, and if in favour of a revision of the law, to submit the same for the consideration of the Government at the present session of the Ontario Legislature?

Picton, 31st of January, 1890.

JUSTITIA.

[We gladly publish the above not because we entirely agree with the writer, but because it is the view of one who, from his position and experience, is competent to form a good opinion on the subject. We should be glad to hear from others of our subscribers who are interested in this branch of the law, and have given consideration to its administration.—ED. C.L.J.]

Notes on Exchanges and Legal Scrap Book.

PROFESSIONAL PRIVILEGE.—The Divisional Court, in *Lowden* v. *Blakey and others* (L.R. 23 Q. B. Div. 332), have decided that "the professional privilege," which prohibits a party to an action from requiring the production by his opponent of communications between the latter and his legal advisers, is not to be narrowed down to communications as regards the conduct of litigation or the rights to property. The opinion of the late Master of the Rolls, as expressed in *Wheeler* v. *Le Marchant* (17 Ch. Div. 675), might seem so to narrow it, but the question before the Court of Appeal in that case was, whether correspondence between the defendants' former solicitors and present solicitors, and their former estate agent and present agent, was privileged or not. The order made by the court was: "Order production of the correspondence except such, if any, as the defendants shall state by affidavit to have been prepared confidentially, after the dispute had arisen between the plaintiff and the defendants, and for the purpose of obtaining evidence or legal advice for the purpose of the action." The decision of the same court in *Minet* v. *Morgan* (8 Ch. App. 361) gave a wider meaning to the term professional priviledge, as Lord Selborne and Lord Justice Mellish refused to compel a plaintiff to produce confidential correspondence between himself or his predecessors in title and their respective solicitors with respect to matters in dispute in the action, though made before litigation was contemplated, and Lord Selborne indeed expressed himself surprised to hear the question raised again. Mr. Justice Denman, in *Lowden* v. *Blakey*, expressed his opinion that Sir G. Jessel's definition was not wide enough, and he and Mr. Justice Charles held that *Minet* v. *Morgan* governed the case before them, and would not accede to the defendant's application for the production of a draft advertisement submitted to counsel by the plaintiff. *Wheeler* v. *Le Marchant* can therefore only be understood as showing, that communications between the solicitor and third person must be as regards the conduct of litigation or the rights to property, if they are to be privileged from production: (see the Annual Practice 1888-9, p. 471). It is interesting to observe that Sir G. Jessel, in his judgment in that case, lays down the rule that "Communications made to a priest in the confessional on matters perhaps considered by the penitent to be

more important even than his life or his fortune, are not protected." This is, of course, only a dictum, and does not affect the statement made by Mr. Justice Stephen in his digest of the Law of Evidence (4th edit.), p. 184, that "the question whether clergymen, and particularly whether Roman Catholic priests, can be compelled to disclose confessions made to them professionally, has never been solemnly decided in England, though it is stated by the text writers that they can."—*Law Times.*

A KAFIR LAWSUIT.—A Kafir in the witness box is often a surprise to those who know little or nothing of the traditions of the Kafir race. The ease with which the ordinary native parries the most dexterous cross-examination, the skill with which he extricates himself from the consequences of an unfortunate answer, and, above all, the ready and staggering plausibility of his explanations, have often struck those who come in contact with him in the law courts. He is far superior, as a rule, to the ordinary European, in the witness box. Keen witted and ready, he is yet too cautious ever to answer a question the drift of which he does not clearly foresee, and which when he understands he at once proceeds, if necessary, to forestall by his reply. As a result, the truth of his evidence can only be sifted by a very careful proceeding on the part of the cross-examiner, and by keeping him in the dark as much as possible to the bearing of his answers upon the subject matter of the suit. Whether this dialectic skill is innate in the Kafir, or whether it is the result of long cultivation, it is difficult to say; but as some proof of the former, we subjoin a very interesting extract from a book now unhappily becoming rare—viz., Colonel Maclean's "Handbook of Kafir Laws and Customs, compiled from Notes by Mr. Brownlee, Rev. Dugmore and Mr. Ayliff," which will, we venture to think, throw a great deal of light on the present abilities of the descendants of those whose judicial customs fifty years ago are so graphically described in the following words: "When a Kafir has ascertained that he has sufficient grounds to enter an action against another, his first step is to proceed, with a party of his friends or adherents, armed, to the residence of the person against whom his action lies. On their arrival they sit down together in some conspicuous position, and await quietly the result of their presence. As a law party is readily known by the aspect and deportment of its constituents, its appearance at any kraal is the signal for the mustering of all the adult male residents that are forthcoming. These accordingly assemble and also sit down together within conversing distance of their generally unwelcome visitors. The two parties, perhaps, survey each other in silence for some time. 'Tell us the news,' at length exclaims one of the adherents of the defendant, should their patience fail first. Another pause sometimes ensues, during which the party of the plaintiff discuss in an undertone which of their party shall be 'opening counsel.' This decided, the learned gentleman commences a minute statement of the case, the rest of the party confining themselves to occasional suggestions, which he adopts or rejects at pleasure. Sometimes he is allowed to proceed almost uninterrupted to the close of the statement, the friends of the defendant listening with silent attention, and treasuring up in their memories all the points of

importance for a future stage of the proceedings. Generally, however, it receives a thorough sifting from the beginning, every assertion of consequence being made the occasion of a most searching series of cross questions. The case thus fairly opened, which occupies several hours, it probably proceeds no further the first day. The plaintiff and his party are told that the 'men' of the place are from home, that there are none but 'children' present, who are not competent to discuss such important matters. They accordingly retire with the tacit understanding that the case is to be resumed the next day. During the interval the defendant formally makes known to the men of the neighboring kraals that an action has been entered against him, and they are expected to be present on his behalf at the resumption of the case. In the meantime the first day's proceedings having indicated the line of argument adopted by the plaintiff, the plan of defence is arranged accordingly. Information is collected, arguments are suggested, precedents sought for, able debaters called in, and every possible preparation made for the battle of intellects that is to be fought on the following day. The plaintiff's party, usually reinforced both in mental and material strength, arm the next morning, and take up their ground again. The opponents, now mustered in force, confront them, seated on the ground, each man with his arms at his side. The case is resumed by some advocate for the defendant requiring a restatement of the plaintiff's grounds of action. This is commenced by one who was not even present at the previous day's proceedings, but who has been selected for this more difficult stage on account of his debating abilities. Then comes the tug of war; the ground is disputed inch by inch; every assertion is contested, every proof attempted to be invalidated, objection meets objection, and question is opposed by counter-question, each disputant endeavoring with surprising adroitness to throw the burden of answering on his opponent. The Socratic method of debate appears in all its perfection, both parties being equally versed in it. The rival advocates warm as they proceed, sharpening each other's ardour, till from the passions that seem enlisted in the contest a stranger might suppose the interests of the nation were at stake and dependent upon the decision. When these combatants have spent their strength, or one or other of them is overcome in argument, others step to the rescue. The battle is fought over again and on different ground, some point either of law or evidence that had been purposely kept in abeyance being now brought forward, and perhaps the entire aspect of the case changed. The whole of the second day is frequently taken up with this intellectual gladiatorship, and it closes without any other result than an exhibition of the relative strength of the opposing parties. The plaintiff's company retire again, and the defendant and his friends review their own position. Should they feel that they have been worsted, and that the case is one that can not be successfully defended, they prepare to attempt to bring the matter to a conclusion by an offer of the smallest satisfaction that the law allows. This is usually refused, in expectation of an advance in the offer, which takes place generally in proportion to the defendant's anxiety to prevent an appeal to the chief. Should the plaintiff at length accede to the proposed terms they are fulfilled, and the case is ended by a formal declaration of acquiesence."—*The Cape Law Journal.*

