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DIARY FOR DECEMBER.

2 Sun.... *Advent Sunday.*
4. Tues..... County Court sittings for York begin. Armour, J., sworn in Q. B. 1877.
6. Thurs... Rehearing in Chy. begins.
8. Sat..... Michaelmas Sittings end.
9. Sun.... *2nd Sunday in Advent.*
11. Tues.... County Court sitt. (except York) begin. Blake, V. C., sworn in, 1872.

TORONTO, DEC. 1, 1883.

WE shall, if possible, issue the index for the present volume, and sheet Almanac for 1884, with our next number. Press of matter compels us to hold over some leading articles and other original contributions until the first number of the coming year.

THE case of *Garrett* v. *Roberts*, decided in the County Court of Northumberland and Durham, seems likely to become a leading case on the question whether a guilty mind is necessary to make an officer under the Election Act liable to the penalty there stated for omitting to perform the obligations specified in the statute. In this case the learned judge of the County Court decided that the officer was liable for the penalty, although he believed at the time he was acting properly. The counsel for the defendant contended that the penalty was in the nature of a punishment. The defendant ought not to be liable unless he intended to do wrong. The case has been carried to the Court of Appeal, but it will nevertheless be useful to give the judgment *in extenso* as we now do in another place.

WE would commend the following effort on the part of a country conveyancer to the notice of the Attorney-General. If the public can stand this sort of thing of course the legal profession can. The latter think they are entitled to protection as professional men in the same way as every other profession, and to the same extent as the legal fraternity has in almost every other country. But there seems to be a power behind the throne which prevents justice being done in the premises, so far as this country is concerned, and no government seems to be strong enough to "do right and fear not."

The facts in the case we are referred were that a married woman, owner in fee, sold her land, and this is the way the conveyancer drew "the writins:"—"The married woman of the first part; the purchaser of the second part; the husband of the third part." After filling up the usual blanks in the form, whereby the party of the first part conveyed to the party of the second part, the deed concludes, "and the party of the third part, husband of of the party of the first part, hereby bars his dower in the said lands." There is a beautiful simplicity in this document which perhaps may furnish a suggestion to the association for the establishing of the Torrens System in this country.

RECENT JUDICIAL APPOINTMENTS.

THE appointment of Mr. Justice Osler to the Court of Appeal to fill the seat created by the late Act, and the elevation of Mr. J. E. Rose, Q.C., to the place thus rendered vacant in the Common Pleas Division, have given general satisfaction to the public, and have been well received by the profession. Mr. Rose is known to be a sound lawyer, quick,

industrious, clear headed, courteous in manner, and fond of his profession. He has not had, as compared with many now at the Bar, a large counsel business; but this was only a question of time, we believe, with Mr. Rose, and like many others who have gained their experience largely on the Bench, he will, we doubt not, fully justify the confidence reposed in him.

The standing of Mr. Justice Osler at the Bar was, when appointed to the Pleas, not dissimilar in kind to that of Mr. Rose—neither having large experience as leading counsel. Every word of commendation then spoken of Mr. Osler has since been more than warranted by the result. His appointment to the Court of Appeal will strengthen a court, which cannot be said to be in as satisfactory a state as a lover of his country could wish. The fact is the court, when reorganized some years ago, was organized on an entirely false principle, as we then pointed out. Without the slightest disparagement to those learned members of the court who were then appointed, it is increasingly manifest that a Court of Appeal should mainly be filled by the best available *judicial* talent; it should be a place where judges who have shown their judicial capacity as either chiefs or puisnes in the courts below, and desire less active work, can, if still of sufficient mental vigour, find work to do of a nature more congenial to their advancing years. Under the present system the judges of the Court of Appeal are sorts of "maids of all work." It is absurd that the highest Court of Appeal in the Province should spend its time in County Court and Division Court cases. The whole thing is wrong in principle, contrary to precedent, and injurious to the public interests. The subject, however, merits further and fuller discussion than we can give it at present. We may return to it hereafter.

NOVEL METHOD OF PLEADING.

IN the case of *Ross* v. *Hunter*, 7 S. C. R. 289, a somewhat novel method of pleading appears to have been adopted. Upon the appeal coming on for argument it was pointed out that a replication setting up the Registry Laws was not upon the record, and it was agreed by counsel that the pleadings should be amended by adding a replication. It appears that there were more pleas than one to which this replication was necessary, but the pleader growing weary, we presume, with the labour of writing out his replication once, appended to it a note in the following terms:—"The same matter is to be *considered* as replied to the 8th plea in addition to the replications already pleaded, and as a part of such replications." Upon which Mr. Justice Gwynne observes:—"I stop not now to enquire whether the brevity which is so conspicuous in this mode of replying to the 8th plea has so much merit in it as to justify us in adopting this novel and unprecedented form upon a document which is intended to be preserved as a record of the issues joined between the parties upon which the court pronounces judgment in favour of one or other of the parties, and which being so preserved might be regarded as establishing a precedent for this concise method of pleading to be followed in other cases." "Brevity is the soul of wit," and the majority of the court, influenced no doubt by that maxim, suffered the pleading to pass. No doubt if the pleading had commenced "for a replication to the 7th and 8th pleas," it would have been perfectly good, The note at the foot, after all, is merely introducing into the tail, what Mr. Justice Gwynne, having regard to established precedents, thought should be in the head.

The case, however, presents another point of wider interest in that it establishes that a person purchasing land which is subject to an easement existing under an unregistered deed

of which he has no actual notice, is not bound thereby, notwithstanding the particular easement may consist of some erection upon the land in question, which, upon close inspection is visible to the eye—provided he has not in fact actually observed it before he completes his purchase.

SELECTIONS.

ASSIGNMENT OF POLICY ON LIFE OF ASSIGNOR.

The question whether one who has insured his own life may make a valid assignment of the policy to another who has no interest in his life, as relative or creditor, is a vexed one. The courts of New York, Vermont and Rhode Island hold the affirmative, those of Indiana, Pennsylvania, Kentucky, Massachusetts, Kansas, and the United States Supreme Court hold the negative.

The court said in *St. John* v. *American Mutual Life Insurance Co.*, 13 N. Y. 31 : I am not aware of any principle of law that distinguishes contracts of insurance upon lives from other ordinary contracts, or that takes them out of the operation of the same legal rules which are applied to and govern such contracts. Policies of insurance are choses in action ; they are governed by the same principles applicable to other agreements involving pecuniary obligations. * * * I do not agree with the counsel of the defendant that the assignee must have an insurable interest in the life of the assured in order to entitle him to recover the amount of the insurance. If the policies were valid in their inception, the assignment of them to the plaintiff did not change the liability of the company." Citing *Ashley* v. *Ashley*, 3 Sim. 149. This was followed in *Valton* v. *National Fund Life Ass. Co.*, 20 N. Y. 32.

So in *Clark* v. *Allen*, 11 R. I. 439 ; S. C., 23 Am. Rep. 496, it is said : "A life policy is a chose in action, a species of property which the holder may have perfectly good and innocent reasons for wishing to dispose of. He should be allowed to do so unless the law clearly forbids it. * * * We should have strong reasons before we hold that a man should not dispose of his own." As to the point of the wager, it is said : "But the wager was made when the policy was effected, and has the sanction of the law. The assignment simply transfers the policy, as any other legal chose in action may be transferred, from a holder to a *bona fide* purchaser. It is true there is an element of chance and uncertainty in the transaction ; but so there is where a man takes a transfer of an annuity, or buys a life estate, or an estate in remainder after a life estate. There is in all these cases a speculation upon the chances of human life. But the transaction has never been held to be void upon that account.

In *Fairchild* v. *North-Eastern Mutual Life Association*, 51 Vt. 613, the court briefly follow the New York and Rhode Island cases, and disapprove the Indiana and Kansas cases.

On the other hand, in *Franklin Fire Ins. Co.* v. *Hazzard*, 14 Ind. 116 ; S. C., 13 Am. Rep. 313, the court says : "Now if a man may not take a policy directly from the insurance company, upon the life of another in whose life he has no insurable interest, upon what principle can he purchase such policy from another ? If he purchases a policy as a mere speculation, on the life of another in whose life he has no insurable interest, the door is open to the same 'demoralizing system of gaming,' and the same temptation is held out to the purchaser of the policy to bring about the event insured against, equally as if the policy had been issued directly to him by the underwriters." Disapproving the New York cases, and citing *Stevens* v. *Warren*, 101 Mass. 564. Followed in *Franklin Life Ins. Co.* v. *Sefton*, 53 Ind. 380.

In *Stevens* v. *Warren*, 101 Mass. 564, it is said : "The rule against gambling policies would be completely evaded, if the court were to give such transfers the effect of equitable assignments," etc.

