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DIARY FOR AUGUST.

2. Wed.. Battle of the Nile, 1798.
6. Sun... *9th Sunday after Trinity.* Prince Alfred born, 1844.
8. Tue... Second Intermediate Examination.
9. Wed.. Second Intermediate Examination.
10. Thurs First Intermediate Examination.
11. Fri.... First Intermediate Examination.
13. Sun... *10th Sunday after Trinity.* Sir Peregrine Maitland Lieut.-Governor U. C., 1818.
15. Tue... Primary Examination.
16. Wed.. Primary Examination.
18. Fri.... Gen. Hunter, Lieut.-Governor U. C., 1799.
20. Sun... *11th Sunday after Trinity.*
21. Mon.. Long vacation ends.
22. Tue... Judicature Act came into operation, 1881.
23. Wed.. Final Examination for Attorney.
24. Thurs. Final Examination for Call,
25. Fri.... Francis Gore, Lieut.-Governor U. C., 1806.
27. Sun... *12th Sunday after Trinity.*
28. Mon.. Trinity Term (Law Society) begins.
31. Thurs. Long vacation in Ct. of Appeal and Supreme Ct. ends.

TORONTO, AUGUST 1, 1882.

THE reporter of the Chancery Division desires us to state that gentlemen requiring copies of the judgments in his custody, during his absence from town, are requested to address their letters as usual, when they will be immediately attended to.

WE catch a faint echo of the usual vigorous language of the Master of the Rolls, in the brief note of *May* v. *Thompson*, W. N. 1882, May 27, wherein it is reported: "Jessel, M. R., said that the Court had gone quite far enough in spelling out contracts from letters." The Master of the Rolls' judgments are, indeed, a constant source of amusement combined with instruction. Thus, in the recent case of *ex parte Hall*, L. R. 19 Ch. D. 580, he says: "This case reminds me of one in which I likened the plaintiff's case to a colander, because it was so full of holes."

IT is remarked by the *Law Journal* that the case of *Toke* v. *Andrews*, noted some weeks ago in Notes of Cases, seems to carry the right of counter-claim much further than has hitherto been allowed. The defendant was permitted to counter-claim in respect of rent which had accrued due since the writ was issued, while the plaintiff was allowed a similar privilege in respect of a cause of action which he could not assert in his statement of claim although it had accrued, because the statement of claim dates from the writ. If counter-claims upon counter-claims are to be allowed, it is difficult to see how an action can ever end, when there is a relation like that of landlord and tenant between the parties.

THE following notice has been issued from the Chancery Division of the High Court of Justice :—During vacation applications of an urgent nature in the Chancery Division are to be made to His Lordship the Chancellor. He will be at Osgoode Hall at 11 a.m. on each Tuesday. Papers relating to applications are to be left with the Registrar or Assistant Registrar on the previous Friday. Applications for leave to serve notice of motion may be made to the Registrar or Assistant Registrar. In any case of urgency the brief of counsel is to be sent to the Chancellor, accompanied by copies of the affidavits in support of the application, and also by a minute, on a separate sheet of paper, signed by counsel of the order he may considered the applicant entitled to, and an envelope capable of receiving the papers, addressed as follows, "To the Registrar of the Chancery Division of the High Court of Justice (Vacation Business), Osgoode Hall, Toronto," and containing stamps for postage. On applications for injunction or writs *ne exeat Provincia*, in addition to the above there must also be sent the writs of summons.

The papers sent to the Chancellor will be returned to the Registrar's office. The Chancellor's address can be obtained on application to the Registrar's office.

FUSION OR CONFUSION—WHICH?

The avowed object of the Judicature Act was to attempt to establish one Court in the place of four, and to provide for that one Court in all its Divisions a uniform system of practice. This was a laudable scheme, but we venture to doubt whether the judges are taking the course best calculated to carry out the intentions of the Legislature.

The Legislature say in effect there shall be one practice for all the Divisions of the Supreme Court. The judges in effect say that there shall be one practice for the Queen's Bench and Common Pleas Divisions and another for the Chancery Division.

The judges, we believe, conceive themselves to be the victims of circumstances, and compelled by the terms of the Act and rules to perpetuate in their respective Divisions the practice which formerly prevailed in the Courts from which the Divisions were constituted, wherever that practice has not been expressly altered by the rules.

This line of action is supposed to be based on the 12th and 52nd sections of the Act, and on the note at the commencement of the rules, where it is said, "Where no other provision is made by the Act or these rules the present procedure and practice remain in force." But although all these provisions are taken almost *verbatim* from the English Act and rules, yet the judges there have come to a very different conclusion as to the construction to be placed upon them, and instead of thinking themelves bound to perpetuate divergencies of practice in the different Divisions, have felt it their duty, as far as possible, to assimilate by judicial decision the practice in all the Divisions. The leading case, we think, on this point is *Newbiggen-by-the-Sea Gas. Co.* v. *Armstrong*, 13 Ch. D. 310. In that case the question arose as to the proper form of an order to stay an action commenced by a solicitor without authority. In this respect there was a difference between the former practice at law and in equity; and the rule was laid down by the Court of Appeal that in cases where no rule or practice is laid down by the Judicature Rules, and there is a variance in the old practice of the Chancery and Common Law Courts, *that practice is to prevail which is considered by the Court most convenient*, Sir Geo. Jessel, M. R., remarking that "by the 21st section of the Judicature Act, 1875 (see O. J. A. sec. 52), it is enacted that in cases where no new method of procedure is prescribed the old practice is to prevail, *but where there is a variance in the practice it does not say which practice.* I have no hesitation in saying, as I have already said at the Rolls Court, though not with the same authority with which I now say it, that I think the Common Law practice in this case is founded on natural justice, and ought to be followed for the future." There the order under review had followed the former Chancery practice

It may be asked how the suitor is to know which practice to adopt when there has been no judicial decision determining which of the two different modes of practice is the most convenient. It would seem, according to Sir Geo. Jessel's gloss on sec. 21, that the answer to that, is that the suitor may select either the former practice at law or in equity in all cases not provided for by the rules; but when any question arises before the Court as to the proper practice, then the Court is to determine the question, not by the rule of what was the former practice in the particular Court from which the Division in which the action is pending was constituted, but, on the contrary, by considerations as to which of the differing modes of practice is most convenient to be adopted in future in all the Divisions.

By this means the present differences in practice which still exist would in time dis-

appear, but by stereotyping the old practice, as has been done by some recent decisions, and by still further accentuating the difference in practice by passing rules of Court making one practice for the Q. B. and C. P. Divisions, and another for the Chancery Division, as has been recently done, the evils of the old system are kept alive and much of the good the Judicature Act was intended to accomplish will not be attained.

Why in the simple matter of enforcing a judgment of the Court of Appeal there should be two modes of practice we are at a loss to understand. At law the certificate of the Court of Appeal was entered on the judgment roll and was acted on without further order, *McArthur* v. *Southwold*, 8 Pr. R. 27. This practice is still in the Q. B. and C. P. Divisions. In Chancery the practice since *Weir* v. *Matheson*, 2 Chy. Ch. R. 10, was to make the certificate of the Court of Appeal an order of the Court of Chancery. This practice, which appears to be quite unwarranted by the Appeal Act R. S. O., ch. 38, sec. 44, which says that "the decision of the Court of Appeal shall be certified by the Registrar of the Court of Appeal to the proper officer of the Court below, *who shall thereupon* make all proper and necessary entries thereof, and subsequent proceedings may be taken thereupon, as if the decision had been given in the Court below," and which is also inconsistent with the practice of the Court of Chancery itself under the Supreme Court Act, 38 Vict., ch. 11, sec. 46 (D), which is in the same terms as the 44th sec. of the Ontario Appeal Act, is nevertheless we see still to be followed in the Chancery Division. The new Rules 522, 523, 524, 527 also appear to us to create needless differences of practice in the Divisions of the High Court and are therefore in our judgment altogether contrary to the spirit and intention of the Judicature Act. The object of all law should be the attainment of justice, and the removal of all hindrances to that great end. To multiply differences of practice in the different Divisions of the same Court is in effect to put obstacles in the way of justice, and to expose suitors to loss and inconvenience.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

SUPREME COURT.

McLEAN ET AL v. THE QUEEN.

Petition of right—Parliamentary contract for printing, breach of—Petition of right does not lie—Departmental contract for printing, breach of—"All the printings"—Demurrer.

The plaintiffs filed a petition of right, claiming that under their contracts with Mr. Hartney, a clerk of the House of Commons, on behalf of the Parliament of Canada and the Government, they were entitled to *all* the parliamentary and departmental printing. The Crown demurred to the petition. It was argued, in the Exchequer Court, that the Crown was not liable on a contract made with Parliament, and that in respect of the contract for departmental printing the contractor alone was bound, the Crown being free to have the work done by other parties.

HENRY, J., in the Exchequer Court, gave judgment in favour of the petitioners in respect of both contracts. On appeal to the Supreme Court,

Held by RITCHIE, C.J.—That the Crown could not be liable under the contract made with Parliament, but that in respect of the contract for the departmental printing, the Crown was liable equally with the contractor; that when the contractor was bound to do *all* the work, the other party was bound to give him *all* the work required to be done. This judgment was concurred in by STRONG and FOURNIER, JJ., TASCHEREAU and GWYNNE, JJ., dissenting.

Demurrer as to contract with Mr. Hartney, for the parliamentary contract maintained, but demurrer as to departmental contract overruled.

H. S. Macdonald and *J. J. Gormully* for suppliants.

Lash, Q.C., and *Hogg* for the Crown.

THE MERCHANTS BANK v. THE QUEEN.

Petition of right—C.S.C., ch. 28; 31 Vict. ch. 12—Slide and boom dues—Chattel mortgage—Agreement between Crown and mortgagor of lumber, effect of—Lien.

This was a petition of right, filed by the appellants, praying that a seizure of a quantity of

logs, which was made by the government collector for arrears of slide dues, owed by one R. S., for the logs seized and other logs, be removed, and that the sum of $5,267, which had been paid by the appellants to the Crown under duress, be refunded to them.

R. S., being indebted to the appellants in a large sum of money, had given them, as collateral security for the amount of his debt, two chattel mortgages on certain logs and timber. These mortgages were executed, the first on 12 December, 1867, and the second on 11 May, 1877. On 15 May, 1877, R. S. became insolvent, and in 1878 the equity of redemption of the insolvent in the chattel mortgages was duly released to appellants by R. S.'s assignee. In June, 1877, R. S., who owed also a large sum of money to the Government for slide dues for several years back, agreed to pay $2 per 1000 feet, B. M., on all lumber to be shipped by him through the canals. The dues recoverable by statute for each log were 4⅓ cents, equal to about 26 cents per 1000 feet, B. M. The appellants claimed that this arrangement was unknown to them. The evidence of its ratification by the appellants was contradictory.