CONTINUING GUARANTEES UNDER SEAL.—The popular notion of a guarantee is unquestionably that it is a contract revocable, whether under hand or seal, as to the future at the will of the guarantor. In contrast to this is the view which seems at one time to have prevailed that *in no circumstances* could a guarantee under seal be revoked. In *Calvert* v. *Gordon*, 3 Man. and Ry. 124, we have a decision which appears to support that view. In that case action was brought against the executrix of a testator who had given a bond conditioned for the faithful service of one Richard Edwards as a collecting clerk to the obligees, trading as Felix Calvert and Co., from time to time and at all times during his continuance in their service and employ. Edwards remained in the service of the plaintiffs and their co-partners as such collecting clerk, was in such service on the day of the death of the testator, and so continued from thenceforth until and after a certain notice was given. This notice was a notice in writing to plaintiff, given by defendant as executrix, to the effect that she would not, as such executrix, remain surety to, or guarantee or indemnify the plaintiffs, for the fidelity of or to and faithful performance by Edwards of his duty as such collecting clerk. Edwards failed to pay over certain moneys that he had collected,and the question was whether the defendant was liable under the bond to indemnify the plaintiffs to the extent of the loss sustained by such non-payment. In respect of moneys received by Edwards before the giving the notice of discontinuance of the guarantee, the loss amounted to £17 2s.; in respect of moneys received subsequently to such notice, the loss was £1,744 1s. 8d. It was in respect of this last-mentioned sum that the real question at issue arose. On behalf of the executrix it was urged that from the nature of the transaction the obligor or his personal representative must be at liberty to discontinue the guarantee, and that a contrary decision would bind the surety to answer for the conduct of the clerk during the joint lives of the master and clerk, provided they continued in that relation to one another, notwithstanding any change of circumstances or conduct on the part of the clerk; but Lord Tenterden, C.J., held that the obligor in such a case must remain liable at all events during the whole period of the service. It would, he said, be a hardship upon the master if the surety could put an end to his liability by giving a notice *which is to take effect from the very day on which it is given.* In reply to the argument of hardship to the surety, his lordship thought it was the intention of the testator to enter into this unlimited engagment, and that he might have stipulated that he should be discharged from all future liability after a specified time, after notice given. In *Burgess* v. *Eve*, L.R. 13 Eq. 450, the question was again raised. There a father, being desirous of obtaining advances for his son from a bank, gave the son a promissory note for £2,000, and entered into an agreement under seal with the bank to the effect that, in consideration of the bank discounting the note for £2,000 for his son, certain deeds and documents which the father deposited with the bank should remain with the bank as security for the payment of all money due or to become due from the son to the bank, on any account whatsoever, and that he would pay the bank upon demand all such money, and he thereby charged the property comprised in such documents with

the repayment thereof. The father died, and the son having become bankrupt, a claim was made by the bank against the estate of the father. This claim had been disallowed by the chief clerk, so far as it rested on the guarantee, on the ground, mainly, that the guarantee being under seal was irrevocable, and that, being irrevocable, the guarantor could not have intended that it should extend to any further sum than £2,000. Malins, V.C., on the question coming before him in Chambers, adjourned it into Court for argument, and decided that the agreement was not limited to the £2,000, but was a continuing guarantee for all money already due, or which should become due, from the son to the bank; and he laid down that a general guarantee under seal might in certain circumstances be withdrawn upon the terms of paying all that may be due under it at the time of giving notice of withdrawal. "Authorities," said the V.C., "have been cited to show that a guarantee under seal is irrevocable. I do not accede to that view of the law. Certain guarantees are undoubtedly irrevocable. When a guarantee is of the fidelity or good conduct of a servant or clerk or person in a confidential position, it may be considered as a contract by the employer and employed, and the surety on his behalf. Therefore if a father guarantee the fidelity of his son, and upon the faith of that guarantee the son obtains a situation, there being no misconduct on the part of the son, reason requires that the father should not arbitrarily have the power of depriving his son, or any person whose credit he guarantees, of the appointment which he has obtained on the faith of the guarantee. If arbitrarily and without the fullest justification he desires to withdraw that which he has deliberately entered into, I am of opinion under such circumstances as those that he would have no right to withdraw . . . but notwithstanding all that has been said, I am clearly of opinion that a person who has entered into such a guarantee, and who is, therefore, responsible for the person whose fidelity is guaranteed, has a right to withdraw from that guarantee when that person has been proved guilty of dishonesty." We do not propose to deal with the question—a wider one—of continuing guarantees in general, their revocability and the distinctions, which may be found in *Harris* v. *Fawcett*, L.R. 8 Ch. App. 866, *Coulthart* v. *Clemenston*, 5 Q.B.D. 42, *Phillips* v. *Foxall*, L.R. 7 Q.B. 666, and *Lloyds* v. *Harper*, L.R. 16 Ch. D. 290; but restricting the inquiry to the case of continuing guarantees under seal, it is, we think, clear that the guarantee is now to be subjected to the same rules of construction as if under hand; the nature of the guarantee is to be the determining factor. If the matter were *res integra* it would, we think, be difficult to defend the reasoning of Lord Tenterden in *Calvert* v. *Gordon* (*ubi sup.*): where is the hardship to the employer if it is open to the guarantor to determine his guarantee, not from the date of the notice, but from a reasonable time after the date? The employed could determine his employment on notice in the usual way, and if he did so the employer would not complain of hardship. Why should not the guarantor—subject to any contract between himself and the employed—have a similar right with regard to that which depends on the employment, the guarantee?—*Pump Court.*

DIARY FOR FEBRUARY.