In *Life Ins. Co.* v. *Sturges*, 18 Kan. 93 ; S. C., 26 Am. Rep. 761, the same doctrine was held. The court said : "How can such a state of things be tolerated by the laws of any civilized country ? * * * Of all wagering contracts, those concerning the lives of human beings should receive the strongest, the most emphatic, and the most persistent condemnation. * * * If said assignment from Haynes to Sturges were to be upheld, as valid under the law, it would be virtually saying that the law authorizes mere wagering speculations, mere mercenary traffic, concerning human life, and it would be opening the door wide, and inviting to enter the most shocking of all human crimes. * * *

Such a thing would be most clearly against the most obvious rules of public policy, and therefore not to be tolerated by law." Citing the Illinois and Indiana, and disapproving the New York and Rhode Island cases.

In *Warnock* v. *Davis*, 104 U. S. 775, the court said: "The assignment of a policy to a party, not having an insurable interest, is as objectionable as the taking out of a policy in his name. Nor is its character changed because it is for a portion merely of the insurance money. To the extent in which the assignee stipulates for the proceeds of the policy, beyond the sums advanced by him, he stands in the position of one holding a wager policy. The law might be readily evaded, if the policy, or an interest in it, could in consideration of paying the premiums and assessments upon it, and the promise to pay, upon the death of the assured, a portion of its proceeds to his representatives, be transferred so as to entitle the assignee to retain the whole insurance money. * * * But if there be any sound reason for holding a policy invalid, when taken out by a party who has no interest in the life of the assured, it is difficult to see why that reason is not as cogent and operative against a party taking an assignment of a policy upon the life of a person in which he had no interest. The same ground which invalidates the one should invalidate the other—so far, at least, as to restrict the right of the assignee to the sums actually advanced by him. In the conflict of decisions on this subject we are free to follow those more fully in accord with the general policy of the law against speculatfve contracts upon human life." Approving the Indiana and Massachusetts, and disapproving the New York cases.

This was followed in *Bayse* v. *Adams*, Kentucky Court of Appeals, June, 1883, where it was said: "We are unable to see why the rule recognized by all the authorities as applicable to, and which renders invalid, because against public policy, policies of life insurance taken for the benefit of a party having no insurable interest in the life of the person in whose name it is insured, should not be also applied to assignment of a policy where the assignee has no such insurable interest. * * * It is not a sufficient answer to say that the policy was valid when issued. For if a person 'may purchase a policy on the life of another, in whose life he has no interest, as a mere speculation, the door is open to the same practice of gambling and the same temptation is held out to the purchaser of the policy to bring about the event insured against, as if the policy had been issued directly. It is in fact an attempt to do indirectly what the law will not permit to be done directly."

The same doctrine is held in the most recent case, *Gilbert* v. *Moose's Administrators*, Pennsylvania Supreme Court, May, 1883. Moose insured his life for the benefit of Jacobs, who had no interest in his life. Jacobs assigned the policy during Moose's life to Gilbert, who on Moose's death collected the money from the company. *Held*, that Moose's administrator might recover it from Gilbert. The court said: "The sole inquiry then is, to whom do the proceeds belong? Was the court right in holding that they could not go to Jacobs, the beneficiary named in the certificate, or to the defendant, his assignee, because of their want of interest in the assured life? If so, judgment was properly entered for the plaintifis, for in that case the beneficial interest in the risk remained in Jacob Moose and the representatives of his estate. We do not overlook the fact that the status of Jacobs is the point of this case, for if he was the proper and lawful beneficiary, then even were Gilbert without right, the plaintiffs could not recover, for the proceeds of the policy would belong to Jacobs, and on the other hand, if his claim was not good, he had nothing to assign to the defendant. But as a beneficiary merely, having no interest in the life, it seems to us very clear that he could lawfully have no interest in the policy. For if we admit the contrary, if we admit that one man can insure his life for the benefit of another, who is neither a relative nor a creditor, our whole doctrine concerning wagering policies goes by the board. The very foundation of that doctrine is that no one shall have a beneficial interest of any kind in a life policy who is not presumed to be interested in the preservation of the life insured. But in the case supposed the presumption is inverted; the beneficiary is directly interested in the death of the assured. Moreover if such a transaction were permitted, the wager could always be concealed under the mere form of the policy. * * * No semblance of authority from either Pennsylvania or Federal courts has been adduced in support of the position assumed for the plaintiff in error, except a dictum of Judge Sharswood, then president of the District Court of Philadelphia, in the case of *Insurance Co.* v. *Robertshaw*, 2

Cas 189. Not only is the case itself very far from being in point, but even the language cited was intended to have no application to a case like that in controversy. The position assumed by the learned judge is, that where a policy is *bona fide* and founded upon an insurable interest, the assignment or a gift of it to a friend or other person is no fraud upon the insurance company by which it was issued. This however is a position not controverted in the suit now under consideration. Therefore admitting this dictum to be authority in a case proper for its application, it is certainly not so in the case at hand." The court then review the Rhode Island and Federal cases, not citing any others, and conclude: "These authorities, in connection with our own, remove all hesitation concerning the rectitude of the judgment of the court below. If however the question were one of first impression, and to be settled on the ground of public morality and judicial policy, we could hardly fail to reach the same conclusion. So fraught with dishonesty and disaster, and so dangerous even to human life has this life insurance gambling become, that its toleration in a court of justice ought not for one moment to be thought of."

There is however a line of cases, even in Massachusetts and Indiana, holding that one may insure his life, and in the policy direct the proceeds to be paid to another having no interest in his life, and that the beneficiary under such a policy will take. For example, in *Lemon* v. *Phœnix Mutual Life Ins. Co.*, 28 Conn. 294, the court said: "Surely Mr. Peterson had an insurable interest in his own life, and he obtained the insurance on it; and we know of no law to prevent him from making the policy payable in case of his death to the person to whom he was affianced; and if such policy is delivered as a gift to the party to whom payable, we know no law to prevent such gift from being effectual. In *Rawles* v. *American Life Ins. Co.*, 27 N. Y. 282, Judge Wright says: 'If the contract is with the party whose life is insured, he may have the loss payable to his own representatives, or his assignee or appointee.'" To the same effect *Campbell* v. *New England Mut. Life Ins. Co.*, 98 Mass. 381; *Guardian Mutual Life Ins. Co.* v. *Hogan*, 80 Ill. 35; *Providence Life Ins. and Investment Co.* v. *Baum*, 29 Ind. 236; *Langdon* v. *Union Mutual Life Ins. Co.*, 14 Fed. Rep. 272. This latter doctrine is denied in the Pennsylvania case, and that case has at least the merit of consistency. It is difficult to see the distinction between appointment and assignment. If it is impolitic and dangerous to allow a man who has insured his own life to assign the policy to another who has no interest in his life, it must be equally impolitic and dangerous to allow the insured to effect the same purpose by appointing the same person beneficiary in the policy. There is the same want of interest and the same inducement to make the policy available by killing the insured.

The weight of authority is unquestionably in the negative of the question, but we think the better reason is with the affirmative.

—*Albany L. J.*

REPORTS

ONTARIO.

(Reported for the LAW JOURNAL.)

COUNTY COURT OF NORTHUMBERLAND AND DURHAM.

GARRETT V. ROBERTS.

Dominion Election Act—Refusal of returning officer to receive good vote—Penalty.

At an election for the House of Commons one S., a tenant, tendered his vote; some one present asserted that his tenancy had ended, and without further enquiry the returning officer assumed that to be true, and refused the vote, unless the voter should take the oath to the effect that he had not left the electoral district, as required from tenants whose tenancy had ended. As a fact it had not ended, and S. being improperly deprived of his vote, it was

Held, that the returning officer was liable to the penalty imposed by sec. 180 of the Dominion Election Act, whether he acted in good faith or not.

[Cobourg, Sept 4.

This action was tried before His Honour Judge Clark, without a jury, at the last June sittings. The facts on which the plaintiff relied were set out in his statement of claim as follows:—

1. On the 27th February, 1883, an election was holden for a member of the Legislative Assembly of Ontario, to represent in said Assembly the West Riding of Northumberland.

2. At such election the defendant was a deputy returning officer, duly appointed for polling sub-division number one, in the town-

ship of Alnwick, in said west riding of Northumberland.

3. One Robert Skinner had at that time his name upon the list of voters for said subdivision, as tenant of the east half of lot 22, in concession 5, in said township, and was at that time actually tenant of said land.

4. The said Richard Skinner, on said day, presented himself to vote at the polling place where the defendant was deputy returning officer as aforesaid, and the vote of the said Richard Skinner was then objected to by the agent of one of the candidates.

5. The said Richard Skinner was willing and offered to take the oath, form 18 of the Election Act of Ontario, and amending Acts, to "swear that he was still actually, truly, and in good faith, possessed to his own use and benefit, as either owner, tenant or occupant, and in such other words as the said Acts prescribe."

6. The defendant, as such deputy returning officer, refused to allow the said Skinner to take the said oath, form 18, without the addition of the words 'and that you are still a resident of the electoral district,' or without the substitution of the said words for the words 'and still are' in said form 18.