In 1878, when the appellants began to ship the lumber in question on barges, the collector of slide dues refused to allow the barges to pass through the canals until the appellants paid the $2 agreed upon between R. S. and the Government. They paid a certain amount under protest, but finally the collector seized and took possession of all the logs and timber on R. S.'s premises, on behalf of the Government.

GWYNNE, J., in the Exchequer Court held that R. S. was agent for the appellants and that he had created a general lien or charge on the lumber mortgaged to the appellants, in favor of the Crown, for the dues he owed them, and that the appellants had knowledge of and ratified such arrangement.

On appeal to the Supreme Court,

Held, (STRONG and TASCHEREAU, JJ., dissenting), that the relation between appellants and R. S., was in no sense that of principal and agent, and that there was no evidence whatever of any contract, express or implied, of a general lien or charge on this timber, so as to bind or affect this timber in the hands of the appellants, to whom the same had been conveyed for valuable consideration, while not cognizant of or parties to such contract.

That all the Government were entitled to on the said lumber, under the statute and the regulations was the sum of 4⅓ cents per log passing through the slides, equal to 26 cents per 1000 feet, B. M., which sum appellants offered to pay. And that R. S., after the execution of the chattel mortgages in favor of appellants, had no right to create in favor of the Crown a lien or charge on the lumber in question, to secure the payment of his own indebtedness.

Bethune, Q.C., and *Gormully*, for appellants.

Lash, Q.C., and *Hogg*, for the Crown.

McCALLUM v. ODETTE.

"THE M. C. UPPER."

Appeal from the Maritime Court of Ontario—Cross appeal—Collision with anchor of a vessel—Contributory negligence—Damages, apportionment of—Court equally divided.

On the 27th April, 1880, at P. K., on Lake Erie, where vessels go to load timber, etc., and where the *Erie Belle*, the respondent's vessel, was in the habit of landing and taking passengers, the *M. C. Upper*, the appellant's vessel, was moored on the east side of the dock, and had her anchor dropped some distance out, in continuation of the direct line of the east end of the wharf, thus bringing her cable directly across the end of the wharf from east to west, without buoying the same or taking some measure to inform incoming vessels where it was. The *Erie Belle* came into the wharf safely, and in backing out from the wharf she came in contact with the anchor of the *M. C. Upper*, and was damaged.

On a petition, filed by the owner of the *Erie Belle*, in the Maritime Court of Ontario, to recover damages done to his vessel by the *M. C. Upper*, the judge who tried the case found, on the evidence, that both vessels were to blame, and held that each should pay one half of the damages sustained by the *Erie Belle*.

On appeal to the Supreme Court by owner of the *M. C. Upper*, and cross-appeal by owner of *Erie Belle*:

Held, per RITCHIE, C. J., FOURNIER, and TASCHEREAU, JJ., that the evidence shewed that the damage was caused solely by the fault and negligence of the owner of the *M. C. Upper* and therefore the owner of that vessel should

pay the whole damage. Per STRONG, HENRY, and GWYNNE, JJ., that the accident happened through no fault or negligence on the part of the *M. C. Upper*, and therefore the appeal should be allowed.

The Court being equally divided, both the appeal and cross-appeal were dismissed without costs, and the judgment of the Maritime Court stands.

Robinson, Q.C., for appellant.

McCarthy, Q.C., for respondent.

MONAGHAN v. HORN.

"THE GARLAND."

Maritime Court of Ontario, jurisdiction of—Rev. Stats. Ont. ch. 128—Lord Campbell's Act—Action in rem against vessel for damages for death of a person by personal representative.

In a suit brought before the Maritime Court of Ontario against a foreign vessel to recover damages by the mother of a child under age, killed by negligence in a collision between two vessels.

Held, (TASCHEREAU, J. dissenting), that the Maritime Court of Ontario has no jnrisdiction in the case of personal injury resulting in death apart from and independently of Rev. Stats. Ont., ch. 128, (a copy of Lord Campbell's Act), and as the plaintiff in this case has not brought her action as the personal representative of the deceased child, under and by virtue of said Act, she has *no locus standi.*

Per FOURNIER and HENRY, JJ., that the Maritime Court of Ontario has jurisdiction to entertain an action *in rem* against a vessel in cases of personal injury resulting in death, when brought at the instance of the personal representative of the deceased, under the statute.

Per TASCHEREAU, J., that independently of the statute the Maritime Court of Ontario has jurisdiction.

H. J. Scott for the appellant.

McCarthy, Q.C., for the respondent.

OLIVER v. DAVIDSON.

Will—Legacy—Whether absolute or conditional.

The question which arose on this appeal was whether a legacy or bequest of $1,600 to one Alex. Oliver, under the will of Wm. Oliver, was absolute and unconditional. In one of the paragraphs of the will, the following words occur: "Subject to the following conditions, *viz.*, that they unite in payment, &c.," and in another paragraph: "And further that Alexander and Duncan Oliver work on the farm until their legacies became due." The date mentioned in the will for the payment of the $1,600 bequest to Alexander, was 1st January, 1877, and prior to that date Alexander ceased to work on the farm, and went away and engaged in other pursuits.

Held, (HENRY, J., dissenting), that the construction of the paragraph in the will, bequeathing the $1,600 to Alexander must be based on a consideration of the whole will, and that the intention was that Alexander's right to receive his legacy was conditional on his remaining on the farm and uniting in earning it.

Bethune, Q.C., for appellant.

Bruce for respondent.

COURT OF APPEAL.

JUNE 30.

CAMERON v. CAMPBELL.

Devise—Trustee—Statute of Limitations.

A testator directed a sum of money to be invested, the interest whereof was to be employed in endeavouring to discover his brother, to whom the money was to be paid if discovered within five years from the death of the testator, and if not so found the amount to be paid to M. C., as fully stated, 27 Gr. 307.

Held, [affirming the decree there pronounced,] that the conduct of the executors constituted them trustees, and that the right to recover the money was not barred by the Statute of Limitations; and that C., into whose hands the money had come, was chargeable with interest from the time of its receipt by him.

Moss, Q.C., and *Watson*, for appeal.

Robinson, Q.C., and *Sidney Smith*, Q.C., contra.

PARKHURST v. ROY.

Devise to Government of foreign state—Supervision of trusts.

A testator directed his executors to pay and deliver the residue of his estate to the Government and Legislature of the State of Vermont, to be disposed of as to them shall seem best,

having regard to certain recommendations set forth in the will.

Held, [affirming the decree reported 27 Gr. 361, where the facts are fully stated,] that the State Government was sufficiently designated as the legatee to entitle it to take the bequest; and the fact that the bequest was for the benefit of, and to take effect in a foreign country, could not be urged as an objection to its validity; neither could the objection that the state could not be made amenable to the courts of the state, and thus there would not be any supervision of the trusts, as it must be assumed that a sovereign state would not do anything to violate a trust; besides which it appeared that the legislature was not, in reality, to assume the trust, their duty being to appoint trustees who would be amenable to the Courts.

W. Cassels and *Black* for the appeal.

Bethune, Q.C., and *Moss*, contra.

RICKER V. RICKER.

Duty of trustee—Liberty to bid at sale—Innocent purchaser.

The plaintiff was mortgagee of certain lands, and by the will of the mortgagor was devisee thereof in trust to pay certain legacies—amongst others one to the defendant, an infant about ten years old. Having instituted proceedings against the defendant to enforce payment of the mortgage, the conduct of the sale was given to the guardian of the infant, and the plaintiff had liberty to bid at the sale under the decree as stated, 27 Gr. 576.

Held, [reversing that decree,] that the liberty to bid accorded the plaintiff, who occupied the twofold character of mortgagee and trustee, was given him for the purpose of protecting his interest as mortgagee, but did not absolve him from the duty which, as trustee, he owed to the infant; and that the conduct of the plaintiff prior to, and at and about the sale, by means of which he had been enabled to make a profit at the expense of the infant *cestui que* trust was such as would have rendered the sale invalid if the land had remained in his hands, but as it had passed into those of an innocent purchaser the plaintiff should be charged with the outside selling value of the estate at the time of the sale, or should pay to the defendant the amount due to him under the will, with interest thereon from the date of the sale, together with the costs of the court below subsequent to the petition, and also the costs of appeal.

T. Robertson, Q.C., for appeal.

W. Cassels and *Duff*, contra.

EMMETT V. QUINN.

Lease, short form of—Covenant not statutory.

In a short form of lease the covenants therein were preceded by the words, prescribed by the Statute, of "The said (Lessee) covenants with the said (Lessor)," two of which covenants were that the lessee would erect a dwelling-house, etc., upon the demised premises, and leave the same and all buildings and fences so erected on the premises, thereon: And also that in the event of the buildings so erected being destroyed by fire during the term, he would rebuild to an equal amount. The lessee, with the assent of the lessor, assigned the lease, and the assignee built in pursuance of the covenant and executed a mortgage to the defendant, and on the buildings being burnt down, rebuilt them. Subsequently the defendant, on default of payment, sold, under the power in his mortgage, to one N., who also mortgaged the property to the defendant, and thereafter the buildings were again destroyed by fire.

Held, (1) [reversing the decree of BLAKE, V.C., 26 Gr. 420,] that the statutory words of covenant, in the absence of words making them expressly applicable, had not their statutory meaning when read with covenants not statutory, and therefore that the covenants above referred to applied to the lessor and lessee only.

Held, (2) [PATTERSON, J., dissenting,] that these covenants being in respect of something not *in esse* at the time of the creation of the lease, did not run with the land; "assigns" not being named.

Maclennan, Q.C., and *McClive*, for appeal.

P. McCarthy and *W. Cassels*, contra.

TURLEY V. BENEDICT.

Life lease—Proviso for re-entry—Ejectment.

The defendant leased to his father the lands in question in this action for life, to work and enjoy the same, but that should the father in his later years become incapable of taking charge of the place as it should be by good husbandry,

then and in such case the defendant was to be at liberty to govern the lands as seemed best to him. And in the event of the father becoming incapable of manual labour he was to be supported by the son, and it was agreed that, subject to the son's rights, the father was entitled to peaceable and quiet possession. The father became incapable of taking proper care of the place, and in consequence the defendant re-entered and worked the farm. Subsequently thereto the interest of the father was sold by the sheriff to the plaintiff, who brought ejectment. The jury having found the facts as above stated :

Held, [reversing the judgment of the Court below,] that the defendant had, according to the terms of the lease, the right to the possession, and that the plaintiff must therefore fail in his action.

G. D. Dickson, Q.C., for appeal.

Bethune, Q.C., and *Clute*, contra.