1. Sat.....Sir Edward Coke born 1552.
2. Sun.....*Septuagesmia.*
3. Mon.....County Court Non-Jury Sittings in York. Hilary Term commences. High Court of Justice Sittings begin.
5. Wed.....W. H. Draper, 2nd C.J. of C.P., 1856.
9. Sun.....*Sexagesima.* Union of U. and L. Canada, 1841.
10. Mon.....Queen Victoria married 1840. Canada ceded to Great Britain, 1763.
11. Tues.....T. Robertson appointed to Chy. Div., 1887.
15. Sat..... Hilary Term and High Court of Justice Sittings end.
16. Sun.....*Quinquagesima.*
18. Tues.....Supreme Court of Canada sits.
17. Wed.....Ash Wednesday.
20. Thu.....Chancery Division High Court of Justice sits.
23. Sun.....*First Sunday in Lent.*
24. Mon.....St. Matthias.
28. Fri.....Indian Mutiny began 1857.

Reports.

FIRST DIVISION COURT OF THE COUNTY OF ONTARIO.

WEBSTER *v.* MCDOUGALL.

Division Court Act, secs. 88, 89, 290.

In an action against a bailiff for a false return, sections 88 and 89 are not applicable, but section 290 is: and the effect of that section is that no such action can be brought except in the county where the bailiff resides and only in the County or High Court.

[WHITBY, Nov. 28, 1889.

The following facts were admitted:

1. The defendant is the Bailiff of the First Division Court of the United Counties of Northumberland and Durham, and this action is brought against him in said capacity.

2. The defendant in the early part of 1888 had an execution in his hands in a suit of Webster (the plaintiff herein) against one Pearce, and under said execution seized a colt, and subsequently seized some cattle; a claim was made to the cattle, an issue was directed, and on the trial the goods were found to be liable to the execution, and against the claimant. That the Bailiff (defendant herein) sold the goods so seized (excepting the colt) and paid the proceeds into Court, and returned the execution also as satisfied in part, and *nulla bona* as to balance.

3. The said return was made more than six months prior to this action being brought.

4. The Bailiff (defendant) herein has received no notice of action.

5. The Bailiff (defendant) resides in the town of Bowmanville which is five miles from the village of Newcastle, where the sittings of Second Division Court of the United Counties of Northumberland and Durham are held; and the town of Whitby, the place where the sittings of this Court are held is distant thirteen miles from Bowmanville.

6. The parties hereto have agreed that the Judge of this Court may decide on these admissions.

DARTNELL, J. J.—Section 88 of the Division Court Act is clearly not applicable, because it only applies to a case where there is a *debt due to or by* a Clerk or Bailiff. The action, therefore, could not be brought in the Newcastle Division Court because it is not brought for a debt but for a malfeasance in office.

Section 89, to my mind concerns actions of a like nature as an action *against* a Clerk or Bailiff, and is controlled by section 290. As practically this action is for a false return, it appears to me that the latter section applies.

It is "a thing done in pursuance of the Act" which provides "that the action shall be commenced within six months after the fact was committed, and shall be "laid and tried in the County where the fact was committed and notice given," etc., sec 290 (d).

These words appear to me to oust the jurisdiction of *any* Division Court to try this action, and that the plaintiff's remedy is in the County Court of the County in which the fact was committed; or in the High Court with the venue laid in that County, according to the damages claimed.

I hold I have no jurisdiction to adjudicate, and I dismiss the action with costs on that ground only. There will be no necessity to express any opinion upon the facts or on the other questions raised.

Early Notes of Canadian Cases.

SUPREME COURT OF CANADA.

ONTARIO AND QUEBEC RAILWAY CO. *v.* MARCHETERRE.

Application to give security for costs—Supreme and Exchequer Courts Act, s. 46—Appeal—Jurisdiction—Interlocutory judgment—Final judgment—Art. 1116, C.C.P.—Amount in controversy not determined—Supreme and Exchequer Courts Act, ss. 28 and 29.

STRONG, J. (in Chambers), dubitante as to the jurisdiction of the Supreme Court to hear an

appeal from a judgment of the Court of Queen's Bench for Lower Canada (appeal side), and desiring to give the parties an opportunity of having the question of jurisdiction decided by the full court, granted an application to allow the payment of $500 into court as security for the costs of the appeal, as the time for appealing from the said judgment would elapse before the next sittings of the Court.

On a motion to quash for want of jurisdiction before the full court, it was

Held, 1. That a judgment of the Court of Queen's Bench for Lower Canada (appeal side), quashing a writ of appeal on the ground that the writ of appeal had been issued contrary to the provisions of the Art. 1116, C.C.P., is not "a final judgment" within the meaning of s. 28 of the Supreme and Exchequer Courts Act. (*Shaw* v. *St. Louis*, 8 Can. S.C.R., 387, distinguished.)

2. Per RITCHIE, C.J., and STRONG, TASCHEREAU, and PATTERSON, JJ., that the Court has no jurisdiction where the amount in controversy upon an appeal by the defendant has not been established by the judgment appealed from. Supreme and Exchequer Courts Act, s. 29.

Appeal quashed with costs.

F. X. Archambault, Q.C., for respondent.

H. Abbott, Q.C., contra.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

COURT OF APPEAL.

Q.B.D.] [Jan. 14.

MAGEE *v.* GILMOUR.

Landlord and tenant—Expiration of term—Notice to quit—Sub-lease—Overholding tenant.

This was an appeal by the defendants from the judgment of the Queen's Bench Division, reported 17 O.R., 620, and came on to be heard before this Court (HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A.) on the 26th and 27th of November, 1889.

The Court, agreeing with the judgment below, dismissed the appeal with costs, holding that the tenancy, though by oral lease void under the Statute of Frauds, was a tenancy for a term certain, and not from year to year; that the sub-tenancy came to an end with the tenancy, and that the subsequent circumstances, fully set out in the judgment below, did not operate to create a new term as between the sub-tenants and the plaintiff.

McCarthy, Q.C., and *W. H. Barry* for the appellants.

J. H. Macdonald, Q.C., for the respondent.

Q.B.D.] ANDERSON *v.* FISH.

Sale of goods—Stoppage in transitu—Consignor and consignee—Right of carriers to prolong period of transitus.

This was an appeal by the plaintiff from the judgment of the Queen's Bench Division, reported 16 O.R., 476, and came on to be heard before this Court (HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A.) on the 14th of November, 1889.

The Court dismissed the appeal with costs, agreeing with and adopting the reasons for judgment of the majority in the Court below.

G. T. Blackstock for the plaintiff.

J. B. Clarke for the defendant.

Q.B.D.]

MANDIA *v.* MCMAHON.

Contract—Breach—Measure of Damages.

The defendant, who was a contractor for certain work at Lancaster, Ont., entered into an agreement with the plaintiffs that if they would go to New York and procure about 200 labourers, he would give them work at $1.25 a day.