7. The defendant refused to allow the said Skinner to vote unless the said Skinner took the oath, form 18, with the addition or substitution before mentioned, and the said Skinner not being able or willing to take such additional or substitutional oath was refused a ballot by defendant, and did not vote. After which statement of facts the plaintiff claimed $200.

At the trial the learned judge found the facts to be as alleged in paragraphs 1, 2, 3, 4 and 7 of the statement of claim. That Skinner did not offer to take the oath as alleged in paragraph 5, and that the defendant did not refuse to allow Skinner to take the oath mentioned in paragraph 6 as therein alleged.

Immediately after this finding the plaintiff, in open court, moved for judgment. The hearing of the motion was enlarged till the 20th July, when it was argued by

H. R. Riddell, for plaintiff, and

Hector Cameron, Q.C., for defendant.

CLARK, Co. J.—Since the trial there has been no application for a new trial or other substantive motion to disturb my finding of facts. If it were necessary to decide now whether that finding was correct, my judgment would be that the evidence fully supports it.

Section 180 of the Election Act, R. S. O. cap. 10, is as follows:—"Any deputy returning officer or poll clerk who refuses or neglects to perform any of the obligations or formalities required of him by this Act, shall for each such refusal or neglect incur a penalty of two hundred dollars;" and by section 182, "All penalties imposed by this Act shall be recoverable with full costs of suit by any person who will sue for the same by action of debt or information in any of Her Majesty's courts in this province having competent jurisdiction . . ."

Though it was made apparent by the addresses and argument of counsel at the trial that the action is brought under section 180, it was not so mentioned in the statement of claim, and the first objection against a judgment in favour of the plaintiff was based on that omission — it was contended that suing in the character of an informer and for a penalty, it was not enough for him to describe the bare facts on which he relied—that (under sec. 182, ss. 2) he must at least allege that the facts stated amounted to an offence, and that the defendant acted contrary to that statute, and it was urged that a court should not aid the plaintiff by permitting an amendment in a case of this kind.

The Bank of Montreal v. *Reynolds*, 24 U. C. Q. B. 381, is an authority against this contention. There the defence was usury, and it was held that the amounts named as the loans by the plaintiff were material and ought to have been correctly stated, which they were not, but at the trial Wilson, J., refused to allow them to be amended, "he doubted if the power should be exercised when the consequences were so serious."

The question whether the amendment ought to have been permitted went to the full court, of which the judgment was delivered by Draper, C.J. He said:—"The legislature have relieved the court and judge from considering the character of the action or of the defence. They give a simple rule for the purpose of determining in the existing suit the real question in controversy," and the decision of the court was that the amendment ought to have been allowed as a matter of course. In his judgment he set out C. L. P. Act, sec. 222, the en-

actment under which permission to amend had been asked; he pointed out that that section used the word "may" concerning one class of amendments, and "shall" as to another, and he spoke of the language which applies to amendments necessary to determine the real question in controversy as amounting to "a mandate," and he was "free from doubt" on the matter before the court.

I feel that if the defect pointed out by the defendant in this case is a material one, then I should be preventing the trial of the real question were I to refuse permission to amend.

The language on which that case turned is reproduced in Rule 178 of the Judicature Act: "All such amendments shall be made as may be necessary for the purpose of determining the real questions or question in controversy between the parties." Assuming then that the statement of claim was defective, as argued by the defendant, I think it would have been my duty at the trial, if asked, to allow its amendment.

The only other question is whether the defendant, having been silent on that occasion, is thereby strengthened in his present position. I think the proposition answers itself. If there is any difference in the rights of the parties then and now, his must be diminished who refrained from objecting to a fault at a time when it could be remedied, and if it were not possible to remedy it now, principle might require me to say that the objection was too late and would not be heard, but that difficulty is not in my way. Rule 474 of the Judicature Act declares that "the court or a judge may at any time and on such terms as to costs or otherwise, as to the court or judge may seem just, amend any defect or error in any proceedings; and all such amendments may be made as may be necessary for the advancement of justice, determining the real question or issue raised by or depending on the proceedings, and best calculated to secure the giving of judgment according to the very right and justice of the case." As the plaintiff has asked to amend his statement of claim if it be defective, I shall order under this rule that it be amended so as to conform to the requirements of the said section 182.

Passing now from matters of form, I understand the defendant's main contention to be that there is no evidence that the defendant did not conscientiously believe it to be his duty to take the course he did, and that if he did so believe then he could not be liable to a penalty, especially as the statute visits the non-payment of it with imprisonment, in other words he argued that the statute should be construed as intending to punish only wilful offenders. If this is the true reading the plaintiff ought not to recover.

The statement of claim did not allege on the part of the defendant any wilful intention to neglect the formality or obligation imposed on him; if such an allegation was considered to be a necessary element in the case, its absence might have been made the ground for a demurrer, which would have been probably the most convenient as well as the most regular way to try the question; but the omission does not relieve me from deciding now whether such an intention is a *sine qua non*, for the plaintiff cannot have judgment if the facts alleged and proved are not sufficient in point of law to entitle him to recover. I may say that if there had been an issue involving the question I should have found at the trial that the defendant committed the wrong complained of under a conscientious belief that he was doing no wrong; but as I read the statute that would not help him.

This is an action of debt, and I do not think the addition of imprisonment to the usual method of enforcing the judgment authorizes me to treat the defendant as if he were being tried as a criminal, and nothing short of that would accord with his contention and enable me to say he is to go free because *mens rea* was not established.

The plaintiff cites *Pickering* v. *James*, L. R. 8 C. P. 489, in support of his right to recover. It is true that the plaintiff there was held entitled to judgment against an official acting under the Ballot Act who had unintentionally neglected his duty. That, however, does not go far enough to show any liability on the part of this defendant. In that case the discussion was mainly on the question whether the Act had cast certain duties on the defendant, which being found in the affirmative, the plaintiff, who had been aggrieved and had in fact lost his election through the error of the defendant, was held entitled to recover damages though the error had been without malice or want of reasonable care. That, however, was only following a principle well

settled, that when a ministerial duty is imposed an action will lie for the breach of it. That and similar cases, which give damages to parties who are injured by the wrong done, throw no light on the reason for directing the defendant in this case to pay $200 to the plaintiff, who has not been injured. The reason is to be found in the positive language of the Election Act already quoted.

It is not for me to decide whether the legislature ought to enact that an officer of the law acting in a ministerial capacity, and conscientiously believing he was doing right, shall be made to pay a penalty or be imprisoned because he did not know he was doing wrong, and irrespective of the question whether the plaintiff or any one else suffered by his mistake. I have only to say whether such a law has been made, and I think it has.

I construe section 180 as meaning what it says, and to interpret it as relating only to wilful refusal or neglect, would, in my judgment, be undertaking to make the law instead of expounding what is already made. In taking this view I do not overlook the rule which requires the words of each portion to be given that meaning which will best accord with the general intent of he whole Act. But as far as I am able to judge there is nothing in the language of this section contrary to the tenor and object of the whole law of which it forms a part.

There is a *dictum* in a practice case which fortifies me in my opinion. *Cameron* v. *Clucas*, 9 Prac. R. 405, was an action for the penalty mentioned in section 108 of the Dominion Election Act of 1874, the language of which is almost identical with that of section 180 in question here. The statement of defence alleged "that if he, the defendant, neglected to perform such of the obligations or formalities required of him by the Dominion Election Act of 1874, as are set forth in the plaintiff's statement of claim, such non-performance was unknown by and unintentional on the part of the defendant, and was not the result of a guilty mind with respect to such non-performance." An application was made to strike out this paragraph on several grounds, amongst others, because it was no answer. The pleadings were ordered to be amended without deciding on its sufficiency; but, in disposing of the matter Cameron, J., made this remark:—"I may say I have very little doubt the paragraph shows no valid grounds of defence."

I have still to say whether the facts proved amount to a refusal or neglect to perform any of the obligations or formalities required of a deputy returning officer by the Ontario Election Act. Section 91 is as follows:—"The deputy returning officer shall receive the vote of any person whose name he finds in the proper list of voters furnished to him, provided that such person, if required by any candidate or by the deputy returning officer himself, takes the oath or affirmation hereinafter mentioned, which such deputy returning officer is hereby empowered to adminster. Such oath shall be according to form 18 in Schedule A to this Act, where the person claims to be entitled to vote in respect of real estate . . . No other oath or affirmation shall be required of any person whose name is entered on any list of voters as aforesaid."

The facts established by the verdict show that the defendant was a deputy returning officer, that he found the name of Skinner in the proper list of voters, that Skinner attended the polling place and claimed to vote in respect to real estate, that he was a tenant of land in the polling sub-division of the defendant, that the defendant refused to allow Skinner to vote unless he would swear amongst other things thathe was a resident of the electoral district.