HARRIS V. MUDIE.

Statute of Limitations—Partial possession—Defective paper title.

The Court will apply a more liberal rule of construction under the Statutes of Limitations in considering the effect to be given to a partial possession of land by a person claiming to have a supposed or defective paper title than to a mere trespasser, therefore :

Held, [CAMERON, J., dissenting,] that where a person having such a title to land makes an entry thereon he will be constructively in possession of the whole, while a mere trespasser must be taken, as against the true owner, to be in occupation of those parts only which he actually cultivates or has enclosed ; and occasional acts of ownership on other parts of the land will not suffice to impliedly extend his possession.

Bethune, Q.C., and *McGee*, for appeal.

Maclennan, Q.C., and *G. M. McDonnell*, contra.

BROWN V. SWEET.

Chattel mortgage—R. S. O. ch. 95, sect. 13.

The trustees of a church had been sued by the defendant, and pending the action they passed a resolution authorizing the raising by loan of $400 to pay off urgent claims, which recited that it was necessary to give security to the party making the advance. The plaintiff, being one of the trustees, thereupon advanced the money, obtaining from the trustees a chattel mortgage on all the moveables contained in the church, which was prepared by a partner of the general solicitor of the trustees who was defending the action against them, but neither partner was called as a witness on the trial. In an interpleader issue the learned judge found for the defendant.

Held, [BURTON, J.A., *dubitante*, affirming the decision of the Common Pleas Division granting a new trial,] that the mortgage was not invalid under R.S.O. ch. 95, sect. 13, and the fact that all the moveable property of the mortgagors was included in the security, was not of itself sufficient to satisfy the Court of any fraudulent intent in making it.

Held, also, that the mere fact of the mortgage having been prepared by the partner of the solicitor for the trustees was not sufficient to impute to the plaintiff knowledge of the pending action against the trustees.

Bethune, Q.C., and *Fitch*, for appeal.

Kerr, Q.C., and *Walker*, contra.

THE QUEEN V. FRAWLEY.

B. N. A. Act, construction of—Power of Provincial Legislatures to imprison with hard labour.

The power of the Provincial Legislatures to pass laws for the purpose of compelling obedience to those enactments respecting subjects which, by the B.N.A. Act, are assigned specially to those bodies, is inherent in them aside from the 92nd section of the Act. The word "imprisonment" used in that section does not necessarily exclude the imposition of hard labour as part of the punishment, therefore :

Held, [reversing the judgment of the Court below,] that the Legislature of this Province has power to impose hard labour in addition to imprisonment.

Hodgins, Q.C., for the appeal.

McMichael, Q.C., contra.

THE QUEEN V. HODGE.

Provincial Legislatures—Delegation of powers to license commissioners under the B.N.A. Act.

The Legislature of the Provinces having been assigned the sole power of passing laws for the infliction of penalties and imprisonment for the

due enforcement of a law of the Province in relation to a matter with which it alone has power to deal; and the granting of licenses for the keeping of public houses and billiard tables for hire, being subjects over which the Provincial Legislature has exclusive jurisdiction.

Held, (1) that the enactment of the Statute (R. S. O. ch. 181,) rendering it illegal to sell liquor to infants, and restricting the hours within which billiard rooms in inns should be kept open, was not *ultra vires;* and (2) [reversing the judgment of the Court below,] that the Provincial Parliament had power to delegate its authority to the license commissioners.

Atty.-Gen. Mowat and *Bethune*, Q.C., for appeal.

J. K. Kerr, Q.C., and *S. H. Blake*, Q.C., contra.

SMITH V. GOLDIE.

Patentable invention.

The plaintiff claimed as his invention, for the purpose of purifying flour during its manufacture, a bolting cloth or sieve, through which a current of air was forced upwards by means of an air chamber and a fan, or substitute therefor, and in order to keep such sieve from becoming clogged, a brush, or a number of brushes, arranged in such a manner as to traverse the under surface. The air chamber and the fan combined with the bolt or sieve were admittedly old; and it appeared that one B. had patented a machine which was in use in the manufacture of semolina, in which a similar brush arrangement was in use for the purpose of keeping open the meshes of the sieve when used.

Held, (affirming the judgment of SPRAGGE, C.), that the plaintiff's invention was not patentable.

Ferguson, Q.C., and *Howland*, for the appellant.

W. Cassels and *W. Ball*, contra.

WORKMAN V. ROBB.

Title by possession—Improvements in lieu of rent.

The defendant R. permitted the defendant L. to occupy certain lands, upon an agreement that he would improve them in lieu of rent, and would give up possession whenever R. required him to do so. The improvements, it was shewn, were all made after consultation with R., and there was no other acknowledgment of his title during thirteen years he was in possession.

Held, (affirming the judgment of PROUDFOOT, V.C., 28 Gr. 243, BURTON, J.A., dissenting), that L. could not set up a title by length of possession as against R., and *a fortiori* his creditor, the plaintiff, could not do so.

Moss, Q.C., and *Fitch*, for the appeal.

S. H. Blake, Q.C., contra.

HARVEY V. THE G. T. R AND G. W. R. COS.

Joinder of parties—Practice—Ont. J. A., rule 94.

The plaintiff shipped goods from St. Johns, Quebec, to Dundas, Ont., by the railway lines of the defendants, and the goods arrived at Dundas in a damaged condition. The plaintiff, being unable to determine which company was liable, joined both as defendants.

Held, (affirming the order of PROUDFOOT, J.) who had sustained the ruling of the Master in Chambers, 9 P. R. 80, that the case came within rule 94, and that the plaintiff was warranted in making both companies defendants.

McMichael, Q.C., for the G. W. R. Co.

J. K. Kerr, Q.C., for the G. T. R. Co.

Muir, contra.

NIXON V. MALTBY.

Landlord and tenant—Evidence of surrender.

In an action to recover a year's rent on a covenant in a lease for three years, it was shown that the defendant had harvested the crops on the farm, and that they, together with the barn and stable, were destroyed by fire before the expiration of the year, and that he was paid the insurance money; whereupon he left the farm, and plaintiff entered, ploughed and put in a crop. The plaintiff afterwards applied on several occasions to the defendant for payment of the rent, when the defendant said he had not any money, and had not been paid his insurance. It was shown that a proposition had been made to leave the matter to arbitration.

Held, [affirming the judgment of the Judge of the County Court of Peel,] that the acts of the plaintiff did not amount to an eviction, and that there was not evidence to support a surrender in law, and that the plaintiff was entitled to recover.

Fleming, for the appellant.

Laidlaw, contra.

QUEEN'S BENCH DIVISION.

JUNE 30.

LEIGHTON V. MEDLEY.

Landlord and tenant—Covenant to keep up fences—Removal of fences—Waiver.

Semble, the removal of fences from place to place on a farm is not a breach of covenant to repair, and where a landlord took rent after knowledge of the fact he was held to have waived forfeiture.

McCarthy, Q.C., for plaintiff.

Reeve, for defendant.

WINFIELD V. KEAN.

Malicious prosecution—Malice—Misdirection.

Want of reasonable and probable cause does not, as a matter of course, establish the malice necessary to the action, and where the judge told the jury not to trouble with the question of malice except as inferable from want of reasonable cause, and that if the information was laid without proper cause it was laid maliciously,

Held, misdirection.

Pepler, for plaintiff.

Lount, Q.C., for defendant.

GOODYEAR RUBBER CO. V. FOSTER.

Sale of goods—Acceptance—Waiver of excess of goods ordered.

The defendants, with knowledge that a consignment of goods was in excess of the quantity ordered by them, made no objection on that ground, though negotiation took place for a reduction in price, but took into stock 15 out of 25 cases sent. The other 10 cases remained in bond till they were sold to pay duties.

Held, that the defendants had waived any objections as to the excess.

Pearson, for plaintiff.

C. H. Ritchie, for defendant.

ROBINSON V. HALL.

Mortgage—Payment—Transfer—Trespass.

A. became mortgagee of lands from B., who then sold the minerals, with right of mining, to defendant. On default in payment of the mortgage A. brought ejectment and issued writ of possession. On learning this defendant told B. he must pay the mortgage or give him an order to do so, and retain amount from the price of the minerals. An agreement was drawn up that defendant should either pay the mortgage or take a transfer to save B., defendant to have credit therefor on the sale of minerals to him, when defendant paid the mortgage, though the price of minerals was not due. B. then gave plaintiff possession at a rental, and defendant, having obtained a transfer of the mortgage and judgment in favour of A., ejected plaintiff.

Held, that defendant's payment was virtually one by B., and discharged the mortgage; and as it had been made to save B. as well as himself, defendant could not in equity have enforced the mortgage against B. or plaintiff, who could claim damages for the trespass. ARMOUR, J., dissenting.

Wallbridge, Q.C., for plaintiff.

Bethune, Q.C., for defendant.

MCLELLAN V. MCKINNON.

Conviction—Hard labour—Amendment of sentence by sessions.

There is no power in the Sessions, under 32-33 Vict. cap. 31, sect. 68, to amend sentence in a conviction. They cannot, therefore, strike out "hard labour" from a conviction.

H. J. Scott, for plaintiffs.

Beaty, Q.C., for defendant.

EDGAR V. MAGEE.

Bill of exchange—Statute of limitations—Point of commencement.

Where a bill matured 1st December, 1875, and writ issued 1st December, 1881.

Held, that the statute began to run 2nd December, 1875, and action, therefore, began in time. CAMERON, J., dissenting.

J. K. Kerr, Q.C., for plaintiff.

Bethune, Q.C., for defendant.

LAROCHE V. O'HAGAN.

Sale of vessel—Warranty—Breach—Loss—Damages.

A vessel on sale to defendant by plaintiff was warranted to class B 1, and insurable for $1,400, which the mortgage, securing the purchase money, covenanted to insure for. The craft

would not insure as B 1, and she was used uninsured, and was lost.

Held, that the measure of damage was what was necessary to make her class B 1.

Wallbridge, Q.C., for plaintiff.

Robinson, Q.C., and *W. H. P. Clement*, for defendants.

THURLOW V. SIDNEY.

Drainage—Rate—Award.

Arbitrators, on an appeal from surveyor's report by defendants, awarded under the Municipal Act that the deepening of a creek, etc., benefited lands in defendants' municipality, and that the defendants should pay $350, without mentioning the lands in Sidney, which the arbitrators considered benefited, nor charging them with a proper portion of the outlay therefor, as per sect. 535.

Held, that lands not being specified or charged in award, defendants could not comply with the Act, and award therefore bad.

J. K. Kerr, Q.C., (*Holden*, with him), for plaintiffs.

Wallbridge, Q.C., for defendants.