The plaintiffs were allowed as damages for the breach of this agreement, $25, their expenses in going to and returning from New York, and $700, the amount of advances made by them to certain of the labourers to pay their fares from New York. They were not allowed commission that would have been received by them from the men if employment had been furnished.

Judgment of the Q.B.D. affirmed.

McCarthy, Q.C., and *Aylesworth* for the appellant.

H. Symons for the respondents.

Co. Ct. Hastings.]

JOHNSON *v.* HOPE.

Assignments and preferences—Bankruptcy and insolvency—Bills of sale and chattel mort-

gages — Mortgage to secure moneys paid by mortgagee to creditor—Intent to prefer—Notice of Insolvency—R.S.O., c. 124, s. 2.

A transaction entered into by a person in insolvent circumstances is not impeachable unless the person claiming the benefit of the transaction had notice or knowledge of the insolvency and did not act in good faith.

A security given by a person in insolvent circumstances to secure an actual advance made without notice or knowledge of the insolvency and in good faith is not impeachable because the moneys advanced are, pursuant to the direction of the insolvent, paid over to one of his creditors, who thereby obtains a preference.

Stoddart v. *Wilson*, 16 O.R., 17, discussed.

Judgment of the County Court of Hastings reversed.

Moss, Q.C., and *F. E. O'Flynn* for the appellant.

R. C. Clute for the respondent.

Q.B.D.]

ROSS *v.* CROSS.

Negligence — Master and servant — Accident caused by defect in hoist.

The defendant was the owner of a tannery for whom a hoist had been built by a contractor, and was, with the plaintiff, one of his employees, aiding the contractor in putting the hoist in place and in testing it. Owing to a defect in the mechanism, of which the plaintiff and defendant were ignorant, the hoist fell, and the plaintiff was severely injured. Both parties were aware that no safety catches had been put in the hoist. The presence of these might have stopped the fall, but their absence had nothing to do with the occurrence of the accident.

Held, that the defendant was not liable.

Judgment of the Queen's Bench Division directing a new trial set aside, and judgment of FALCONBRIDGE, J., at the trial restored.

McCarthy, Q.C., and *Pepler* for the appellant.

Lount, Q.C., for the respondent.

Chy.D.]

GIBBONS *v.* WILSON.

Assignments and preferences—Bills of sale and chattel mortgages—Actual advance—R.S.O., c. 124, ss. 2 and 3.

A solicitor, acting for a creditor, obtained for the debt, on the security of a chattel mortgage, a loan from another client who was ignorant of the purpose for which the loan was required. The solicitor, out of the moneys advanced, paid off the creditor in full, and shortly afterwards the debtor assigned.

Held, affirming the judgment of the Chancery Division, 17 O.R., 290, that the mortgage was one to secure a present actual *bona fide* advance, and could not be impeached.

Moss, Q.C., and *Garrow*, Q.C., for the appellant.

W. F. Walker for the respondent.

ARMOUR, J.]

JOHNSTON *v.* TOWNSHIP OF NELSON.

Municipal Corporations — Highways—Bridges —Limitation of action—R.S.O., c. 184, ss. 530 and 531.

An action to recover damages sustained by reason of the neglect of a municipal corporation to keep in repair the approaches to a bridge, where the bridge and approaches are under the jurisdiction of one municipality only, must be brought within three months after the damages have been sustained.

Section 530 of R.S.O., c. 184, applies only to cases where one municipality has jurisdiction over a bridge and another has jurisdiction over the adjacent approaches.

Judgment of ARMOUR, C.J., affirmed.

Carscallen for the appellant.

Fullerton and *J. W. Elliott* for the respondents.

ROSE, J.]

IN RE CROFT AND THE TOWN OF PETERBOROUGH.

Municipal corporations— By-law—Liquor License Act. R.S.O., c. 194, s. 42—Electors.

The electors entitled to vote upon by-laws under R.S.O., c. 194, s. 42, are those entitled to vote at municipal elections.

Judgment of ROSE, J., 17 O.R., 522, affirmed on other grounds.

Robinson, Q.C., and *E. B. Edwards* for the appellants.

Proussette, Q.C., and *Aylesworth* for the respondent.

PROUDFOOT, J.]

SWIFT *v.* THE PROVINCIAL PROVIDENT INSTITUTION.

Insurance—Benevolent Society—R.S.O., c. 136 R.S.O. c. 172.

The "Act to secure to Wives and Children the Benefit of Life Insurance," R.S.O., c. 136, applies to insurances in Societies incorporated under the Benevolent Societies Act, R.S.O., c. 172.

In re O'Hern, 11 P.R., 422, overruled.

Judgment of PROUDFOOT, J., reversed, BURTON, J.A., dissenting.

G. M. Rae for the appellant.

J. S. Robertson for the respondent.

Q.B.D.]

HANDS *v.* THE LAW SOCIETY OF UPPER CANADA.

Barrister and Solicitor—Law Society—Disciplinary jurisdiction — Evidence — Notices—R.S.O., c. 145.

In exercising their disciplinary jurisdiction, the Benchers of the Law Society, if they take evidence at all, must take it upon oath, unless the right to have the evidence taken upon oath is waived.

Where the plaintiff attended before the Discipline Committee and, without objection, allowed witnesses to make unsworn statements, and examined them upon them, and made an unsworn statement himself, it was held that he could not, after the investigation was ended, take exception to the regularity of the proceedings on the ground that no oath was administered.

Nor could he take exception to the regularity of the proceedings after the investigation was ended, because the notice to the members of the Discipline Committee of the meeting to consider his case did not specify the nature of the business to be disposed of, nor because no notice of the meeting was sent to the Treasurer of the Society, *ex officio* a member of the Discipline Committee, he being at the time in Europe.

Judgment of the Queen's Bench Division, 17 O.R., 300, reversed, and that of BOYD, C., 16 O.R., 625, restored.

A. H. Marsh and *W. Read* for the appellants.

C. J. Holman for the respondent.

HIGH COURT OF JUSTICE.

Queen's Bench Division.

Full Court.] [Dec. 21st, 1889.

REGINA *v.* MCMAHON.

Criminal law—Indictment for murder—Evidence, admissibility of—Statements of deceased after being shot—Complaint—Cross-Examination of Crown witness—Particulars of complaint—Res gestae—Dying declaration.

At the trial of the defendant upon an indictment for the murder of one H., a witness for the Crown swore upon direct examination that H. lived about thirty rods from him, and that one night about half an hour after he had heard shots in the direction of H.'s house, H. came to the witness' house and asked the witness to take him in, for he was shot. The witness did so, and H. died there some hours afterwards.