Now the form alluded to in sub-section 2 does not require a tenant to swear that he is still a resident of the electoral district, but the defendant took upon himself to decide, and did decide, that this tenant should not vote unless he would so swear, and he acted on that decision. The explanation given of this conduct is that when Skinner went up to vote some one present asserted that Skinner's tenancy had ended, and without further enquiry the defendant assumed it to be true.

The main fact of the case was proved beyond question; the defendant, in his evidence, did not prevaricate or attempt to deny it. He said, "I refused to allow him to vote unless he took the oath with the words 'and still are' left out, and the other clause substituted to the effect that he was still a resident of this electoral district, after that he went out without voting."

In my opinion the defendant refused to perform an obligation required of him by the Election Act.

Judgment is for the plaintiff with full costs, the statement of claim to be amended as aforesaid.

RAILWAY CASES.

IN RE O'BOYLE AND THE ONTARIO AND QUEBEC RAILWAY.

Dominion Railway Act of 1879, 42 Vic. ch. 9.

The notification of the non-acceptance of the sum offered by the railway company, and the appointment of an arbitrator on behalf of the owner of the land, under sub-sections 15 and 16 of sec. 9 of the Dominion Railway Act of 1879, need not be in writing when the facts sufficiently show that the owner was aware of the Company's offer, and verbally refused to accept it, and named his arbitrator.

[Whitby, Sept. 25.

This was an application to the County Judge to appoint a sworn surveyor, to act as sole arbitrator under sub-sec. 15 of sec. 9 of the Dominion Railway Act of 1879. The application was opposed on the part of the claimant. Affidavits on both sides were put in, from which it appeared the owner was duly served with the notice required by sub-sec. 12 of sec. 9, but, being illiterate did not read it, and lost it some time before the expiration of the ten days from its service. They further show that he was aware of its material contents and the offer made, and that he had an interview with the company's secretary and solicitors before the expiration of the ten days after service, at which he, *ore tenus*, refused acceptance of the offer and named his arbitrator.

DARTNELL, J.J.—I strongly urged upon the owner to accept the arbitrament of a sworn surveyor, as just as likely to do full justice between him and the company as any other tribunal, and being much less expensive to him should the award be against him—but without avail. He has a right to the tribunal given by the Act, unless his own conduct has deprived him of it.

When the words of a statute have the effect of depriving any one of a right they must be construed strictly, and as the words of the statute in question do not require the notification of the non-acceptance of the offer and of the name of the owner's arbitrator to be in writing, and the evidence showing such notification to have actually taken place, although not reduced to writing, I think I should decline to make the appointment of a sole arbitrator.

Application refused.

SECOND DIVISION COURT OF THE COUNTY OF YORK.

HUNTER V. SAUNDERS.

Joint tort feasors—No contribution.

In a *qui tam* action judgment was recovered against four justices. One paid the amount of the judgment and sued one of his co-defendants in the Division Court to recover a contribution of one-fourth of the judgment and costs.

Held, that they were joint *tort feasors*, and that no contribution could be enforced.

[Toronto, Nov. 16.

The facts of the case sufficiently appear in the judgment of

MCDOUGALL, J.J.—In this action the plaintiff seeks to recover from the defendant the sum of $26 as a contribution, being one-fourth share of a judgment obtained against the plaintiff, the defendant and two others, and which the plaintiff in this action, under the pressure of execution issued against his goods, was compelled to pay.

The plaintiff and defendant are Justices of the Peace for the County of York. The plaintiff, defendant and two other justices of the county tried one Lloyd for an offence committed by him, and convicted him. The plaintiff was requested by his associates to see to a proper return being made of the conviction in due time to the Clerk of the Peace, and he undertook the duty. The conviction not being returned in proper time, Lloyd brought a *qui tam* action against all four justices, and recovered a judgment against them in default of a plea for the penalty $80, and $24.71 costs. The amount of the said judgment was paid under pressure by the plaintiff.

The general principle of law no doubt is very clear that there is no contribution between joint *tort feasors*. It is contended that there are exceptions to the general rule, and that this action can be sustained under some of the cases.

In *Merryweather* v. *Nixan*, 8 T. R. 186, Lord Kenyon laid down broadly the principle that no contribution could be claimed at law as between wrong doers. He made this qualification—that contribution might sometimes be enforced in

cases of indemnity, where one man employs another to do acts not unlawful in themselves.

In *Adamson* v. *Jarvis*, 4 Bing. 66, Best, C.J., said that the rule that wrong doers cannot have redress or contribution against each other is to be confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act.

In *Betts* v. *Gibbons*, 2 Adol. & E. 76, Lord Denman, in commenting on the cases, particularly the two above quoted, says that the cases would appear to go this far "that where one party induces another to do an act which is not legally supportable, and yet is not clearly a breach of law, the party so inducing shall be answerable to the other for the consequences." Taunton, J., in the same case, says :—"The principle laid down in *Merryweather* v. *Nixan* is too plain to be mistaken. The law will not imply an indemnity between wrong doers. But the case is altered when the matter is indifferent in itself, and when it turns upon circumstances whether the act is wrong or not." The case of *Wooley* v. *Batte*, 2 C. & P. 417, was an action by one proprietor against a co-proprietor for contribution, the plaintiff having had to pay damages caused by the negligence of a servant of the proprietors, but that was evidently a case of partnership. The same may be said of *Pearson* v. *Skelton*, 1 M. & W. 504. A ground alleged in these cases too, was that the wrong doers in these cases were *tort feasors* only by inference of law. In the latter case a non-suit was sustained because the question of liability involved the taking of partnership accounts, and was therefore a case for equity.

It has been expressly held that where the tort amounts to a crime there is no contribution : *Shackel* v. *Rosier*, 2 Bing. N. C. 648 ; *Colburn* v. *Patmore*, 1 C. M. & R. 73.

In *Power* v. *Hoey*, 19 W. R. 916, the question of the liability of wrong doers is fully discussed, and the learned Irish Vice-Chancellor states that the principle that there is no right of indemnity between wrong doers is confined to cases where the fraudulent or illegal transaction is itself the basis of the claim, but that the rule does not apply where the transaction, though leading to that which is the basis of the claim, is separable from it.

The only case which has been cited or which I have been able to find where perhaps the doctrine laid down seems to favor the plaintiffs contention is an American case—*Armstrong Co.* v. *Clarion Co.*, 66 Penn. St. 218. There two counties were jointly responsible for maintaining in repair a bridge over a stream running between the counties. It was allowed to get into a state of disrepair, and a traveller was injured. He sued and recovered damages against Armstrong County. This county brought an action against Clarion County to enforce contribution to the extent of one-half the damages which it had been compelled to pay. The court, after reviewing the English cases, held that in the case before them the plaintiffs could recover.

In the present case the omission of duty subjected the justices to a penalty of $80. True it may be that it was as much the duty of one as the other to make the proper return of the conviction, indeed it required the signatures of all the justices ; but all failed to make a return, and therefore all became liable to the penalty. It appears to me that all being in fault, and having incurred the consequence of a joint default—the responsibility for a statutory penalty—they were joint tort *feasors*. Nor can the case be brought within the doctrine of the cases of doing an act not unlawful in itself, for here the omission to perform the duty was expressly contrary to the statute, and therefore unlawful, and unlawful to the knowledge of each of the justices. The American case above cited is, in my opinion, not in point. There there was no statutory penalty. There was a liability to the injured party for pecuniary damages. Again I do not think the case entirely reconcilable with the English authorities, and even if the doctrine laid down could be supported I think the present case distinguishable. Here the plaintiff knowingly omitted to perform a duty imposed by statute. Morally as between himself and his associate justices it was his personal neglect that caused all the difficulty. The defendant and the others were not at all absolved from their responsibility by reason of this fact, but certainly his own neglect raises no equity in favor of the plaintiff.

The penalty imposed by the Summary Conviction Act is in the nature of a statutory fine, and although the failure to return the conviction does not amount in law strictly to a crime, it is an offence which is somewhat akin in its con-

sequences. The informer sues on behalf of himself, and the Crown for the recovery of the penalty, and one-half thereof, when recovered, belongs to the Crown, and is applied to the public uses of the Province. The difference between a fine imposed for an offence punishable by summary conviction, or by indictment, where the whole fine is appropriated by the Crown, and the case of the recovery of a penalty for not making a return of a conviction where one-half goes to the Crown, consists chiefly in the mode in which the penalty or fine is proceeded for. The penalty is recovered by civil action, and the fine proceeded for by information, and summons followed in both cases by a judgment of the court.

Upon the law as above summarised, and upon the facts stated, I am therefore clearly of the opinion that the plaintiff is not entitled to succeed, and I must direct the entry of a non-suit.

EIGHTH DIVISION COURT OF THE COUNTY OF YORK.

HANNON V. CHERRY.