HARGREAVES V. SINCLAIR.

Slander—Repetition—Privilege.

Plaintiff assisted one C. in his shop, (that of a druggist,) over which defendant and her husband, a doctor, lived; C. being tenant of the latter. Plaintiff was charged by defendant, in presence of a witness, with taking $4 from her trunk. Of this C. was told by defendant's husband, and that plaintiff must be dismissed on pain of losing his (the husband's) prescriptions. A meeting having been arranged between the parties, in presence of the witness, to investigate the matter, as was stated, the slander was repeated, and the plaintiff was dismissed.

Held, a privileged occasion.

Bethune, Q.C., for plaintiff.

Robinson, Q.C., for defendant.

COMMON PLEAS DIVISION.

JUNE 23.

ROSENBURGER V. THE GRAND TRUNK RAILWAY COMPANY.

Railways—Accident—Failure to sound whistle or ring bell—Collision—Evidence—Findings—New trial.

Action against the defendants for the omission to give the necessary statutory warning, namely, by ringing the bell and sounding the whistle on approaching a railway crossing, by reason of which the plaintiff's horse took fright and ran away, and injured the plaintiff.

Held, (WILSON, C.J., dissenting,) that sect. 104 of C. S. C., ch. 66, is not restricted to injuries caused by actual collision but extends also to the case, as here, of a horse taking fright at the appearance or noise of the train.

The jury in answer to the question:—"If plaintiffs had known that the train was coming would they have stopped their horse further from the railway than they did?" said "yes."

Held, that though this was not very definite, yet taken with evidence on which the jury acted, which is set out in the case, it was sufficient.

A new trial was also asked for on the ground of the verdict being against the evidence and weight of evidence, but was refused.

Ward Bowlby, for the plaintiffs.

Bethune, Q.C., for the defendants.

MURTON V. KINGSTON AND MONTREAL FORWARDING CO.

Bill of lading—Excess in quantity named therein—Right to—Custom.

The Northern and North Western Railway and the Great Western Railway shipped a quantity of wheat from Hamilton to Kingston, consigned with Molsons Bank, in care of the defendants. The bills of lading contained the following provision:—"All the deficiency in cargo to be paid for by the carrier and deducted from the freight, and any excess in the cargo to be paid for to the carrier by the consignee." The quantity described in the bills of lading was 15,338 bushels, while the actual quantity shipped was 15,838 bushels. In shipping the wheat it was weighed in drafts of 500 bushels at a time, and by mistake a draft of 500 bushels was omitted in making up the total quantity shipped.

The plaintiff, the carrier, claimed he was entitled to the 500 bushels, being the excess of the quantity mentioned in the bill of lading.

Held, that the plaintiff was not entitled to recover, for that under the circumstances the provision in the bill of lading had not the effect of giving it to him, nor was there any custom proved shewing he was entitled to it.

Mackelcan, Q.C., for the plaintiff.

Bruce, for the defendants.

THE LONDON AND CANADIAN LOAN CO. V. MERRITT ET AL.

Sequestration—When issued—Judgment at Law—Service out of jurisdiction—Chose in action.

Held, that a writ of sequestration cannot issue under the O. J. Act, rule 339, on an ordinary common law judgment for debt recovered before the passing of the Judicature Act, if not being an order for payment of a specific sum, and no day for payment being named in it.

The property attempted to be sequestered was property in the hands of trustees under a will. Two of the trustees, one of whom was the judgment debtor, and took a life interest as part of the property, resided within the jurisdiction; the other trustees resided out of the jurisdiction, namely, in St. Johns, N.B., and the rest of the property was also out of the jurisdiction.

Held, that service of a notice of motion founded on such writ of sequestration on such non-resident trustees was sufficient.

Semble, that under the writ of sequestration a debtor's *choses* in action can be reached.

Arnoldi, for the plaintiffs.

Bain and *W. S. Gordon*, for the defendants.

WHITELY V. MCMAHON.

Arbitration—Costs—Evidence taken in absence of parties.

Under a submission to arbitration certain matters in controversy existing and pending between A. W., J. W. and M. in relation to the amounts due and paid on a certain mortgage made by M. to the T. and L. Co., and as to the proportion of said mortgage paid by the said parties to the Company, were submitted to the arbitrators. The arbitrators made their award by which they found that M. had paid the T. and L. Co. the amount he agreed with A. W. to pay on the mortgage, and had over-paid his proportion by $627, in which sum A. W. was indebted to him; that A. W. should pay that sum to him on or before the 1st of June, 1882, and should also pay the costs of the reference, amounting to $35.

Held, by OSLER, J., that the finding as to costs was an excess of the power of the arbitrators, but that it was severable from the rest of the award; and that the arbitrators in other respects had not exceeded their powers.

Held, however, that the award was bad and must be set aside, as it appeared that the arbitrators had received the evidence of one of the parties in the absence of the others, and after the arbitration was supposed to be closed.

Bethune, Q.C., and *Garrow*, for the applicants.

Shepley, contra.

MACDONALD V. HENWOOD.

Malicious prosecution—Setting criminal law in motion—Trespass—Evidence—New Trial.

Action for malicious prosecution and for trespass. The information which was drawn out by the magistrate on what he said the defendants told him was, that the plaintiff took and carried away a quantity of oats, in which the defendants had a joint interest, without their knowledge or consent, and contrary to their wishes, according to the best of their knowledge and belief. The magistrate, on this information, caused the plaintiff to be arrested and committed to jail to await his trial on this charge. The defendants did not tell the magistrate the whole facts, namely:—That the plaintiff had originally been put in possession of the oats under an agreement that he was to thrash them and take the straw in payment, and that, as he contended, he subsequently became the purchaser, and at the time the information was laid was claiming them as such purchaser. Also when the plaintiff was before the magistrate, on his solicitor objecting that no criminal offence was charged, P., one of the defendants, acting for himself as well as for the other defendants, stated that in order to have the charge investigated he would charge the plaintiff with stealing. The magistrate, however, did not appear to have heard this, and did not act upon it. Also, when the plaintiff was put in charge of the constable and committed to jail, the defendants were present. At the trial the plaintiff was non-suited.

A new trial was granted, with leave to the plaintiff to amend his statement of claim—which stated that the defendants had charged the plaintiff with felony—so as to state the true facts, and so as to enable the question to be presented whether on such facts a legal cause of action arose.

The new trial was also granted because there seemed to be evidence to connect the defendants with the trespass.

Pepler, (of Barrie,) for the plaintiff.

Lount, Q.C., for the defendants.

CHANCERY DIVISION.

Wilson, C. J.; Proudfoot, J.] [June 22.

McGEE V. CAMPBELL.

Insolvency—Setting aside final order of discharge—Forum—Parties.

A certain firm having become insolvent, made an assignment under the Insolvent Acts on Sept. 16th, 1878. By a deed of composition and discharge made Oct. 2nd, 1878 the firm covenanted to pay their creditors 10 cents in the dollar, and on Feb. 28th., 1879, the firm applied to the County Court Judge for an order of confirmation thereof. The plaintiff in the present action was one of the creditors of the firm, and he refused to execute or be a party to the said deed; but on persuasion he consented to assign his claim to one Smith, who should hold the same as trustee for the firm, and for the mere purpose of signing the deed. Thus the composition was carried out, and the plaintiff received a certain sum from the firm. Smith gave no consideration for the assignment. The plaintiff afterwards, and long after the confirmation of discharge, discovered that the firm, in the statement of assets and liabilities filed by them with the assignee before the order of discharge, in pursuance of the Insolvent Acts, had failed to disclose certain railway stocks standing in the name of, and owned by the defendant Campbell, a member of the firm; and, also, certain other assets of the defendant Campbell. Thereupon the plaintiff filed this bill, declaring this withholding of assets was fraudulent, and submitting that the deed of composition and discharge was void as against him, and praying a declaration to this effect, and to the effect that he was a creditor of the said firm to the amount of his claim against them.

It appeared on the evidence that some of these railway stocks were obtained by Campbell on a contract that he was to retain one half, if he could give them a marketable value, but if he could not do so within a certain time, the transaction was to be void, and he was to re-transfer.

Held, inasmuch as Campbell had an interest in these shares, which was not merely that of a trustee only, but was a personal interest and property, though contingent on the result of his service, and inasmuch as the contract remained in full force up to the time of the making of the deed of assignment in insolvency, and after it,—although no profit had at that time been actually made on the stock,—the shares should have been returned as part of Campbell's assets, for the language of the statute is large enough to cover such an interest. It was a valid executory contract, and as such passed on insolvency to the assignee.

It also appeared that among the assets which the plaintiff alleged were wrongfully withheld was a certain sum which Campbell had received, or to which he had a claim, from a certain Railway Company as compensation for services rendered as temporary acting President.

Held, the portion of the allowance payable and allowed for services rendered up to the date of the assignment in insolvency, was an asset which Campbell was bound to account for, although the remainder of the said compensation belonged to the insolvent.

Held, also, on the whole case, it appearing the said assets were wrongfully and fraudulently withheld, there was no reason why the insolvency proceedings should not be re-opened and carried on in order to make a due administration of the property, thus withheld; and the final order was impeachable on the grounds stated in the bill.

Held, further, (PROUDFOOT, J., *dubitante*), that the discharge should not be affected further than was absolutely required, and as the property in question which was not returned by the defendant as part of his estate was never entered on the books of the partnership, or treated as partnership property, but was always considered and treated by Campbell as his own private

property the discharge should not be vacated, excepting as to the private estate of Campbell.

Held, further, the assignee in insolvency was not a necessary party to the present suit, which was rightly brought in this Court.

Held, per PROUDFOOT, J., even if the amount received by the plaintiff at the time of the confirmation and discharge, must be taken to have been a compromise of the debt for a valuable consideration, it was sufficient for the plaintiff to show that it was entered into under a mistake caused by the defendants, as to the true amount of the assets, whether the defendants acted innocently or otherwise.

S. H. Blake, Q.C., (*Francis* with him) for the plaintiff.

Maclennan, Q.C., for the defendant Campbell.

D. McCarthy, Q.C., (*Foster* with him) for the defendent Cox.

Rae for the defendant Cassells.

Boyd, C., Ferguson, J.] [June 29.

HARDING V. CARDIFF.

Municipal Act—By-law for opening road—R. S. O. ch. 174, sect. 509.

There is nothing necessarily inconsistent in a plaintiff seeking cumulative relief by attacking a municipal by-law directing the opening of a road across his land, and also the award under it, fixing the amount of compensation to be paid to him.