Evidence of statements made by H. after being taken into the witness' house was rejected.

Upon a case reserved it was contended on behalf of the defendant (1) That counsel for the defendant was entitled to ask the witness in cross-examination whether H. mentioned any particular person as the person who attacked him ; (2) That statements made by H. after he arrived at the witness' house were admissible as part of the *res gestae* ; (3) That such statements, or some of them, were admissible as dying declarations.

Held, 1. That the admission of evidence of a complaint having been made ought properly to be confined to rape and its allied offences, but even if such evidence is admissible in other cases, it can only be so where the person making the complaint has been examined as a witness ; and moreover in this case, when H. asked the witness to take him in for he was shot, he was not making a complaint at all, but merely assigning a reason for asking to be taken in, and the question proposed to be asked was not relevant.

2. That the statements made by H. after he was taken into the house were not admissible as part of the *res gestae*, being made after all action on the part of the wrongdoer had ceased through the completion of the principal act, and after all pursuit or danger had ceased.

Regina v. *Bedingfield*, 14 Cox 341, and *Regina* v. *Goddard*, 15 Cox, 7, followed.

3. That upon the evidence the statements made by H. after being taken into the house were not made under a settled hopeless expectation of death, and were, therefore, not admissible in evidence as a dying declaration.

J. R. Cartwright, for the Crown.

W. R. Meredith, Q.C., and *Pegley*, for the defendant.

Div'l Court.] [Dec. 21, 1889.

WALKER *v.* BOUGHNER.

Specific performance—Contract to make provision by will for granddaughter—Action against executors—Uncertainty of promise and consideration—Services rendered to testator—Remuneration for.

Where a contract on the part of a testator, founded upon a valuable and sufficient consideration, that he will leave by his will to the other contracting party a sum of money as a legacy, is clearly made out, the representatives of the testator may be compelled to make good his obligations.

But where the testator, the grandfather of the plaintiff, took her from the home of her parents at the age of twelve, adopted her, and maintained her, while she worked for him, for nine years, but left her nothing by his will, and paid her nothing for her services, and she sued his executor for specific performance of an alleged contract or promise to make the same provision for her by his will as he should make for his own daughters, and in the alternative for wages;

Held, upon the evidence, that the case did not fall within the rule; the promise alleged to have been made, and the consideration for it, being both of too uncertain a character to entitle the plaintiff to come to the Court for a performance of the promise: but that the circumstances gave rise to an implied contract for the payment of wages, and took the case out of the ordinary rule that children are not to look for wages from their parents, or those in *loco parentis*, in the absence of special contract, whilst they form part of the household.

Decision of PROUDFOOT, J., varied.

Lash, Q.C., for the plaintiff.

Moss, Q.C., for the defendants.

Div'l Court.] [Dec. 21, 1889.

HUBERT *v.* TOWNSHIP OF YARMOUTH.

Municipal corporations — Action to compel maintenance of road—Assumption of road by corporation—Statute labour done with consent of municipal officers—Remedy by indictment.

In an action to compel a municipal corporation to maintain and repair a street laid out by private persons, it appeared that such street was not established as a highway by by-law nor assumed for public use by any corporate act of the municipal corporation; but it was contended that the performance of statute labour thereon with the consent of the pathmaster, and on one occasion with the consent of the councillor for the ward and of the reeve, was evidence that it was otherwise assumed for public use.

Held, that the acts required to work such an assumption must be corporate acts, clear and such as clearly and unequivocally indicate the intention of the corporation to assume the road; and the acts relied upon in this case could not bind the corporation nor work such an assumption.

Held, also, following *Hislop* v. *McGillivray*, 15 A.R. 687, that even if the street had been assumed for public use, the plaintiff's only remedy was by indictment, and the action was not maintainable.

G. T. Blackstock, for plaintiffs.

Glenn, for defendants.

Practice.

MACMAHON, J.] [Jan. 6.

MACDONELL *v.* BAIRD.

Costs—Judgment by consent referring to arbitration—Omission to provide for costs—Powers of arbitrator—Rule 550—Amendment of judgment.

In an action on a bill of costs the parties consented that judgment should be entered for a certain sum "subject to the award" of a named person. When the action came on for trial this consent was filed, and the trial Judge indorsed the record, "I order that judgment be entered for the plaintiff for the sum of, etc., subject to the consent filed herein." Nothing was said about costs, and they were not provided for in

any way. The arbitrator or referee made his report or award finding that the amount of the judgment should be reduced to a named sum, and adding, "I do award to the plaintiff the costs of this action, including the costs of the reference and award." Judgment was entered in accordance with this award.

Rule 550 provides that "The Court will not refer to arbitration."

Held, that this Rule does not prevent any arrangement for the settlement of an action entered into and acted upon by litigants from being sanctioned and enforced by the Court; and therefore there was power to make a reference by consent in this way; but it was a reference to arbitration and not a reference under the Judicature Act, and the referee had no power to deal with the costs.

The award of costs was stricken out of the judgment, and an application afterwards made to the trial Judge to amend the indorsement on the record so as to provide for the costs was refused, although the omission to provide for the costs was not intentional.

Masten for the plaintiff.

W. H. Blake for defendant.

ARMOUR, C. J.] [Jan. 10.

MELBOURNE *v.* CITY OF TORONTO.

Costs—Defendants severing—Partnership—Dissolution before action.

In an action against a municipal corporation for injury to a drain, the corporation caused the two contractors who had constructed the drain and the assignee of one of them to be made defendants. The two contractors were partners at the time of the construction of the drain but had dissolved partnership before the action was begun One partner appeared and defended by one solicitor and the other and his assignee by another solicitor. Judgment was given dismissing the claim of the corporation against the added defendants with costs, but they were not by the judgment limited to one set of costs.

Held, that there was no "law of the Court" which under the circumstances of this case justified the taxing officer in refusing to allow more han one set of costs to the added defendants.

Rule 1202 considered.

C. R. W. Biggar for the City of Toronto.

C. Millar for added defendants.

ROSE, J.] [Jan. 27.

MILLIGAN *v.* SILLS.

Venue—Change of—Preponderance of convenience—County Court action—Appeal from Master in Chambers—Rule 1260.

Upon motion to change the venue from Toronto to Napanee in a County Court action, brought to recover $100 damages for breach of a contract by the defendant to sell a horse to the plaintiff, it appeared that the defendant resided in the County of Lennox and Addington and the plaintiff in Toronto and all the witnesses on both sides were in Lennox and Addington except the plaintiff himself and one other in Toronto.

The defendant swore that he required eleven witnesses at the trial. It was not clear where the cause of action arose, but the breach was probably where the defendant resided.

Held, that there was a very great preponderance of convenience in favor of having the action tried at Napanee, and the venue was accordingly changed.