Lien of innkeeper—Sale of chattels left by guest—Waiver of lien.

A man left a stolen horse with C., an innkeeper, as security for a night's lodging for himself and horse. He never came back to redeem the animal. C., after advertising and getting no claimant for horse, at expiration of four months sold horse to pay for its keep. Five years afterwards, through conviction of thief, the true owner learned that the horse was left with C. He demanded the animal; but C. having sold it was unable to comply with demand.

Held, that before 45 Vict. cap. 16, an innkeeper had no power to sell goods of guest to realize his lien without consent of owner of goods.

Held also, that the unauthorized sale in this case was a waiver of the lien, and rendered innkeeper liable for damages for the conversion to extent of full value of the horse, and that claim for keep could not be deducted from damages.

[Toronto, Nov. 16.

The facts of the case fully appear in the judgment of

MCDOUGALL, J.J.—The plaintiff in this case is a livery stable keeper in Hamilton. The defendant an hotel keeper in the County of York. In 1877 the plaintiff had a mare stolen from him at Hamilton. He subsequently, in 1881 or 1882, secured the arrest of the thief, and procured his conviction. From the thief he learned that he (the thief) had left the stolen horse with an hotel keeper in the township of York. From the evidence it appears that the defendant was the hotel keeper in question. The thief came to the defendant's hotel in 1877, the next day after the alleged theft, and stopping over night at his hotel left in the morning without paying his bill, but leaving the horse as security therefor, promising to return in a few days to settle the claim and redeem his horse. He never came back again. After waiting a couple of weeks the defendant advertized for an owner of the horse in the *Globe* newspaper. Getting no reply to the advertizement the defendant, at the end of about four months, advertized a public sale of the horse, and at the sale bought it in himself, after some competition, for $42. He kept the animal about a month or six weeks longer and sold it for $50. There is no doubt from the evidence, and the defendant himself does not seriously dispute the fact, that the horse in question was the horse stolen from the plaintiff in 1877, and that it was left with him by the thief.

The plaintiff in this action claims the right to recover the value of the horse from the defendant on the ground that the sale by the defendant was an act of conversion which waived the lien, and renders him liable for the value of the animal. The defendant claims a set off for the keep of the horse for four months.

There is no doubt that at common law an innkeeper was not bound to enquire whether the guest who might come to his inn was the true owner or not of the goods he brought with him. The sole question of importance as affecting the rights of the true owner would be whether the person leaving the goods with the inn-keeper was in fact *a guest;* for if he came as a guest the inn-keeper was bound to receive him and his goods whatever their nature: *Johnson* v. *Hill*, 3 Stark 172; *Threfall* v. *Barwick*, L. R. 10 Q. B. 210; *Kent* v. *Shuckard*, 2 B. & A. 805. He was bound to receive him if he had accommodation, and having received him as a guest, would have a lien upon any goods brought by him, which lien could not be defeated even by the true owner: *Johnson* v. *Hill*, *supra.* The owner would have his remedy against the guest. But although the landlord is not bound to enquire who is the owner of the goods, still if it can be shown that he knew the

guest was *not owner*, he will have no lien upon them: *Broadwood* v. *Granara*, 10 Ex. 423. Having once obtained a right of lien it remains as long as the goods remain, and the person who bought them retains the character of a guest. Continuance of possession of the goods is absolutely necessary to enable the holder of the goods to exercise his right of lien: *Ryall* v. *Roth*, 1 Atk. 165. The general principle appears to be that if an inn-keeper allows a traveller to leave goods at his inn, and the traveller never becomes a guest, the innkeeper is answerable for the loss or damage to the goods, and consequently will have no lien upon them, for in the case of goods the right of retainer exists only in consideration of the obligations due to the guest; but it would be otherwise as to animals or chattels, which may be improved by keeping, for then the general principle of the law of lien prevails, and the innkeeper can retain a horse for its keep even though the person who has brought it to the inn has not lodged it there himself: *Allan* v. *Smith*, 12 C. B. N. S. 638. The mere leaving the horse constitutes the person who leaves it "a guest," and thus the landlord becoming responsible has also his security. In the present case there is no doubt, however, that the thief became a guest, for he lodged all night with the defendant, and the horse was kept in the stable.

But another principle of the peculiar nature of an inn-keeper's lien is that the property detained cannot be sold unless by the consent, express or implied, of the owner, either to reimburse the inn-keeper for the original bill, or to cover the expenses incurred in keeping it: *Thames Iron W. Co.* v. *Patent Derrick Co.*, 1 Johns & W. 97. A lien is a *mere right of detention* for the debt due, and the property cannot be parted with or sold without a waiver of lien: *Jones* v. *Pearl*, Strange 556; *Ex parte Shunk*, 1 Atk. 234; *Kruger* v. *Wilcox*. Amb. 252; *Wilkins* v. *Carmichael*, Dougl. 101: *Sweet* v. *Ryan*, 1 East. 4; *McCoulbie* v. *Davies*, 7 East 5.

In the present case, in view of the authorities, I must hold that the sale of the horse in question determined the lien, and rendered the defendant liable to the plaintiff, the true owner, for the value of the animal. And the lien being ended there can be no claim for the keep of the horse against the plaintiff.

It is unfortunate for this defendant that the Ontario Act, passed in 1882, had not been on the Statute book some years sooner. That Act, 45 Vict. cap. 16, Ont. enables an inn-keeper, (providing certain formalities are observed), to sell a horse or other animal should his claim in respect of them be unpaid for the space of *two weeks*—a salutary provision, and conferring a power which it is somewhat surprising to find the legislature have been so tardy in extending to our numerous publicans.

As to the damages, under all the circumstances of the case, I think they should be the price realized by the defendant at his last sale of the animal, when he sold it as his own property, viz. $50. The defendant appears to have acted in good faith though in ignorance of the law. Verdict for plaintiff, $50.

RECENT ENGLISH PRACTICE CASES.

MCGOWAN ET AL. V. MIDDLETON.

Imp. O. 19, r. 3; O. 23, r. 1—Ont. rr. 127, 170.
Pleading—Discontinuance of action—Counter-claim.

By discontinuing an action after a counter-claim has been delivered, a plaintiff cannot put an end to it so as to prevent the defendant from enforcing against him the causes of action contained in the counter-claim.

Vannasseur v. *Kraff*, L. R. 15 Ch. D. 474, overruled.

[C. A., L. R., 11 Q. B. D. 464.

Per BRETT, M. R.—I think that a counter-claim is not a cross-action; it cannot be deemed an action, it not being commenced by writ of summons. But a counter-claim must be treated as if it were a proceeding in a cross action. . . The fundamental idea of the framers of these statutes [the Judicature Acts] is to be found in the Judicature Act, 1873, sec. 24, sub-s. 7 (Ont. Jud. Act. sec. 16, sub-s. 8.) . . The plaintiff's action being discontinued, that which is only a defence to it drops with it; but anything beyond a defence, anything in the nature of a claim against the plaintiff, must be treated separately and cannot be discontinued. . . The plaintiff has a right to plead to it (the counter-claim) anything which would be a defence to a cross-action; the old doctrine of defence in pleading is gone, and the plaintiff may plead by way of defence to the counter-claim the facts averred in the claim which he has discontinued; but he must do that within a limited time, and if he

does not deliver a pleading within a proper time, the defendant has a right to ask for judgment.

FRASER v. COOPER, HALL & CO.
WADDELL v. FRASER.

Imp. O. 22, r. 6—Ont. r. 165.
Counter-claim against non-party—Appearance thereto.

A person not a party to an action, when made a defendant to a counter-claim, is not entitled to enter an appearance gratis, *i. e.* until such service upon him as is mentioned in the above rule.

[L. R. 23 Ch. D. 685.

Per BACON, V. C.—Counter-claims, though they are to be treated for some purposes as independent actions, are the creatures only of the statute. They did not exist in any form or kind until this Act was passed. The Judicature Act has introduced an entirely new practice, and in ascertaining that practice, the rules must be construed according to the words used.

WEBB v. STENTON.

Imp. O. 45, r. 2—Ont. r. 370.
Attachment of debts—Income from trust fund—"Debt owing or accruing."

A judgment debtor was entitled for his life to the income arising from a fund vested in trustees, payable half-yearly in February and August. Upon application by the judgment creditor in November for a garnishee order, attaching the debtor's share of the income in the hands of the trustees, it appeared that the last half-yearly payment had been made, and that there was no money, the proceeds of the trust property, in the hands of the trustees,

Held, that although any debt, legal or equitable, may be attached under the above rule, there was here no debt "owing or accruing" at the time when the order was applied for which could be attached under it.

Semble, that the proper course for the judgment creditor to pursue was to apply for the appointment of a receiver, under the practice of the Chancery Division.

In re Cowan's Estate, L. R. 14 Ch. D. 638, considered.

[C. A., L. R. 11 Q. B. D. 578.