The by-law impeached was passed on June 22nd, 1878, and was not attacked till this bill was filed on Nov. 20th, 1880. The plaintiff did not maintain that it was void on its face, or *ultra vires*, but he alleged that it was void on account of irregularities in the passing of it, and because it was not under seal, and was not properly registered, and because the defendants had themselves abandoned it. Nevertheless, although aware of its invalidity, the plaintiff, so far from moving against it within the year allowed by the statute, recognized its validity by naming an arbitrator to act for him in assessing compensation.

Held, under these circumstances, on authority of *Vandecar* v. *Oxford*, 3 App. 131, no court had any jurisdiction to interfere therewith, and the by-law became, by effluxion of time, absolute and incontrovertible.

Held, also, although under the Municipal Act such a by-law may not become effectual till it is registered, still that does not prolong the period within which, by the other sections of the statute, it may be quashed.

Held, further, when the by-law directs the opening of a road on a person's land, this in substance imports that the land may be entered upon for the purpose of making the road; and as held in *Stonehouse* v. *Enniskillen*, 32 U. C. R. 567, a municipality may, under R.S.O. ch. 174, sec. 509, enter upon and take or use the land before making compensation.

C. Moss, Q.C. (*Beck* with him) for the plaintiff.

W. Cassels (*Dickson* with him) for the defendant.

Wilson, C. J., Ferguson, J.] [June 29.

CUNNINGHAM V. CANADA SOUTHERN RY.

NORVELL V. CANADA SOUTHERN RY.

Orders of Appellate Courts—Costs.

In each of the above two suits, which were brought to enforce certain awards, the Court of Appeal, on appeal of the plaintiffs, gave judgment in their favour, and also gave each of the plaintiffs his costs.

On appeal to the Supreme Court of Canada, in both suits, that tribunal ordered, in the Cunningham case, a new trial without costs to either party.

Held, the meaning was that the parties should go back to a stage in the cause prior to the appeal to the Court of Appeal, and begin again; that neither party was to have any claim against the other for any costs that had been incurred after that step, and up to the time of the judgment of the Supreme Court; and that in this way the costs of appeal to the Court of Appeal were necessarily taken away.

In the Norvell case, the Supreme Court declared that the award was void, saying nothing about costs.

Held, inasmuch as the award in question was the sole foundation of the plaintiff's suit, and a formal entry of such a judgment would be a dismissal of the bill and a direct reversal of the Court of Appeal; therefore, as a necessary consequence, the plaintiff was deprived of the costs in question.

Held, consequently, as to both suits, the effect

of the judgment of the Supreme Court was to supersede and annul any effect of the orders of the Court of Appeal, or of the certificates of their judgments, or any entries that might have been made of them, or of the orders, making them orders of this Court, and writs of execution issued by the respective plaintiffs therein, after the judgments of the Supreme Court, to enforce payment of the costs of appeal, must be set aside; and it was not necessary to the said plaintiffs to resort to the Supreme Court for relief.

W. Cassels for the plaintiffs in both suits.

Cattanach for the Railway.

NOTE.—The above note is taken from the judgment of Ferguson, J., the judgment of Wilson, C. J., not having yet been handed out, but it was to the same effect.

Boyd, C., Ferguson, J.] [June 29.

RE WOODHALL.

Administration proceedings—Costs.

The costs should not be given out of the estate in administration proceedings, unless it appears that the litigation has been in its origin directed with some show of reason, and a proper foundation for the benefit of the estate, or has in its result conduced to that benefit. Therefore, in this case, where no benefit was shown to anyone by the administration proceedings, as the same result would have been secured without suit, if the plaintiff had not acted so precipitately, and the said proceedings were taken against the will of the adult beneficiaries.

Held, the expense to which the other parties had been put should be paid by the plaintiff, and the order requiring her to pay the costs should be affirmed, according to the rules laid down in *Mackenzie* v. *Taylor*, 7 Beav. 467, as explained in *Hilliard* v. *Fulford*, L. R. 4 Ch. D. 389, and *Rosebatch* v. *Parry*, 27 Gr. 193.

Held, also, following *Farrow* v. *Austin*, L. R. 18 Ch. D. 58, that the question of the residuary legatees' costs is an appealable matter.

Stonehouse for the plaintiff.

J. Hoskin, Q. C., for the infant defendants.

Sheppard for the adult defendants.

Boyd, C.] [June 30.

BELL V. MCDOUGALL.

Insolvency of firm—Surplus after payment in full of partnership creditors.

J. L. McDougall was in business as lumberman and miller, and as such incurred large liabilities. In 1875 he took into partnership D. C. McDougall, who agreed to put in a certain capital. J. L. McDougall's assets were taken over by the partnership, but not his liabilities. In 1877 the firm became insolvent. Bell, the plaintiff, was appointed assignee under the Insolvent Act of 1875. The firm's creditors proved on the estate of the firm, and J. L. McDougall's separate creditors proved on his separate estate. D. C. McDougall had no separate creditors. In 1882 sufficient had been realized out of the partnership assets to pay the partnership creditors in full, and to leave a surplus. D. C. McDougall petitioned the County Judge in insolvency to have the partnership accounts taken, and his share of the surplus paid over to him. Bell, the plaintiff, under instructions from J. L. McDougall's separate creditors, applied for an injunction to restrain D. C. McDougall from proceeding with his petition to the Judge in insolvency, on the grounds (i) that the partnership between him and his brother was fraudulent as against J. L. McDougall's separate creditors, and gave him no right to any share in the surplus; (ii) that the partnership accounts were very intricate, and could not conveniently be taken in the insolvency matter. An injunction was granted *ex parte*. On motion to continue the injunction—

Held, *In re Caton*, 36 C. P. 308, showed that jurisdiction existed in the insolvency court to deal with the claim of the separate creditors of J. L. McDougall as present in this suit, and this being so, under *Close* v. *Mara*, 24 Gr. 593, that was the proper tribunal to deal with the matter, and if any error arose the proper remedy was by appeal The motion to continue the injunction must be refused; should, however, the judge decline for any reason to entertain the matter as set forth by the assignee in the interests of the individual creditors, the application for injunction might be renewed on amended pleadings, if the plaintiff was so advised.

Moss, Q. C., for the plaintiff.

Lash, Q. C., for the defendant.

REPORTS

ONTARIO.

COUNTY COURT OF THE COUNTY OF SIMCOE.

MITCHELL *qui tam* V. PHILLIPS.

Justices of the Peace—Return of conviction—When to be made—33 Vict. c.27 (D).

Held, that a return by the defendant on the 19th January of a conviction made on the day before the "second Tuesday in the month of December" preceding, was sufficient under the above statute.

[Barrie, ARDAGH, Co. J.

The defendant applied to set aside the judgment by default obtained against him by the plaintiff, and the execution issued thereon, and for an order to stay payment over to the plaintiff of the moneys in the hands of the sheriff.

The facts of this case were not disputed, and may be stated as disclosed by the defendant's affidavit. On Monday, the 12th day of December last, the defendant, who resided at Bondhead, happening to be at Beeton, another village some six miles distant, was applied to for a warrant against this plaintiff for an assault and breach of the peace. He granted the warrant and the same night convicted the plaintiff, the proceedings coming to a close about midnight. Defendant then returned to his home at Bondhead, where he arrived about two o'clock in the morning of Tuesday, the 13th December. The only mail from Bondhead to Barrie, the county town, closed at 6 a.m. No return of this conviction was made by defendant until the 19th of January following. On March 13th the plaintiff commenced this action, endorsing his writ for the penalty of $80.00 prescribed by the statute. No appearance was entered by the defendant; whereupon the plaintiff entered judgment and issued execution in due course. Upon the sheriff's officer's demand under the execution the defendant paid over to him the full amount claimed thereunder. The affidavit of the defendant shews to my mind a sufficient excuse for the delay and neglect on his part; and, that being so, I think I ought, as to this part of his application, to interfere and give him what relief he is entitled to, so long as the money has not reached the plaintiff's hands.

The question then arises, whether upon the facts stated, about which there is no dispute, the defendant has really any defence if allowed to appear.

The action is brought under sect. 3 of 33 Vic c. 27, which, after referring to 32-33 Vic. c. 31, goes on to say, "the returns required by the 76th section of the Act hereinbefore recited shall be made by every Justice of the Peace quarterly, on or before the second Tuesday in each of the months of March, June, September and December in each year, to the Clerk of the Peace," &c. It is to be observed that sect. 76 of the old Act is not repealed but only amended; this it is important to bear in mind.

If we refer to that Act (32-33 Vict. c. 31), we find sect. 76 enacting that "Every Justice of the Peace shall make return in writing under his hand of all convictions made by him to the next ensuing general or quarterly Sessions of the Peace, or to the next term or sitting of any court having jurisdiction in appeal. . . . at which in either case the appeal can be heard," &c.

The object of this is plain enough; for by reference to section 65 of the same Act, we find the practice in appeal to be: (1) If the conviction was made not less than twelve days before the next sessions, then the appeal was to be to such sessions; (2) If the conviction was made less than twelve days before the next sessions, then the appeal was to the sessions *after* the then next sessions; so that if a conviction were made under that Act within twelve days before any session, no return by the Justice of this conviction was required before the *second* sessions thereafter, inasmuch as there would be no necessity for the return to be made any earlier than that sitting of the Court at which the appeal was to be tried. This section (65) was directly repealed by sect. 1 of 33 Vict. c. 27, which preserves the same distinction as in the old Act, adding, however, a day to the twelve therein mentioned. As far as this case is concerned this alteration in the practice need not be noticed.

We now come to sect. 3 of 33 Vict. c. 27, which amends sect. 76 of 32-33 Vict. c. 31, and we find it begins with a recital as to the necessity for amending the old section: "Whereas in some of the Provinces of Canada the terms or sittings of the General Sessions of the Peace or other Courts to which, under sect. 76 of the said Act, Justices of the Peace are requested to

make returns of convictions had before them, may not be held as often as once in every three months; *and it is desirable that such returns should not be made less frequently.*" This, then, is the purpose of this amendment, to secure returns *quarterly* in every Province instead of *half-yearly* as in some. So that had the conviction taken place on the 13th (*i. e.* the second Tuesday) of December instead of on the 12th of that month, the defendant would be bound to make a return of it "on or before the second Tuesday in March," instead of, as under 32-33 Vict. c. 31, on or before the second Tuesday in June, when the next sittings of the Court at which an appeal might be heard took place. The case of *Corsant, qui tam* v. *Taylor*, 23 U. C. C. P. 607, seems at first sight to be in the plaintiff's favour. The fact there was that the conviction took place on the 21st of January, but no return of it was made before the "second Tuesday in March," as required by the statute. The plaintiff then brought his action alleging the non-return. No *plea* clearly could have helped the defendant; and so as a forlorn hope, it would seem, he demurred to the declaration on the ground that it did not aver that the return of the conviction was not made to the sessions to which a party complaining could by law appeal. The Court above decided against the demurrer—and rightly enough; for independent of the reasons given in the judgment, it was clear that the defendant claimed the right to delay from the 19th of January till the second Tuesday in June following, a period of nearly three months; and this in the face of the recital in sect. 3 of the Act 33 Vict. quoted above: "It is desirable that such returns should not be made less frequently" than once in every three months. Here the defendant sets up no such claim, but he makes his return within three months, and only such a one as was possible—one before the second Tuesday of that one of the four months mentioned in the statute, the earliest before which it was *possible* to make a return.