Held, also, that an appeal lay to a Judge in Chambers from an order of the Master in Chambers under Rule 1260.

Hilton for plaintiff.

Aylesworth for defendant.

ROBERTSON, J.] [Jan. 28.

In re GIBSON.

Bond—Solicitors for committee of lunatic as sureties.

The rule that the solicitor for a party will not be accepted by the court as a bondsman for such party is still in force.

The rule was applied to the case of the committee of the person and estate of a lunatic giving a bond for the due performance of her duties as such committee and offering her two solicitors as sureties.

E. T. Malone for Inspector of Prisons and Public Charities.

Hoyles for Committee.

MACMAHON, J.] [Jan. 30.

KNIGHT *v.* GRAND TRUNK RY. CO.

Discovery—Examination of officers of railway company.

Held, that a track foreman, a switch-foreman and two engine-drivers in the employment o

the defendant company were not officers of the company examinable for discovery under Rule 487, in an action for damages arising out of a railway accident.

Walter Read for plaintiff.

Douglas Armour for defendants.

Court of Appeal.] [Jan. 14.

LEITCH *v.* GRAND TRUNK RY. CO.

Discovery--Examination of officer of railway company—R.S.O., 1877, c. 50, s. 156, (Rule 487) —Railway conductor—Reading depositions at trial.

An appeal from the decision of the Queen's Bench Divisional Court, 12 P.R. 671, that the plaintiff had the right to examine for discovery, as an officer of the defendants the conductor of a train of the defendants through whose alleged misconduct the plaintiff was injured, was dismissed by reason of the disagreement of the Judges in this Court.

Held, per HAGARTY, C.J.O., and BURTON, J.A., that the conductor was not examinable as an officer under R.S.O., 1877, c. 50, s. 156 (Rule 487); and per OSLER and MACLENNAN, JJ.A., that he was examinable.

Per BURTON, J.A.—The only officers intended by s. 156, were such officers as might under the former system have been properly made defendants for discovery merely. The examination sought was not really for discovery; it was a fishing inquiry to ascertain before the trial what precise evidence a particular witness would give.

Per OSLER, J.A.—The test of the propriety of allowing an officer or servant of a corporation to be examined for discovery is his ability to give the necessary information. A person who is entrusted with the charge of a railway train in the course of its transit, the conductor of the train, is, as to that particular occasion, and for that particular purpose, to be regarded as an officer of the corporation as distinguished from a mere servant, no matter how temporary his employment or how summary the corporation's power of dismissal.

Moxley v. *Canada Atlantic Railway Co.*, 15 S.C.R., 145, discussed.

Semble, per OSLER, J.A., that the depositions of an officer of a company upon examination for discovery can only be read against the company at the trial, if at all, when they have taken part in the examination.

Aylesworth for appellants.

W. R. Meredith, Q.C., for respondent.

ROBERTSON, J.] [Feb. 3.

MONK *v.* BENJAMIN.

Parties—Mortgage action for foreclosure—Wife of assignee of mortgagor—Costs—Appeal from taxation—Amount involved.

The wife of a person to whom the mortgagor conveys his equity of redemption is not a proper party to an action by the mortgagee for foreclosure.

Semble, if such person died after judgment, but before final order of foreclosure, his widow would have a right to redeem and might be made a party. An appeal from taxation of costs was entertained in Chambers where the amount involved was only $5.32, for the reason that a question of principle was raised.

J. C. Hamilton, for plaintiff.

R. A. Dickson, for defendants.

FERGUSON, J.] [Feb. 10.

LEACH *v.* GRAND TRUNK RY. CO.

Discovery—Examination of officer of railway company—Engine driver.

Held, following *Knight* v. *Grand Trunk Ry. Co.*, *ante* p. 90, that a servant of the defendant company who was driving a detached engine of the company when it knocked down and killed the man for whose death the action was brought, was not an officer of the company examinable for discovery under Rule 487.

J. W. McCullough, for the plaintiff.

Aylesworth, for the defendants.

Law Students' Department.

EXAMINATION BEFORE HILARY TERM: 1890.

FIRST INTERMEDIATE.

Anson on Contracts—Statutes.

Examiner—R. E. KINGSFORD.

1. What are the requirements in an *offer* and an *acceptance*, respectively, as elements of contract?

2. Where skilled labour has to be expended upon a thing sold before the contract is executed and the property transferred, in what case does the contract come within the Statute of Frauds?

3. In what respect do the rights to rescind a contract obtained by undue influence differ from those of rescission where the contract has been obtained by fraud?

4. What exceptions to the general rule that the written record of a contract must not be varied or added to by verbal evidence of what was the intention of the parties?

5. What are the characteristics of *negotiability* in instruments? Illustrate by example.

6. What is the difference between *substituted contracts* and *waiver?*

7. What is a *protest* of a bill or note? What is *notice of dishonor?*

Smith's Common Law.

Examiner—R. E. KINGSFORD.

1. In what cases may an *assault and battery* be justified?

2. In what cases can a private individual justifiably cause the arrest of another person without a warrant?

3. In an action for malicious prosecution or malicious arrest, what must the plaintiff prove?

4. What are the requisites in an agreement for the sale of goods for the price of $40.00? Why?

5. What is the remedy in case of breach of warranty (1) on an executory contract; (2) where there has been an absolute sale of an article *in esse* with a warranty?

6. What is the difference in result where a particular agent exceeds his authority, from that where a general agent exceeds his authority?

7. Mention the modes of redress of private injuries *by the mere act of the parties.*

Equity.

Examiner—P. H. DRAYTON.

1. Define constructive fraud, and give an example.

2. What distinction (if any) is there between trustees and executors, in regard to the effect of their joining in receipts?

3. What is meant by the maxim Equity imputes intention to fulfil an obligation? Illustrate.

4. Define mistake as remediable in Equity. What mistake of law is considered as equivalent to a mistake of fact, and why?

5. Into what different classes are accounts divided?

6. A. makes a mortgage to B. for $1,000, with interest at the rate of 6 per cent. The mortgage contains a proviso that if interest be not regularly paid, the mortgagor shall pay 7 per cent. Is such a proviso good? if not, why not?

7 What is meant by the term "election" as used in Equity?

Real Property.

Examiner—P. H. DRAYTON.

1. Distinguish between a reversion and a remainder?

2. State the reasons which led to the passing of the Statute of Uses, and state how, if in any way, the provisions of the statute were avoided?

3. Give an example of a tenant in tail after possibility of issue extinct.

4. What is meant by an estate in land?

5. What is an "*interesse termini*"?

6. Distinguish between a joint tenancy and a tenancy in commom.

7. What is the provision of the Statute of Frauds with regard to leases for a fixed number of years?

SECOND INTERMEDIATE.