Per BRETT, M. R.—It seems to me, upon the plain reading of O. 45. r. 2 (Ont. r. 370), that no order can be made unless some person at the time the order is made is indebted to the judgment debtor. If there be a person so indebted, then the order will be that all debts owing or accruing from such person to the judgment debtor shall be attached. If there is a debt due payable *in præsenti*, of course an order may be made to attach that debt. If there is not a debt payable *in præsenti*, but there is a debt in existence, *debitum in præsenti*, but payable *in futuro*, it seems to me that such an order could be made with regard to that debt, although it be the only debt, and there is no debt payable *in præsenti*, because such third person is indebted to the judgment debtor, and that would satisfy the words of the rule. . . It seems to me that the meaning of "accruing debts," in O. 45, r. 2 (Ont. r. 370) is *debitum in præsenti, solvendum in futuro*, that it goes no further, and that it does not comprise anything which may be a debt, however probable and however soon it may be a debt. That is the construction which I put upon this rule.

Per LINDLEY, L.J.—I am of the same opinion. The question is one of very considerable importance, especially as our decision is likely, we are told, to disturb the practice, in Chambers at least, of the Chancery Division, if not of the Common Law Division.

Per FRY, L. J.—I agree in the conclusion which has been arrived at by the other members of the Court. . . I will make one more observation only. It appears to me that in arriving at this conclusion we are not laying down any rule which will produce a defect in the administration of justice. I think the power of the judgment creditor to obtain a receiver under the practice of the Chancery Division is adequate to meet all that may be required, and will prevent any denial of justice.

THE MERSEY STEAMSHIP CO. v. SHUTTLEWORTH & CO.

Imp. O. 19, r. 3; O. 40, r. 11—Ont. rr. 127, 322.
Claim, admission of—Counter-claim—Payment into court.

In an action for a liquidated demand the defendants pleaded admitting the claim, but setting up a counter-claim for unliquidated damages to a greater extent.

The Court refused an application under Imp. O. 40, r. 11 (Ont. r. 322) for an order to sign judgment for the plaintiffs upon the claim, and for payment of the amount thereof by the defendants into Court to abide the result of the action.

Per COTTON, L. J.—The orders and the rules under the Judicature Acts ought to be construed with reference to one another, and we must not

over-look the rules as to counter-claims. . . The contention for the present plaintiff is that whenever the claim of a plaintiff is admitted, he is entitled to have the money paid into court. I cannot agree to that argument; a plaintiff is not entitled to have the money paid into court unless the counter-claim is frivolous and unsubstantial.

UNITED STATES.

CIRCUIT COURT—DISTRICT OF KANSAS.

COBB V. PRELL.

Contract for future or non-delivery.

When it is the intention of the parties to contracts for the sale of commodities that there shall be no delivery thereof, but that the transactions shall be adjusted and settled by the payment of differences, such contracts are void.

It is the duty of the courts to scrutinize very closely contracts for future delivery, and if the circumstances are such as to throw doubt upon the question of the intention of the parties it is not too much to require a party claiming rights under such a contract to show affirmatively that it was made with actual view to the delivery and receipt of the commodity.

As the evidence in this case establishes the fact that the parties did not intend the actual delivery of the corn contracted for, but did intend to speculate upon the future market and to settle the profit or loss of defendant upn the basis of the prices of grain on the 3rd of May, 1881, as compared with the prices at which defendant contracted to sell, the contracts sued upon are void, the plaintiff cannot recover.

[Am. Law Reg.—Sep.

Action at law for breach of contract.

The opinion of the court was delivered by

MCCLEARY, J.—In this case a jury was waived and the cause was tried by the court. It is an action at law in which the plaintiff claims damages for breach of contract. The complaint alleges that during the months of February, March and April, 1881, the defendant, who is a grain dealer, residing at Columbus, Kansas, authorized the plaintiff, who is a commission merchant at St. Louis, Missouri, to sell for him certain quantities of corn to be delivered to the party or parties to whom the plaintiff might sell the same, at the option of defendant, during the month of May, 1881. The complaint further alleges that the plaintiff contracted for the sale of said corn, to be delivered during said month of May; but that defendant failing to deliver said corn, the plaintiff having contracted to sell the same in his own name, was obliged to and did pay the damages resulting from such failure, to wit: the difference between the price of corn at the place of delivery on the 31st day of May, and the price at which defendant had agreed to sell and deliver the same, amounting in the aggregate to $2945.25, for which, with interest, he prays judgment.

The answer alleges that the contracts set out in the complaint were option or marginal contracts, and that said plaintiff well knew them to be such, and so made the contracts of sale of said corn, not expecting to receive of the defendant any portion of the amounts of corn for delivery, but expecting to pay any losses or receive any gains that might accrue for or against said defendant; that said contracts were made for the purpose of speculating on the rise and fall of prices, the plaintiff to receive commissions for such transactions; and that said contracts were mere wagers on the fluctuating of the prices of grain in the market of the city of St. Louis.

The case therefore turns upon the question whether or not it was the intention of the parties that the corn should be delivered. If such was the *bona fide* intention, then the plaintiff is entitled to recover; but if, on the other hand, it was understood that the defendant was not required to deliver the corn, and that the transactions should be adjusted and settled by the payment of differences, then the contracts were void and the plaintiff cannot recover. Upon this controlling element in the case, as might reasonably be expected, the testimony of the plaintiff and defendant is in conflict. Under such circumstances we are obliged to determine the controversy by reference to the actions of the parties in connection with the transactions and their contemporaneous declarations, especially those in writing, having a bearing upon the subject. If we can learn from these what interpretation the parties themselves have put upon their own contract, we shall find a satisfactory guide in determining the case.

The evidence satisfactorily shows that the plaintiff was largely engaged at and about the time of these transactions in dealing in options. He was also largely engaged in buying and selling grain for actual delivery. It appears that he adopted and had in use two blank forms upon which statements of account were rendered

to his dealers, one of which was used when the grain was actually delivered, and the other when it was not delivered, and the settlement was made upon the basis of the differences. In the former statement, as might be expected, we find charges for freight, inspection, insurance, weighing, storage and commissions. These are charges which necessarily entered into the transaction where the grain was shipped and delivered. In the latter statements these items do not appear. They show only the number of bushels of grain bought, the price at which bought and the month of delivery; the price at which the same was sold and the net loss or gain. There are in evidence thirty-four of these last-named bills, used in the settlement of option deals between June 26th, 1881, and July 30th, 1881, all representing transactions between plaintiff and defendant. Of the bills representing actual sales from defendant to plaintiff between September 18th, 1880, and April 19th, 1881, there are fifty-seven; so that it appears that the course of dealing between the plaintiff and defendant was such that sometimes the grain contracted for was to be delivered, and at other times it was not to be delivered, and the transactions were to be settled upon the basis of margins. It only remains to be determined whether the transactions in controversy belong to the former or to the latter class. If the question were to be determined upon the testimony of the parties themselves, conflicting as it is, in connection with the facts already stated, it would probably depend upon the question, upon which party rests the burden of proof? And I am inclined to the opinion that, without reference to other evidence, the plaintiff would fail.

It is the duty of the courts to scrutinize very closely these time contracts, and if the circumstances are such as to throw doubt upon the question of the intention of the parties it is not too much to require a party claiming rights under such a contract to show affirmatively that it was made with actual view to delivery and receipt of the grain: *Barnard* v. *Backhaus*, 9 N. W. Rep. 595.

It appearing that the parties were in the habit of dealing in options, and the evidence being equally balanced upon the question whether these were option contracts or not, the court would be obliged, I think, to say that the plaintiff has failed to make out his case by a preponderance of evidence. But whether this be so or not, a reference to the written evidence, to be found in the correspondence of the parties at and near the time of the transaction, strongly corroborates the defendant. A number of letters, written about the time of these transactions, and evidently referring to them, are in evidence, and an examination of them will show that the plaintiff was constantly insisting, not upon the shipment of the quantity of corn purchased by him, but upon the payment of margins, either in cash or by the shipment of enough corn to cover margins. February 11th plaintiff writes to defendant, referring to the transactions between the parties as "option deals." April 22nd, he writes, "We had to put up over $2,000 on your deals," &c. May 2nd, he says, "You must ship us some corn as a margin." May 7th, he says, "If you can't ship us any corn to cover margins, please send us $500." May 18th, he writes, "We draw $500 on you. This is margins for your corn deals, which we hope you will pay. This will leave you about $300 behind to make corn deals up to market." May 27th, he says, "We have written you and drawn on you for margins."