The intention, as it seems to me, of the Act (33 Vict. c. 27,) was this, (and the wording, I think, may, without wresting the plain meaning, bear the same construction) that in the case of a conviction made within the twelve days immediately preceding either of the semi-annual sittings of the General Sessions, the right given under the Act of 32-33 Vict. ch. 31, to delay making a return of the conviction until the first day of the next sitting of such sessions, that is for a period of over six months, it might be, was taken away and a return ordered to be made on or before the second Tuesday of the third month thereafter, that is on or before the first day of what had been the next sittings of such sessions previous to the Law Reform Act, which made such sittings semi-annual instead of quarterly as theretofore. I have said I think the wording of the section may bear the same construction and I say this looking at the closing words of the section, which are, "and the penalties thereby imposed," (that is by the Act of 32-33 Vict.) ". . . shall hereafter apply to the returns hereby required, and to any offence or neglect committed with respect to the making thereof, as if the periods hereby appointed for making the said returns had been mentioned in the said Act instead of the periods thereby appointed for the same." Now let us substitute the periods in the latter Act for those in the prior one. In the older Act there appear to be prescribed *two* periods for making returns, the one, the *first* sittings of the session after the conviction; the other, the *second* sittings after the convictions; and these periods were to be ascertained and determined according as the conviction took place: (1) *Not less* than twelve days before a sittings; (2) *less* than twelve days before a sittings. There were then only semi-annual returns, but the Legislature thought it desirable there should be quarterly returns instead, and so it substitutes *four* periods for the *two* in the former Act; or rather it added two more periods, dove-tailing them in as it were. Had there been no change from quarterly to semi-annual sittings, in some of the Provinces, there would have been no need for this section, and it would probably never have been passed, for if returns were actually required and were necessarily made once in every three months, the recital above quoted, that "it is desirable that such returns should not be made less frequently" than once in every three months, would be meaningless. I have said this section *added two more periods*. It says in effect to a justice, "instead of delaying the return of a conviction made by you within the twelve days next preceding any sessions, till the sessions held six months after such (first mentioned) sessions, you must make it within the time you formerly had to make it, that is on the

second Tuesday of the succeeding quarter." The section does not say that every Justice of the Peace shall make his returns quarterly on or before the second Tuesday, etc., but "that *the returns required by the said seventy-sixth section . . . shall be made,*" etc.; thus it appears to me, retaining and recognizing some of the conditions and circumstances surrounding and bearing upon the returns mentioned in that seventy-sixth section. Furthermore the new section provides that "every such return shall include all convictions . . . not included in some previous return." Now the form of return prescribed (that in the old Act being still retained) seems to contemplate *monthly* returns, as the heading of it is "Return of convictions made by me in the month of ——— 18—," and the Act says the Justice *shall* make his return "in the following form." Still, as the new section says that returns now shall be quarterly and that every such return shall include all convictions not included in some previous return, it would appear that *one* return for the quarter is sufficient. Is a justice then to wait till the expiration of the last day before the second Tuesday in each of the several months mentioned, before he begins to make up his quarterly return? Under the old Act he had *twelve days* at least to make such return, now he has not as many hours unless he encroaches upon the hours of his natural rest. It seems to me it would be unreasonable to require a Justice of the Peace to delay making up his return till midnight of such a day, which he must do if he wishes to be certain that he will not be called upon to make more than one return, as he is liable at any time of the Monday before such second Tuesday to be called upon to perform magisterial duties.

The question may arise as to what is meant by *making* a return? Does it mean that the return shall be in the hands of the Clerk of the Peace on the second Tuesday, or would it be sufficient if the return should be deposited in one of Her Majesty's post-offices at some hour, even the latest on such Tuesday. If the former, as might reasonably be contended, then it would be requiring an impossibility from this defendant to comply with the statute in this particular case, and the law does not require impossibilities from any man. Looking at the case then in these several aspects, I have come to the conclusion that if any straining of the Act is to be done at all it should be in favour of the defendant, that being the tendency of all recent legislation. And as I cannot, from any of the cases reported, find that this particular point has been settled, I prefer, as far as my light goes, to lean in favour of protecting this defendant against whose *bona fides* in the matter I see no ground for any charge. The judgment and the execution thereon will be set aside, and the money received by the sheriff be paid into Court till further order be made respecting the same, upon payment by the defendant of the costs of entering said judgment, the costs of the execution and sheriff's fees thereon, and the costs of this application, within fifteen days, within which time the defendant is to plead to the action.

MARITIME COURT OF ONTARIO.

(Reported for the LAW JOURNAL.)

THE TUG MAYTHAM.

Suit for wages, part of which accrued more than 90 days before petition filed—Custom of hiring—Covenant by master and part-owner against overdue wages—Meaning of the word seaman—Mode of hiring—Power of Court to deal with mortgages.

This was a proceeding *in rem*, in which Alexander McNabb was petitioner. The answer was filed by D. Moore (mortgagee of the vessel) who intervened. The pleadings were filed in Toronto, and the cause ordered to be heard before the Surrogate Judge of this Court at Collingwood.

ARDAGH, S. J.—The petitioner, Alexander McNabb, claims to be allowed the sum of $300 for 5 months' wages, at $60 a month, up to the 1st September, 1880, and a further sum of $180 as 3 months' wages from 1st July to 1st September 1881. But he admits having received some $45 out of the earnings of the boat, about $25 or $30 of this sum in 1880.

The petitioner's evidence, which was uncontradicted, is that in 1880 his wife, Jane McNabb, and their two sons, John and James, were the owners of this tug, that the two latter hired him as captain or master for $60 a month, to be paid out of the earnings of the boat, that he took charge of her about the 1st April and continued in charge till the 20th August, when she was

burnt. That during the following winter she was repaired, and in the season of 1881, about the 1st of July, he took charge of her again and so continued for 2½ or 3 months, when the respondent took possession of her by virtue of an overdue mortgage, held by him on the tug. On cross-examination the petitioner said, that when his wife and sons bought the tug from the respondent Moore, he helped them a little, but it was his wife's own money that "went into it;" that when he was hired in 1880, nothing was said about the length of time he was hired for; that he could come or go when he liked; that he had always made a bargain *every year* with other boats and for, perhaps, different wages; that every spring they hire their captains and crew, who, when paid off, can go where they like.

The respondent took possession of the vessel under the power in his mortgage,, and after giving the necessary security, sold her, so that this proceeding *in rem* may now be said to be changed into a proceeding *in personam*.

The objection was taken by the respondent that in no case could the petitioner recover wages for 1880, inasmuch as the hiring ended that year, not later than the 1st September, at which date the wages must be said to have accrued. And that, as this petition was not filed till the month of November, 1881, more than the ninety days prescribed by the M. C. Act, 40 Vict. c. 21, s. 2, sub-s. 4, have expired, and that the petitioner cannot enforce this claim against respondent, a *bona fide* mortgagee.

This contention must, I think, be allowed. I should find as a fact that the hiring for 1880 was a separate and independent one from that of 1881, and terminated by the 1st of September in that year; no custom of any sort is proved by which such a hiring could, in these inland waters, where navigation is altogether closed for at least five months of the year, be construed to be a continuous hiring for any longer period than the close of navigation in that year. Indeed, the evidence of the petitioner himself shows the contrary to be the case.

The respondent also filed two mortgages upon the vessel to him. The first dated 18th April, 1881, for the sum of $300, made by Jane McNabb, James McNabb and John McNabb. The second is for the sum of $500, dated the 5th July, 1881, made by Alexander McNabb (this petitioner), and the said James and John McNabb. Both the mortgages contain a covenant in the words following: "We covenant with the said D. Moore, to indemnify and save harmless the said D. Moore, and the said ship, from any lien which might attach to the said ship by reason of overdue wages, or otherwise." The respondent contends that these words "overdue wages," must refer to wages to be earned in the future, and therefore cover the claim of the petitioner for the year 1881's wages, but that if not they must refer to the wages of 1880.

It seems to me that this last is the proper construction to be given to them; and that therefore the petitioner, having given this covenant of indemnity, knowing he had such a claim for 1880 as he now puts forward, should not be heard in support of that claim. Supposing he had as master a right to recover these wages for 1880, the respondent would have the right to fall back on this covenant and recover back from the petitioner the very sum *he* had just recovered from the respondent—such a proceeding as would not be sanctioned by this Court.

To put the opposite construction upon this covenant, and make it applicable to future wages would clash with the well known principle that "no seaman can by agreement forfeit the legal right he has to his wages, and that whether the same be due under special agreement or otherwise." *The Julina*, 2 Dods, 504.

It has been objected that the petitioner is not a "seaman," within the meaning of the Act. This point has already been raised in the case of *The Tug Robb*, 17 C.L.J., 66. McKenzie, J., in that case, says: "It is not necessary to decide here whether the contract specified in the petition should be in writing or not under the Dom. Statutes."

I do not see myself that it is necessary to show that this contract was in writing, or to show anything more than that the petitioner was engaged to do the work he did as master. The Merchants' Shipping Act, 1854, requires the master in hiring seamen, to enter into a written agreement with them. But even if he neglected to do so, would a seaman who went the voyage be thereby debarred from recovering his wages. I see nothing about the mode of hiring the *master* in that Act, but section 191 enacts, that every master of a ship shall have, so far as the case permits, the same rights, rem-

edies and liens for the recovery of his wages, whether by this Act or by any law or custom, any seaman, not being a master, has for the recovery of his wages. As at present advised I must hold this petitioner to have a right to recover here.

A question was raised as to the power of the Court to deal with mortgages. The Vice-Ad. Ct. Act of 1863, confers jurisdiction upon those Courts as to claims in respect of mortgages when the ship has been sold by a decree of the Vice-Ad. Court, and the proceeds are under its control. Our Maritime Court Act gives this Court the same jurisdiction as is conferred upon that Court. But I do not quite see how this question comes in; the mortgagee here merely intervenes, upon the filing of a petition *in rem*, and disputes the petitioner's claim.

Upon the whole case, then, I am of opinion, that there should be a decree in favour of the petitioner for the sum of $160, *i. e.*, the sum of $180, 3 months' wages in 1881, less the sum of $20 received on account, together with his costs of suit.