Personal Property and Judicature Act.

Examiner—R. E. KINGSFORD.

1. Define a *Warranty*, and distinguish Breach of Warranty from Fraud.

2. Why are Trustees of Personal Estate property constituted joint owners?

3. Name and define the kinds of chattels which descend to the *heir?*

4. How far is the rule against perpetuities applied as respects interests in personal estate? Why?

5. In an action for partnership account, what steps can the plaintiff take to obtain the account and how soon can he take them?

6. In what case, the defendant being in default, of pleading can the plaintiff enter final and interlocutory judgment simultaneously?

7. On an assignment of a chose in action, what effect has notice in writing to the original debtor of the fact of such assignment?

Broom's Common Law.

Examiner—R. E. KINGSFORD.

1. In what cases will an action of slander lie without proof of *special damage?*

2. What is the law as to criminal liability of a married woman?

3. Explain how *false representation* will be a ground for an action of damages.

4. Distinguish *absolute privilege* from *qualified privilege* as affecting communications.

5. Explain the difference as regards criminal liability between an *intention* to commit a crime and attempt to do so.

6. Explain the different kinds of estoppel.

7. By what authority, and in what time may Acts of the Dominion and Provincial Legislatures respectively, be disallowed?

Equity.

Examiner—P. H. DRAYTON.

1. Under what circumstances is extrinsic evidence admissible in the case of double legacies, either in favor of or against the presumption of satisfaction?

2. A. enters into a binding contract with B. for the purchase of Blackacre; he refuses to carry out the contract. B. brings an action for specific performance of the contract. A. defends the same alleging, as a defence, misrepresentation. What must he prove under such a defence in order to succeed?

3. A. becomes surety to B. for the payment by C. (who is at the time perfectly solvent) of $1,000. B. has taken a chattel mortgage from C. to secure $500 of the debt, but neglects to register the same. C. becomes insolvent, and the chattel martgage for want of registration is void as against the other creditors. B. calls upon A. to pay the $1,000. Should he succeed, and if not, why not?

4. State the law with regard to the appropriation of payments between debtor and creditor.

5. A. and B. are about to intermarry; marriage articles are drawn up, and after marriage a settlement is made which does not in its terms purport to be made in pursuance of the pre-nuptial articles, and settlement is found not to conform with the articles, and B., the wife, seeks to have it rectified. Can she succeed? State the general law.

6. Under what circumstances (according to Snell) will a Court of Equity in general set aside and cancel agreements and securities which are voidable merely and not void?

7. Under what circumstances (if any) can a trustee safely delegate his authority to another?

Real Property.

Examiner—P. H. DRAYTON.

1. Is it necessary that there should be a consideration in a deed by way of bargain and sale? If so, why?

2. When do covenants run with the land, and when not?

3. What time has a mortgagee within which to sue on the covenant in his mortgage, and how long within which to recover the land after default?

4. What is meant by a "protector of the settlement"?

5. What was the reason that no freehold estate could be created by deed to take effect "*in futuro*"? By what method (if any) could it be done?

6. What are the formalities required to be observed in the execution of a will?

7. What is the effect of a statutory discharge of mortgage *(a)* before, *(b)* after registration?

Law Society of Upper Canada.

TRINITY TERM, 1889.

This notice is designed to afford necessary information to Students-at-Law and Articled Clerks, and those intending to become such, in

regard to their course of study and examinations. They are, however, also recommended to read carefully in connection herewith the Rules of the Law Society which came into force June 25th, 1889, and September 21st, 1889, respectively, copies of which may be obtained from the Secretary of the Society, or from the Principal of the Law School, Osgoode Hall, Toronto.

Those Students-at-Law and Articled Clerks, who under the Rules are required to attend the Law School during all the three terms of the School Course, will pass all their examinations in the School, and are governed by the School Curriculum only. Those who are entirely exempt from attendance in the School will pass all their examinations under the existing Curriculum of The Law Society Examinations as heretofore. Those who are required to attend the School during one term or two terms only will pass the School Examination for such term or terms, and their other Examination or Examinations at the usual Law Society Examinations under the existing Curriculum.

Provision will be made for Law Society Examinations under the existing curriculum as formerly for those students and clerks who are wholly or partially exempt from attendance in the Law School.

Each Curriculum is therefore published herein accompanied by those directions which appear to be the most necessary for the guidance of the Student.

CURRICULUM OF THE LAW SCHOOL, OSGOODE HALL, TORONTO.

Principal, W. A. REEVE, Q.C.
Lecturers, E. D. ARMOUR. A. H. MARSH, LL.B.
Examiners R. E. KINGSFORD, LL.B. P. H. DRAYTON.

The School is established by the Law Society of Upper Canada, under the provisions of rules passed by the Society with the assent of the Visitors.

Its purpose is to promote legal education by affording instruction in law and legal subjects to all Students entering the Law Society.

The course in the School is a three years' course. The term commences on the fourth Monday in September and closes on the first Monday in May; with a vacation commencing on the Saturday before Christmas and ending on the Saturday after New Year's Day.

Students before entering the School must have been admitted upon the books of the Law Society as Students-at-Law or Articled Clerks. The steps required to procure such admission are provided for by the rules of the Society, numbers 126 to 141 inclusive

The School term, if duly attended by a Student-at-Law or Articled Clerk is allowed as part of the term of attendance in a Barrister's chambers or service under articles.

By the Rules passed in September, 1889, Students-at-Law and Articled Clerks who are entitled to present themselves either for their First or Second Intermediate Examination in any Term before Michaelmas Term, 1890, if in attendance or under service in Toronto are required, and if in attendance or under service elsewhere than in Toronto are permitted, to attend the Term of the School for 1889-90, and the examination at the close thereof, if passed by such Students or Clerks shall be allowed to them in lieu of their First or Second Intermediate Examinations as the case may be. At the first Law School Examination to be held in May, 1860, fourteen Scholarships in all will be offered for competition, seven for those who pass such examination in lieu of their First Intermediate Examination, and seven for those who pass it in lieu of their Second Intermediate Examination, viz., one of one hundred dollars, one of sixty dollars, and five of forty dollars for each of the two classes of students.

Unless required to attend the school by the rules just referred to, the following Students-at-Law and Articled Clerks are exempt from attendance at the School:

1. All Students-at-Law and Articled Clerks attending in a Barrister's chambers or serving under articles elsewhere than in Toronto, and who were admitted prior to Hiliary Term, 1889.

2. All graduates who on the 25th day of June, 1889, had entered upon the *second* year of their course as Students-at-Law or Articled Clerks.

3. All non-graduates who at that date had entered upon the *fourth* year of their course as Students-at-Law or Articled Clerks.