Perhaps the most significant letters bearing upon this question are those of May 30th and 31st, the dates on which the time for the delivery of the corn expired. If it was a *bona fide* transaction, and plaintiff was expecting the delivery of the corn, we should expect to hear him, in these letters, complaining or expressing surprise that the time was about expired and the corn had not been delivered. But, on the contrary, a reference to the letters of those dates will show that the only complaint was that defendant had not furnished the margins. Thus, on May 30th, plaintiff writes, "We cannot carry these deals when you not only refuse to give us margins, but seem to pay no attention to our demands." On the 31st plaintiff writes to explain the manner in which he had closed out the May corn, and expressing regret at the serious loss to the defendant, but says nothing to indicate that he expected the corn to be shipped. Upon all of the evidence, I am of the opinion, and therefore find the fact to be, that the parties did not intend the actual delivery of the corn contracted for, but did intend to speculate upon the future market, and to settle the profit or loss of the defendant upon the basis of the prices of the grain on the

31st May, 1881, as compared with the price at which defendant contracted to sell. Such being the fact, the law is well settled that the plaintiff cannot recover: *Melchert* v. *Am. Un. Tel. Co.* 11 Fed. Rep. 193; *Gregory* v. *Wendell*, 39 Mich. 337; *Pickering* v. *Cease*, 76 Ill. 328; *Barnard* v. *Backhans*, *supra*.

Judgment for defendant.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

QUEEN'S BENCH DIVISION.

In Banco.] [Nov. 24.

HENDRIE v. NEELON.

Sale of timber—Non-delivery—Profits—Damages.

Plaintiff agreed to deliver timber to defendant at S. for carriage to O., to be sold there. There was no market nearer place of delivery than O. Delivery was not made. Defendant counter-claimed for non-delivery.

Held, [CAMERON, J., dissenting,] that the measure of damages was what timber was worth at O., minus what the carriage there from the place of delivery cost.

Osler, Q.C., for motion.
E. Martin, Q.C., contra.

Full Court.] [Nov. 24.

MCCLUNG v. MCCRACKEN.

Statute of frauds—Sale of lands—Evidence—Specific performance—Deed executed but not delivered.

When A., whose wife owned a certain freehold property on St. George street, wrote to B., the owner of a certain freehold property on King street, with reference to the said properties as follows:—"If you will assume my mortgage and pay me in cash $3,750, I will assume your mortgage of $5,000 on the leasehold." And B. replied:—"Your offer of this date for the exchange of my property on King street for your property on St. George, I will accept on your terms."

Held, [affirming the judgment of FERGUSON, J., 2 Ont. R. 609,] not a sufficient memorandum of the contract to satisfy the Statute of Frauds.

Held also, in an action for specific performance of the above contract by B., correspondence between the solicitors of the parties of date subsequent to the date of the above letters, as also the requisitions respecting title which passed between the solicitors, were inadmissable in evidence.

Held also, that the fact that A.'s wife had signed a conveyance of the land in question to B., which conveyance had never been delivered, and did not by recital or otherwise set forth the contract relied on, could not assist B. in the action for specific performance.

Rose, Q.C., for motion.
Maclennan, Q.C., contra.

FOOT v. PRICE.

Deficiency from false survey—Compensation—Trusts declared of original lot—Disclaimer by cestui que trust—Improvement under mistake of title.

G. W. F. being the patentee of a certain lot described as of 200 acres, but in which there was a deficiency, conveyed half of the lot to J. B. P., who conveyed it to trustees to hold in trust for E. F., wife of G. W. F., upon certain trusts contained in the deed, and without power to her to anticipate. It was subsequently discovered that there was a deficiency in the lot, and upon the application to the government in the name of the trustees by G. W. F., whom they appointed their agent for that purpose, a grant of land as compensation for the deficiency was made to the trustees of E. F., describing them as such. Subsequently an instrument under seal, expressed to be made between J. B. P. of the first part; E. F., wife of G. W. F., of the second part; and the trustees of the third part, which recited the facts, and also that the trustees had no real interest therein, but were named as grantees merely as being the legal owners of the original half lot, was executed by J. B. P. and E. F. whereby they declared that the parties of the first and second parts were not in any way interested in the lands granted as compensation, and that the trustees held them as trustees for G. W. F., the patentee of the original lot. Subsequently the trustees, under the direction

of G. W. F. conveyed to E., under whom the defendants claimed. E. F. now brought this action to recover the land.

Held, [HAGARTY, C. J., dissenting,] that E. and those claiming under him, must be held to have had notice of the title of the trustees who were described in the patent as trustees of E. F., that E. F. was not estopped by the declaration executed by J. B. P. and herself, which did not divest her of her title, and that therefore she was entitled to recover.

Held also, that there should be a reference to the Master to take an account of taxes paid and permanent improvements made upon the lands, further considerations being reserved.

Per HAGARTY, C. J.—The legal estate being in the defendant by conveyance from the trustees, the plaintiff should show an equity to recover what she claims as part of the trust estate, which she has not done; that the patent to the trustees, though describing them as such, did not in terms declare any trust respecting the land, and it could not be assumed that they formed part of the trust premises.

Per ARMOUR, J.—The case was not within R. S. O. cap. 95, sec. 4, as to improvement under a mistake of title, but was governed by the principles of equity governing the relationship of trustee and *cestui que trust*.

Per CAMERON, J.—The case was within the statute.

CHANCERY DIVISION.

Boyd, C.] [Nov. 21.

ALLEN V. LYON.

Copyright—Verbal assent to infringement—Injunction—38 Vict. c. 88, D.

Action for infringement of copyright in a book. The defendant pleaded assent on the plaintiff's part. At the trial a verbal assent was proved, and it was also proved that the plaintiff was aware of the defendant's intention to publish the parts complained of, in pursuance of such assent, and encouraged the defendant in so doing.

Held, that under these circumstances the plaintiff was not entitled to an injunction.

To create a perfect right under 38 Vict. c. 88, D., there should be an assignment in writing of such parts of the book as the owner of the copyright therein is willing to permit his licensee to publish, but without any writing there may be such conduct on the part of the owner as disentitles him to relief in equity by way of injunction.

The plaintiff having proved some damage, though very trifling, ordered that defendant should get his costs, but only on the lower scale.

W. Cassels, Q.C., and *Ferguson*, for plaintiff.

Osler, Q.C., and *Guthrie*, Q.C., for defendant.

Proudfoot, J.] [Nov. 21.

MCINTYRE V. THOMPSON.

Mortgage—Parol agreement as to true consideration—Evidence.

Appeal from the report of the Master on Lindsay. A mortgage was given by T. to W., who assigned it to M. No money was actually advanced on the mortgage, but before the assignment to M. a parol agreement was come to between M. and T. that M. should hold the mortgage as security for a debt which T. owed to M. on a promissory note.

Held, that M. was entitled to hold the mortgage as security for the amount due him from T.

The rule that a mortgage for a specific sum may be shown to be for other purposes by parol evidence, is not confined to cases where the person having the legal estate is the original mortgagee whose claim has been paid off, and with whom the new agreement for security has been made. The same principle must apply whenever the legal estate becomes vested in the creditor by the agreement of the mortgagor, as was the case here.

H. Cassels, for the appellant.

Moss, Q.C., for the respondent.

Proudfoot, J.] [Nov. 21.

MCGARVEY V. THE CORPORATION OF THE TOWN OF STRATHROY.

Injunction—Appeal—Stay of proceedings—R. S. O. c. 38, ss. 26, 27.

Motion for a writ of sequestration on the ground of non-compliance with an injunction.

Held, that where an injunction is ordered at the hearing of a cause, and the parties enjoined give the security required by R. S. O. c. 38, s.

26, pending an appeal to the Court of Appeal, the proceedings to enforce the injunction are, by virtue of s. 27 of the said Act, thereupon stayed; and a writ of sequestration cannot therefore be obtained, pending the appeal, on the ground of non-compliance with the injunction. *Dundas* v. *Hamilton and Milton Road Co.* 19 Gr. 455, followed, and preferred to *McLaren* v. *Caldwell*, 29 Gr. 438.

Folingsbee, for the motion.

Cattanach, contra.

Proudfoot, J.] [Nov 22.

PARADIS V. CAMPBELL.

Will—Construction—"Children."

Hearing on further directions. A testator devised his farm to his wife for life, and at her decease to be disposed of by his executors in the following manner, viz.:--One-third to his sister F., to her heirs and assigns for ever; one-third to his sister H., her heirs and assigns forever, and the remaining third to the lawful children of his sister P., their heirs and assigns forever, to be apportioned and divided by his executors unto them equally, share and share alike. "And in case either or both of my sisters aforesaid, that is F. or H., is or are dead, or may or do die previous to my decease, then and in that case my will and meaning is that each of their portions bequeathed and devised to them respectively, shall be by my executors apportioned and divided between their and each of their heirs, share and share alike, that is each sister's share to each sister's children to them their heirs and assigns for ever."

The testator's sister H. predeceased him, leaving children, who survived the testator, and having a daughter, who died before her mother, leaving a son H. H.

Held, that H. H. took no share of the devise to his grandmother H. It was clear the testator was using the word "children" in a colloquial and not in a technical sense as meaning "children;" but the legal construction of the word "children" accords with its popular signification, viz., as designating the immediate offspring.