Gamon and *A. Howell*, for petitioner.

O'Connor, for intervener.

THE TUG MAYTHAM.

Suit for wages, proceeding in rem—Mortgagee intervening—Hiring of petitioner by two only of the three joint-owners, the third being the master of the vessel—Mortgagee not bound by such a hiring if wages excessive.

This was also a proceeding *in rem* (against the same vessel as in the last case), in which the petitioner was Walter McNabb, a son of the petitioner in that suit. David Moore, a mortgagee intervened here also, and filed his answer disputing the claim of the petitioner, or at least a portion of it. The claim was for $120, three months' wages from the 1st day of July, 1881, at $40 per month.

ARDAGH, S. J.—The petitioner, who did not appear at the trial, was a young man of 21, who appears to have been hired by James and John McNabb, two of the owners. The first witness called for the petitioner was John McNabb, who produced a small piece of paper, written with pencil, signed by the parties, by which John and James McNabb agreed to give the petitioner, Walter McNabb, the sum of $40 a month. Witness states that petitioner was to do all the work of fireman and deck hand. This witness states that $18 to $20 was the wages usually paid to firemen that season.

One Clark, called by the petitioner, said that what the petitioner did was not worth $40. Captain Alex. Cameron, also called for the petitioner, admitted, in cross examination, that $20 to $25 would be fair wages for what the petitioner did. On the other hand, Fred. Love, engineer on this boat at the same time, was called by the respondent, and said: "Walter McNabb was on board all the time, on and off, as he was wanted. Can't tell what he was worth. He was a smart man. He was worth all that, $40." James Morrow stated that he worked at the same work in 1876, and got only $16 a month, and that wages were then as good as now. One Campbell, part owner of a steam barge, said that firemen were paid $20 a month in October, deck hands $15, $18 and $25. There were one or two other witnesses on either side, but the above ones I consider as giving the most positive evidence.

I am asked to disregard the agreement put in evidence, and the equitable powers of this Court are invoked to prevent the petitioner enforcing what is said to be an unconscionable bargain.

At the hearing I was impressed with the difficulty of getting over a regular written agreement made with the petitioner. On considering the matter, however, I have come to the conclusion that the petitioner as to part of his claim must be postponed to the intervener. The agreement was no doubt made with the petitioner, but with two of the owners only; the third owner, and the one who ought to have had most to say in hiring hands as being the master, not being a party to it. It was expressed to be made on the 1st July, though it appeared in evidence that the petitioner had been working before that time on the vessel. It appears, too, to have been signed by one of the McNabbs at Owen Sound, and by the other at Collingwood. I cannot help saying that looking at the document itself, the manner of the two McNabbs in giving evidence, the absence of the petitioner, and all the attendant facts and circumstances, I have grave doubts as to this agreement having been executed on the day it was said to have been.

I was impressed with the argument that one

man cannot do two men's work; and some of the witnesses said that what the petitioner did was usually one man's work.

The remarks I have made in the last suit on the subject of mortagages I might refer to here, and inasmuch as this intervener Moore has sold the vessel, subject to the claims of this petitioner and of Alexander McNabb, the purchase money may be said to be in such a position as to be dealt with without this intervener asking a reference. The proper decree, therefore, to be pronounced, would be this: Declare that the petitioner is entitled to be paid the sum of $78 on account of his claim herein, together with the sum of ten dollars as and for his costs, by the said David Moore. Declare that if upon reference to the Deputy Registrar, which the petitioner is hereby allowed to take, it is found that there remains any surplus from the sale of the said vessel after payment of: (1) the judgment of Alexander McNabb, with his taxed costs; (2) the above mentioned sums of $78 and $10; (3) the moneys secured by all the outstanding mortgages made to the said David Moore by any of the said McNabbs, as owners, together with the costs of exercising the powers of sale contained in the said mortgages; then that there shall be paid to the said petitioner herein, a further sum of $32, together with the residue of his costs of suit beyond the sum of $10 already allowed, or so much of the said surplus as shall be available for such purpose; any balance to be paid over to the owners at time of sale.

Both these causes might, I think, have been consolidated under rule 265. If it would be of any benefit now to any party, an order for such consolidation would be made if asked for.

Birnie, for petitioner.

O'Connor, for intervener.

ASSESSMENT CASE.

RE CANADA PACIFIC RAILWAY COMPANY.

Assessment of Railway Lands.

On an appeal from the assessment of the property of the Canada Pacific Railway Company at Ottawa, the following judgment was delivered by

DANIELL, CO.J.:—The notice in this matter contains ten grounds of appeal, but most of these being for irregularities which we have the power to amend, it is unnecessary to refer to them in detail. I will therefore deal with the real grounds of complaint, which are as follows:

1st. What portion of the land occupied by the railway should have been assessed as roadway and at the average value of land in the locality as stated upon the assessment roll of the previous year?

2nd. What part of the land other than the roadway should be assessed as lands in the actual occupation of the company?

3rd. What the residue of the company's lands is which should have been assessed as vacant lands not in the actual use of the company?

4th. Whether the buildings upon the land, such as stations, offices and other buildings, should have been included in the value of the lands of the company, or should be excluded on the ground that they are superstructure, as iron rails, fences bridges, etc., are so considered and held to be exempt?

Section 26 of chap. 180 of the Revised Statutes of Ontario is the governing enactment on the subject, and it reads as follows:—"Every railway company shall annually transmit, on or before the 1st day of February, to the clerk of every municipality in which any part of the roadway or other real property of the company is situated, a statement showing:—

1st. The quantity of land occupied by the roadway and the actual value thereof according to the actual value of land in the locality, as stated in the assessment roll of the previous year?

2nd. That real property other than the roadway in actual use and occupation by the company and its value.

3rd. The vacant land not in actual use by the company, and the value thereof as if held for farming or gardening purposes. And the clerk of the municipality shall communicate such statements to the assessor, who shall deliver at or transmit by post to any station or officer of the company, or notice addressed to the company, of the total amount at which he assessed the real property of the company in his municipality or ward, showing the amount for each description of property mentioned in the above statement, and such statement and notice respectively shall be held to be the statement and notice required by the 37th and 41st sections of the Act."

I find the land of the company assessed upon the present roll as follows :—

18 lots, or 2¾ acres, part lot 39, at $700 a lot	$12,500
11½ acres, part lot 39, $2,000 per acre	22,500
2 acres, part lot 39, farm land, at $150	300
Buildings	15,000
Total, all freehold property	$50,300

A plan produced marks the lands owned by the company. The part coloured yellow is called the company "roadway," the balance "unoccupied land." Lines upon the plan show what the assessors call roadway. The assessors assessed roadway 5¼ acres ; lands in actual use and occupation of the company, 6¾ acres, and unoccupied land, 4 acres ; in all 16 acres. It is admitted that all the lands upon the plan, except the portion, 5¼ acres "roadway," extending to Oregon street, was purchased by the company for station grounds.

I have been able to find only three cases in our courts bearing upon the question in dispute. This appears strange, for within the limits of every city and town in Ontario one or other of the railway companies own lands upon which are erected buildings for stations, offices, workshops, etc. How those lands and buildings have for years been assessed, what portion as roadway, and what portion as real property in the actual occupation of the railways, appears to be unknown as far east as Ottawa. I heard in evidence for the first time that three of the county judges in the vicinity of Ottawa rendered judgment in support of the company's contention. The judgments were not reported and are not produced, and I am not therefore aware of the grounds in which those judgments proceeded.

The following are the cases I have been able to find in our report : *Great Western Railway Company* v. *Rouse*, 15 U.C.R. 168—a special case submitted to the Court as follows : "The company being assessed, as they contended improperly, under section 30 of chap. 55, 22 Vict., appealed to the Court of Revision of the Municipal Council, which confirmed the assessment made by the assessor, and from this decision the company appealed to the Judge of the County Court, who, upon hearing the appeal, amended the matter thus :—

Station and Buildings	£1,000
Railway and superstructure	21,000
	£22,000

The first question submitted was "whethe- the assessment roll (as amended and corrected by the Judge) shows that the company were illegally assessed for superstructure, to which the late Chief Justice Robinson replies, "We find nothing in any statute which relates to the question submitted in this case besides the 21st clause of 16th Vict., chap 182, and it is admitted in the arguments that there is no other enactment on the subject. The language of that clause is too plain to admit of a doubt. The Legislature has expressly directed what is to be assessed, and in respect to the roadway it is the actual value of the land occupied by the road which the assessors are to place upon the roll, and it is in so many words directed that the value shall be estimated accordiug to the average value of land in the locality in which it is located. That excludes superstructure, such as iron, rails, etc." The assessment as to the value of the superstructure upon the "road" was reduced, but the assessment as altered and corrected by the County Judge upon "station and buildings" stood as a correct assessment without alteration by leave of the Chief Justice.

In the *City of Toronto* v. *Great Western Rail. Company*, 25 U.C.R. 570, the assessors assessed certain land of the company upon which there was a large frame building used entirely for railway purposes. Several railway tracks were laid through the building ; the clerks' offices, waiting rooms, freight sheds, baggage rooms were all in the building. The land was assessed at an annual value of $1,200, and the station at $1,500. From this assessment the company appealed to the Court of Revision, who confirmed the assessment, and the company appealed to the County Judge. The County Judge affirmed the assessment, but declared his judgment to be subject to the determination of a superior court. Chief Justice Draper in his judgment says : "As to the question itself, (that is as to whether the building should be assessed with lands), as at present advised, we do not think it would be found to present any great difficulty, and if the city assessors and the Court of Revision had put the two values into one, as forming the whole valuation of the "land," though there might have been an appeal to the County Judge on the question of excessive valuation, and he must have confirmed or reduced it, we do not see how under the statute his decision could have been brought in question." I consider that these two cases go far in deciding that station buildings should be assessed with the lands upon which they are erected, and that the lands on which buildings are erected are not roadways within the meaning of the Assessment Act. *The Great Western Railway Company* v. *Town of Windsor*, 2 U.C.L.J. 193, was an appeal from the Court of Revision to the County Judge who described the land as follows:- "The land once mostly under water, but reclaimed by filling in and grading at great expense, taken by the assessors as land occupied by the road, seems properly so considered, as it really was taken from the main and adjoining tracks, off sets switches and time tables, being fixed machinery and works appurtenant thereto, erections and approaches, without which the railway could not be worked." The judge with the assessors decided the land to be "roadway." The learned judge, I think, properly decided the rails, etc., to be superstructure and exempt, but I am not

prepared to agree with all the learned judge said in reference to the taxation of railway lands. That decision was, moreover, anterior to the other decisions of the Superior Court Judges, and must be held to be overruled so far as it is opposed to them.