In regard to all other Students-at-Law and Articled Clerks, attendance at the School for one or more terms is compulsory as provided by the Rules numbers 155 to 166 inclusive.

Any Student-at-Law or Articled Clerk may attend any term in the School upon payment of the prescribed fees.

Every Student-at-Law and Articled Clerk before being allowed to attend the School, must present to the Principal a certificate of the Secretary of the Law Society shewing that he has been duly admitted upon the books of the Society, and that he has paid the prescribed fee for the term.

The Course during each term embraces lectures, recitations, discussions, and other oral methods of instruction, and the holding of moot courts under the supervision of the Principal and Lecturers.

During his attendance in the School, the Student is recommended and encouraged to devote the time not occupied in attendance upon lectures, recitations, discussions or moot courts, in the reading and study of the books and subjects prescribed for or dealt with in the course upon which he is in attendance. As far as practicable, Students will be provided with room and the use of books for this purpose.

The subjects and text-books for lectures and examinations are those set forth in the following Curriculum :

CURRICULUM.

FIRST YEAR.

Contracts.

Smith on Contracts.
Anson on Contracts.

Real Property.

Williams on Real Property, Leith's edition.

Common Law.

Broom's Common Law.
Kerr's Student's Blackstone, books 1 and 3

Equity.

Snell's Principles of Equity.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

In this year there will be two lectures each day except Saturday, from 3 to 5 in the afternoon. On every alternate Friday there will be no lecture, but instead thereof a Moot Court will be held.

The number of lectures on each of the four subjects of this year will be one-fourth of the whole number of lectures.

The first series of lectures will be on Contracts, and will be delivered by the Principal.

The second series will be on Real Property, and will be delivered by a Lecturer.

The third series will be on Common Law, and will be delivered by the Principal.

The fourth series will be on Equity, and will be delivered by a Lecturer.

SECOND YEAR.

Criminal Law.

Kerr's Student's Blackstone, Book 4.
Harris's Principles of Criminal Law.

Real Property.

Kerr's Student's Blackstone, Book 2.
Leith & Smith's Blackstone.
Deane's Principles of Conveyancing.

Personal Property.

Williams on Personal Property.

Contracts and Torts.

Leake on Contracts.
Bigelow on Torts—English Edition.

Equity.

H. A. Smith's Principles of Equity.

Evidence.

Powell on Evidence.

Canadian Constitutional History and Law.

Bourinot's Manual of the Constitutional History of Canada. O'Sullivan's Government in Canada.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to the above subjects as shall be prescribed by the Principal.

In this year there will be two lectures on each Monday, Tuesday, Wednesday, and Thursday from 10.30 to 11.30 in the forenoon, and from 2 to 3 in the afternoon respectively and on each Friday there will be a Moot Court from 2 to 4 in the afternoon.

The lectures on Criminal Law, Contracts, Torts, Personal Property, and Canadian Constitutional History and Law will embrace one-half of the total number of lectures and will be delivered by the Principal.

The lectures on Real Property and Practice and Procedure will embrace one-fourth of the total number of lectures and will be delivered by a lecturer.

The lectures on Equity and Evidence will embrace one-fourth of the total number of lectures and will be delivered by a lecturer.

THIRD YEAR.

Contracts.

Leake on Contracts.

Real Property.

Dart on Vendors and Purchasers.

Hawkins on Wills.

Armour on Titles.

Criminal Law.

Harris's Principles of Criminal Law.

Criminal Statutes of Canada.

Equity.

Lewin on Trusts.

Torts.

Pollock on Torts.

Pmith on Negligence, 2nd edition.

Evidence.

Best on Evidence.

Commercial Law.

Benjamin on Sales.

Smith's Mercantile Law.

Chalmers on Bills.

Private International Law.

Westlake's Private International Law.

Construction and Operation of Statutes.

Hardcastle's Construction and Effect of Statutory Law.

Canadian Constitutional Law.

British North America Act and cases thereunder.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

In this year there will be two lectures on each Monday, Tuesday, Wednesday, and Thursday, from 11.30 a.m. to 12.30 p.m., and from 4 p.m. to 5 p.m., respectively On each Friday there will be a Moot Court from 4 p.m. to 6 p.m.

The lectures in this year on Contracts, Criminal Law, Torts, Private International Law, Canadian Constitutional Law, and the construction and operation of the Statutes, will embrace one-half of the total number of lectures, and will be delivered by the Principal.

The lectures on Real Property, and Practice and Procedure will embrace one-fourth of the total number of lectures, and will be delivered by a lecturer.

The lecturers on Equity, Commercial Law, and Evidence, will embrace one-fourth of the total number of lectures, and will be delivered by a lecturer.

GENERAL PROVISIONS.

The term lecture where used alone is intended to include discussions, recitations by, and oral examinations of, students from day to day, which exercises are designed to be prominent features of the mode of instruction.

The statutes prescribed will be included in and dealt with by the lectures on those subjects which they affect respectively.

The Moot Courts will be presided over by the Principal or the Lecturer whose series of lectures is in progress at the time in the year for which the Moot Court is held. The case to be argued will be stated by the Principal or Lecturer who is to preside, and shall be upon the subject of his lectures then in progress, and two students on each side of the case will be appointed by him to argue it, of which notice will be given at least one week before the argument. The decision of the Chairman will be pronounced at the next Moot Court.

At each lecture and Moot Court the roll will be called and the attendance of students noted, of which a record will be faithfully kept.

At the close of each term the Principal will certify to the Legal Education Committee the names of those students who appear by the record to have duly attended the lectures of that term. No student will be certified as having duly attended the lectures unless he has attended at least five-sixths of the aggregate number of lectures, and at least four-fifths of the number of lectures of each series during the term, and pertaining to his year. If any student who has failed to attend the required number of lectures satisfies the Principal that such failure has been due to illness or other good cause, the Principal will make a special report upon the matter to the Legal Education Committee. For the purpose of this provision the word "lectures" shall be taken to include Moot Courts.

Examinations will be held immediately after the close of the term upon the subjects and text books embraced in the Curriculum for that term.

Examinations will also take place in the week commencing with the first Monday in September for students who were not entitled to present themselves for the earlier examination, or who having presented themselves thereat, failed in whole or in part.

Students are required to complete the course and pass the examination in the first term in which they are required to attend before being permitted to enter upon the course of the next term.

Upon passing all the examinations required of him in the School, a Student-at-Law or Articled Clerk having observed the requirements of the Society's Rules in other respects, becomes entitled to be called to the Bar or admitted to practise as a Solicitor without any further examination.

The fee for attendance for each Term of the Course is the sum of $10, payable in advance to the Secretary.

Further information can be obtained either personally or by mail from the Principal, whose office is at Osgoode Hall, Toronto, Ontario.