Walkem, for the plaintiff.

F. Arnoldi, for the adult defendants.

T. S. Plumb, for the infant defendants.

PRACTICE.

Wilson, C. J.] [Nov. 13.

RE MEEK V. SCOBELL.

Prohibition—Division Court—Jurisdiction—Application of deduction from claim.

Motion for prohibition to the 18th Division Court of the County of York. The plaintiff brought his action in the Division Court, claiming $42.06 debt, and $62 damages, and at the end of his claim wrote "plaintiff abandoned $11.39."

Held, that it cannot be assumed the plaintiff, by his claim, reduced his demand for damages so as to bring it within the jurisdiction of the Division Court, as there are other claims in respect of which such abandonment may presumably be applied as well as to the demand for damages.

Prohibition granted with costs.

A. C. Galt, for the motion.

E. Meek, contra.

Wilson, C. J.] [Nov. 16.

DEMOREST V. MIDLAND RY. CO.

Mandamus—Disobedience to—Attachment—Officer of corporation.

Where a *mandamus* was directed to a railway company, commanding the company to perform certain acts, and was served upon the president of the company,

Held, that an attachment against the president of the company is not an available proceeding for default in performing an action which he could not by himself perform.

Where the act commanded could only have been done, so far as appeared, by a majority of the board of directors of the company,

Held, that in order to bring them into contempt and subject them to attachment, they should have been served with the *mandamus*.

Held, that sequestration is not the proper remedy for disobedience to *mandamus*.

Holman, for the plaintiff.

A. H. Marsh, for the defendants.

Wilson, C. J.] [Nov. 17

RE GARLAND V. OMNIUM SECURITIES CO.

Prohibition—Division Court—Cause of action.

Motion for prohibition to a Division Court of the County of Carleton. The plaintiff lived in Ottawa, and the defendant corporation had its head office at Hamilton. The plaintiff made a mortgage to the defendants, and a dispute arising between the plaintiff and the defendants as to the amount of interest to be paid thereon, the defendants claimed the full interest according to the mortgage, and desired the plaintiff to remit it by mail to their office at Hamilton, which the plaintiff refused to do. The defendants then began proceedings under the power of sale contained in their mortgage, and also an action for the recovery of the land, whereupon the plaintiff paid the money to his solicitors in Ottawa, and the latter sent it under protest to the defendant's solicitors in Hamilton, who in turn paid it to the defendants in Hamilton. This action is brought in the Division Court in Ottawa for the recovery of the money so paid under protest.

Held, that when the plaintiff made the payment by reason of the action against him, the defendants' former direction to pay by deposit of the money in the Ottawa P. O. was superseded; and that the payment having been made by the plaintiff in Hamilton, the whole cause of action did not therefore arise at Ottawa.

Writ of prohibition granted with costs.

Mr. Dalton, Q. C.] [Nov. 23.

PARIS MANUFACTURING CO. V. WALLS.

Interpleader—Sale of goods before application.

The sheriff having seized goods, which were claimed by a third party, of much greater value than the amount of plaintiff's execution, received from the claimant the amount due on the execution in cash, and withdrew from the seizure.

Held, that the sheriff did not thereby disentitle himself to relief by interpleader.

Aylesworth, for the sheriff.

Watson, for the execution creditors.

John R. Kerr, for the claimant.

BOOK REVIEW.

THE LAW AND PRACTICE OF DISCOVERY IN THE SUPREME COURT OF JUSTICE, with an Appendix of Forms, Orders, etc. By Clarence John Peile, of the Inner Temple, Barrister-at-Law. London: Stevens & Haynes.

We have received the above work, and after examination, are inclined to agree with the learned author in his opinion expressed in the preface, that there is nothing in that "other work upon the same subject" which has recently appeared, to render his own unnecessary. We presume by the "other work" is meant the second edition of "Hare on Discovery." "Hare on Discovery" appears to us to deal with what may be termed the Practice relating to Discovery, at a somewhat disproportionate length as compared with his treatment of the Law of Discovery. In Mr. Peile's work on the other hand, the Law of Discovery is dealt with very fully, and appears to be presented in a very lucid and readable shape. We therefore welcome the work as likely to be more useful than "Hare" in this country, where, though the Law of Discovery is the same, the machinery for obtaining Discovery is somewhat different and of a simpler kind.

FLOTSAM AND JETSAM.

A legal gentleman met a brother lawyer on Court street one day last week, and the following conversation took place:—"Well, judge, how is business?" "Dull, dull; I am living on faith and hope." "Very good; but I have got past you, for I am living on charity."—*Central Law Journal.*

The lot of the Russian counsel is not a happy one, if the *Petersburger Herald* is really correct in a report of a case—for the truth of which it specially pledges its credit. It appears that a Russian peasant in a southern village was accused of theft, and keeping himself out of the way, sent an advocate to conduct his case—a proceeding peculiar to Russia. The magistrate heard the pleading, found the absent culprit guilty, and sentenced him to a flogging. On hearing that the criminal was *non est inventus*, he decreed that the advocate should receive the flogging, observing that the man who had the audacity to defend a rascal deserved to smart. The flogging was, we are told, actually inflicted, and the above named journal vouches for the absolute reality of the whole story.—*Pump Court.*

Law Society of Upper Canada.

OSGOODE HALL.

TRINITY TERM, 1883.

During this term the following gentlemen were entered on the books of the Society as students-at-law, namely :—

Graduates—John Murray Clarke, Robert Urquhart Macpherson, George Somerville Wilgress, George Henry Kilmer, Robert Charles Donald, Arthur Freeman Lobb, John Joseph Walsh, Francis Edmund O'Flynn, John Hampden Burnham, William Smith Ormiston, Lyman Lee, John Samuel Campbell, Alfred David Creasor, Henry Smith Osler, Charles Perley Smith, Herbert Hartley Dewart, Duncan Ontario Cameron, Wellington Bartley Willoughby, Alexander Lillie Smith, William Chambers, Edward Cornelius Stanbury Huycke, William Hope Dean, Allan McNabb Denovan, Alexander Fraser, William Ernest Thompson, Alfred Buell Cameron.

Matriculants—Alexander James Boyd, John Wm. Mealy, Robert Sullivan Moss, Arnold Morphy, Thos. R. Ferguson, Robert James McLaughlin, William Henry Campbell, Malcolm Wright.

Junior Class—Wentworth Green, Frank Langster, Daniel Frederick McMartin, Frank Reid, Jonathan Porter, William Woodburn Osborne, George Frederick Bradfield, Charles Downing Fripp, Robert Franklyn Lyle, William Charles Fitzgerald, William Edward Fitzgerald, John Wesly Blair, Alexander Duncan Dickson, William George Munroe, Edward Henderson Ridley, Alexander Purdom, George Chesly Hart, William Henry Lake, Robert Ruddy.

The following gentlemen were called to the Bar, namely :—Messrs. Hugh Archibald McLean, William John Martin, Harry Thorpe Canniff, Henry Carleton Monk, David Haskett Tennent, Robert Peel Echlin, Charles Henderson, Alexander John Snow, Robert Taylor, Frank Howard King, William Armstrong Stratton, Robert Kinross Cowan, Thomas Parker, Daniel K. Cunningham, David Mills.

On and after Monday, October 1st, lectures will be delivered in the Law School as follows: —Senior class, Mondays and Tuesdays. Junior class, Thursdays and Fridays of each week, at 8.45 a.m.

Special Notice.—No candidate for call or certificate of fitness who shall have omitted to leave his petitions and all his papers with the secretary complete on or before the third Saturday preceding the term, as by rules required, shall be called or admitted, except after report upon a petition by him presented, praying special relief on special grounds.

RULES

As to Books and Subjects for Examination.

PRIMARY EXAMINATIONS FOR STUDENTS AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his Diploma, or a proper certificate of his having received his Degree. All other candidates for admission as Articled Clerks or Students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects :—

Articled Clerks.

From 1883 to 1885.
- Arithmetic.
- Euclid, Bb. I., II., and III.
- English Grammar and Composition.
- English History Queen Anne to George III.
- Modern Geography, N. America and Europe.
- Elements of Book-keeping.

In 1883, 1884, and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil at their option, which are appointed for Students-at-law in the same year.

Students-at-Law.

CLASSICS.

1883.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. VI.
- Cæsar, Bellum Britannicum.
- Cicero, Pro Archia.
- Virgil, Æneid, B. V., vv. 1-361.
- Ovid, Heroides, Epistles, V. XIII.

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

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

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

Translation from English into Latin Prose.

MATHEMATICS.

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

ENGLISH.

A paper on English Grammar.
Composition.
Critical Analysis of a selected Poem :—

1883—Marmion, with special reference to Canto V. and VI.
1884—Elegy in a Country Churchyard.
The Traveller.