I found several cases in our courts in which railways companies have resisted what they considered illegal and improper assessment upon their property, but none raising distinctly the matter in dispute in this appeal. Considering the well known inclination of municipalities to tax everything, and of railway companies to pay as little taxes as possible, I cannot account for the absence of any such case except upon the hypothesis that the foregoing judgments have been accepted as determining beyond doubt the liability of railway buildings to municipal assessment.

Several American cases were cited in the argument by the learned counsel for the company, in which some American courts held railways to be totally exempt from taxation. The examination of these decisions show that they proceeded chiefly on the ground that the provisions of the charters of the railway companies in the states in which the decisions took place contemplated such an exemption, and they do not therefore afford much assistance in the present case, which must be decided on a different principle.

It is a clear principle of law that when an exemption is claimed it must be clearly made out by the party making it. When there is no express provision to the contrary the burden of taxation should fall equally upon the whole rateable property, real and personal, of the municipality. Section 6 of the Assessment Act provides that all land and personal property in this province shall be liable to taxation, subject to certain exemptions therein mentioned, which exemptions make no reference to railway property of any kind.

I am of the opinion that sub-sect. 1 of section 26 of the Assessment Act contains language which imports clearly enough that only the land of the "roadway" or tract on which the rails are laid can be assessed, and that the superstructure, such as rails, bridges, etc., cannot be taken into consideration when determining the value at which the land of the "roadway" ought to be assessed. But sub-section 2, which applies to the assessment of the other real property in the occupation of the railway company, contains no language from which any exemption can be implied. Whilst the first section uses the word "land," and declares that it cannot be rated higher than other land in the locality in which the same was rated during the previous year, the second sub-section uses a different and, in its ordinary signification, a wider term, namely, "real property," and provides that it is to be assessed at its value. Section 2 contains no words restricting the meaning given to the term "real property" by sub-section 7 of section 2 of the Act, which declares that the words "real property" shall include the buildings or other things erected on the land, neither does it contain any words indicating in any way that the "real property" should be rated relatively to any other property or lands in the locality.

It may be remarked, moreover, as important that whilst the former Assessment Act, 16 Vict., chap. 182, sect. 21, provided in one section for the assessment of the land and real property of railways, the present Act contains three sub-sections providing separately for the assessment of the three different kinds of railway property therein specified, with the evident purpose of not only directing a different basis of assessment for each, but also of removing all doubt about the partial exemption given in the first sub-section, not applying to the "real property" referred to in the second sub-section. The transposition in the present Act of the parts of clause 21 of the former Act, and the precision with which these parts are formulated in the three sub-sections of the present Act, clearly point in the same direction. If the land on which stations, offices and storehouses are erected is held to be roadway, and such buildings held to be superstructure and exempt, it would be difficult to imagine what property of railway companies the Legislature intended should be assessed under the head of "real property" mentioned in sub-section 2.

I am, therefore, of opinion that the stations and other buildings of the company must, for the purposes of assessment, be included in determining the value of the land in which they are erected and both assessed together under the head of "real property" in the occupation of the company. I regret having to differ from my brother Judge Ross, who is of opinion that such buildings are not assessable as being part of the superstructure and necessary for the convenient carrying on of the business of the railway. As to the division of the land under the several headings required by the statute, I do not see any difficulty on the evidence. Whether a small portion of the land used for switches, etc., outside of the main track of the railway should be included under the head of "real property in actual use" presents no practical difficulty, as the assessment of it under either head would, according to the evidence, be about the same. As my brother Judge Lyon agrees with me in opinion it will be ordered that the assessment roll shall be amended and altered as follows:—

Roadway, part lot 39, west Broad Street, 5¼ acres	$9,875
Land in actual use and occupation by the railway, 6¾ acres, being part Broad Street west	25,000
Land not in actual use of the railway, 4 acres, part of 39 Broad Street west, being vacant land	600
	$34,975

MISCELLANEOUS.

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Greenwood's Manual of the Practice of Conveyancing, showing the present practice relating to daily routine of conveyancing in solicitor's offices; to which are added concise forms and precedents in conveyancing. 7th edition. Edited and revised, with special reference to the Conveyancing and Law of Property Act, 1881, by Henry Greenwood. London, 1882.

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The Practical Statutes of the Sessions of 1879 and 1881, with introduction, notes, tables of statutes repealed and subject altered, lists of local and personal and private Acts, and a copious index. Edited by W. Paterson. London, 1879—1880.

DIGEST.

The Law Reports under the superintendence and control of the Incorporated Council of Law Reporting for England and Wales. Digest of cases decided by the House of Lords, Privy Council and the Superior Courts of Common Law and Equity, and by the Admiralty and Ecclesiastical Courts and the Courts for Probate, Divorce and Matrimonial Causes, and for Crown cases reserved, and by the Court of Appeal, the several Divisions of the High Court of Justice and the Chief Judge in Bankruptcy, together with a Digest of the important Statutes, from the commencement of Michaelmas Term, 1865, to the end of Trinity Sittings, 1880. Compiled by Martin Ware, John Edward Hall and H. Lacy Fraser.

BOOKS RECEIVED.

A CONCISE TREATISE OF THE LAW OF PROPERTY. By H. W. Boyd Mackay, LL.B. London: H. Sweet, 3 Chancery Lane, 1882. Willing & Williamson.

ESSAYS ON JURISPRUDENCE AND ETHICS. By Frederick Pollock, M.A., LL.D. London: MacMillan & Co., 1882.

THE ADMIRALTY DECISIONS OF SIR WILLIAM YOUNG, KT., LL.B., 1865-1880. Edited by James M. Oxley, LL.B., B.A. Toronto: Carswell & Co., 1882.

A CONCISE TREATISE ON THE PRINCIPLES OF EQUITY PLEADING WITH PRECEDENTS. By Franklin Fiske Heard. Boston: Soule & Bugbee, 1882.

ARTICLES OF INTEREST IN COTEMPORARY JOURNALS.

Spectators at a prize fight.—*Eng. L. J.*, June 17.

Judgment against a firm.—*Ib.*

The alteration of bank notes.—*Ib.*, July 1.

Boundary—Side of road.—*Albany L. J.*, July 1.

Relinquishment of a parent's right to custody of child to third person.—*Ib.*, July 8, 15.

Dentists.—*Ib.*, July 22.

Profert of the person.—*Central L. J.*, July 7.

Expert testimony in insanity cases.—*Ib.*

Parent and child.—*Ib.*, July 14.

Conduct punishable as contempt of Court.—*Ib.*, July 21.

Equitable mortgage by deposit of title deeds—*Ib.*

Support, lateral (adjacent) and subjacent.—*Am. Law Rev.*, July.

The proximate cause of death in accident insurance policies.—*Ib.*

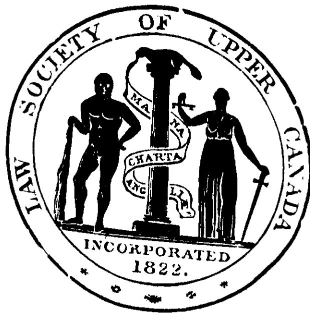
The doctrine of materiality in the law of perjury.—*Crim. Law Mag.*, July.

Expert testimony—Examination of written documents.—*Am. Law Register*, July.

FLOTSAM AND JETSAM.

The elevation of Mr. Justice Fitzgerald, of the Queen's Bench Division in Ireland, to the peerage as a life-peer and a Lord of Appeal, divides the Lords of Appeal with tolerable fairness between the three kingdoms. England, Ireland and Scotland have now each a Lord of Appeal; although Scotland, not without precedent, has the best of the bargain, as Lord Blackburn may be accounted at least half Scotch. The balance in favour of England is, however, made up by the hereditary law lords.—*Law Journal.*

Law Society of Upper Canada.



OSGOODE HALL.

EASTER TERM, 1882.

During this term the following gentlemen were called to the Bar, namely:—

George S. Lynch Staunton, with Honours, awarded Silver Medal; Arthur O'Heir, Thomas Henry Luscombe, James Leaycroft Geddes, David Henderson, John Williams, Thomas Alpheus Snider, Dennis J. Donahue, John Travers Lewis, William Steers, Alexander Aird Adair, Andrew Taylor G. McVeity, Alexander Howden, George William Meyer, William Alexander Macdonald, John Dickinson, Hugh Boulton Morphy, John Vashon May.

The following gentlemen received Certificates of Fitness, namely:—

William Burgess, jr., Thomas Henry Luscombe, George William Meyer, John Arthur Mowat, Alfred Beverly Cox, Charles Rankin Gould, David Henderson, Frank Russell Waddell, W. H. Hastings, Alexander Aird Adair, Alexander John Snow, Dennis J. Donahue, John Vashon May, Henry Joseph Dexter, Andrew Taylor G. McVeity, John Barry Scholefield, William Aird Adair, Henry Bogart Dean, Thomas Ambrose Gorham, Christopher William Thompson, Thomas H. Stinson, Thomas Edward Moberly, Charles Edward Jones, John Wood, Alexander Howden, Robert Taylor, Albert John Wedd McMichael, and Charles Edward Irvine, who passed his examination in Michaelmas Term, 1881.

And the following gentlemen matriculated as students and articled clerks, namely:—

Graduates—Archibald Gilchrist Campbell, Alex. W. A. Finlay, and James Redmond O'Reilly. Matriculants of Universities—James Michael Lahey, Hugh Hartshorne, Edward M. Young, and John Clarke. Junior Class—Richard Henry Collins, Leopold Wm. Fitz Hardinge Berkeley, John Lindsay Snedden, Charles E. Weeks, Alexander James McKenzie, P. Henry Allin, Herbert James Dawson, Angus Wm. Fraser, Albert Edward Taylor, Thomas Sherk, David Gordon Marshall, Henry Edward Ridley, Abner Jas. Arnold, James Herbert Kew, Ralph Herbert Dignan, William John McDonald, Shirley B. Ball, Alfred Wm. Lane, Orville Montrose Arnold, Horace Bruce Smith, Jas. Archibald Macdonald, Theodore Augustus McGillivray, Geo. Wellington Green, James Alfred Mills, Ernest Morphy, J. Frederick Cryer, Robert Chappelle, Alexander Sanders, James Francis R. O'Reilly. Articled Clerks—E. Considine, D. A. Cameron.

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 1882 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 1882, 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.

1882.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. VI.
- Cæsar, Bellum Britannicum, B. G. B. IV., c. 20–36, B. V. c. 8–23.
- Cicero, Pro Archia.
- Virgil, Æneid, B. II., vv. 1-317.
- Ovid, Heroides, Epistles, V. XIII.

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:—
1882—The Deserted Village.
The Task, B. III.