The Canada Law Journal.

VOL. XXIV. NOVEMBER 16, 1888. NO. 18.

THE recent consolidation of the Statutes and Rules of Practice renders a new annotated edition of the Judicature Act and Rules almost a necessity for the practitioner. We understand that Mr. Holmested, the Registrar of the Chancery Division, and Mr. Thomas Langton, who are both favourably known to the profession for their previous works on the practice, have combined their forces, and intend shortly to publish an annotated edition of the Judicature Act and Rules, which, we doubt not, will prove a valuable and useful addition to our legal literature.

AN extraordinary case of contempt of court comes from the Bahama Islands, where a prisoner, after sentence had been pronounced upon him for some offence, savagely assaulted the Chief Justice on the bench. Four days afterwards the Chief Justice was sufficiently recovered from the attack to sentence the prisoner for this contempt of court, to receive "thirty lashes, and to be held in penal servitude for his natural life," which goes far to show the wisdom of the rule of law which says that "No man is to be a judge in his own cause," and the folly of permitting judges to make the only exception to that rule.

THE establishment of a Chair of Political Science in the University of Toronto marks a new era in the development of university education in this Province and, indeed, in Canada. Professor Ashley's inaugural lecture, with which our readers are already familiar through the reports in the daily press, was an able vindication of the claims of the latest department recognized in our university curriculum to the place so tardily accorded to it. As the learned lecturer pointed out, the presence of a large number of people, taking an active part in politics, who have given serious and honest attention to questions of government, and are determined to make their influence felt, is essential in a democratic government. We sincerely trust that the new Chair may be the means of directing young Canadians to the study of politics by scientific methods, with the calm deliberation used in the investigation of problems in biology or optics, for example. If this result is attained with those who graduate in this department, the tendency must inevitably be to raise politics out of the mire into which blind zeal has dragged everything savouring of political parties, and to make intelligent thought, independent of factions, more respected. While we rejoice in the advancement already made in university work, we look forward to the establishment of a faculty of law, with the hope

that the time has almost arrived when more ample facilities will be provided for the instruction of those who intend to devote themselves to the study and practice of the law. The legal faculty and the department of political science must, from their nature be closely connected, and we understand that instruction in the former will soon be provided. The curriculum has not yet been made public, but those who have the means of knowing, regard the choice and arrangement of subjects as excellent. Lectures thereon will, we understand, soon be provided.

CHANGES ON THE BENCH.

The vacancy in the Supreme Court caused by the death of the late Mr. Justice Henry has been filled, as already announced, by the appointment of Mr. Justice Patterson, of the Ontario Court of Appeal, and his place has been taken by Mr. James Maclennan, Q.C.

In reference to Mr. Justice Patterson—he has been so long before the public and the profession in a judicial position that we merely refer to the fact of his appointment, and congratulate him upon his promotion.

The appointment of Mr. Maclennan to the Bench is no surprise to the profession. The only surprise is that he was not appointed long ago, a view already expressed in these columns. The appointment is one of the very best that could have been made. A man of the highest personal character, Mr. Maclennan is, as our judges should be, without fear and without reproach. He is a sound and able lawyer, has had long experience at the Bar, has a judicial mind with a large fund of common sense, and is thoroughly familiar with the business of the country and the instincts of the people. At the same time he has not lost his interest in art and general literature, and few men at the bar have read more of our English classics.

Mr. Maclennan is a Canadian, having been born in 1833 in the county of Glengarry, a county which has produced many eminent men and good lawyers. He graduated at Queen's College, where he received his education, in 1849, at the early age of sixteen years. Having chosen the law as his profession, he commenced its study in the office of Mr. (now Sir) Alexander Campbell, in the city of Kingston, where he was an intelligent and industrious student. He was called to the Bar with honors in Michaelmas Term, 1857. We understand that for a short time previous to commencing the study of the law he taught school, a training most valuable to one desiring to excel in a profession where patient plodding is an essential, and which largely calls into requisition a knowledge of human nature.

Mr. Maclennan commenced the practice of his profession in the city of Hamilton, where he remained, however, for only two years, removing to Toronto in 1859, where he entered into partnership with the Hon. Oliver Mowat, then one of the leaders of the Bar on the Equity side. He has remained in Toronto in the same professional connection ever since. In 1871 he was elected a

Bencher of the Law Society, and we are bound to say that if the Law Society owes anything to any single individual amongst their governing body they owe a debt of gratitude to Mr. James Maclennan. His duties there have been performed with the most painstaking industry and with a conscientious regard to the best interests of the profession. His now necessary retirement from the prominent position he took in Convocation will be a great loss to a body which can ill afford to lose such a hard-working, intelligent member. In 1872 he was made Q.C., a position which was then more a recognition of merit and less a *solatium* to political supporters than it has now become.

We congratulate the Government of the Dominion upon the appointment of Mr. Maclennan, and we venture to predict that the strength of the court will not suffer by his appointment. If this should be the result, the country may also be congratulated. Any Appellate Court which, as a whole, is not a strong court, and does not thus command the full confidence of the litigating public, cannot but be a misfortune to any country.

IMPROVEMENTS UNDER MISTAKE OF TITLE.

The recent decision of the Court of Appeal in *Beaty* v. *Shaw*, 14 App. R. 600, establishes a very important qualification to the right of persons to recover for improvements made under a mistake of title. In that case the parties claiming the improvements had purchased the land in question under the erroneous supposition that a prior mortgage had been duly discharged. The plaintiff who claimed under this mortgage, established that notwithstanding the pretended discharge of it, it was still a subsisting security, but though making a declaration to this effect, the learned Chancellor, before whom the case was originally tried, coupled with it an order that the defendant purchasers were, as against the mortgagee, entitled to be allowed for the improvements made by them on the land, as having been made under a mistake of title. The claim of the mortgagee was thus virtually postponed to the lien for improvements in favour of the defendants. From this decision, however, the Court of Appeal dissented. Their Lordships were of opinion that the statute, R. S. O. c. 100, s. 30, does not apply to cases where a purchaser buys with a defective title.

Osler, J.A., says: "The governing words of the clause are 'under the belief that the land is his own;' the implication from them being that the case intended to be provided for by the Legislature is that of improvements made by a person, under a mistake of title, on land which turns out not to belong to him—not to be his own. Do they extend to such a case as the present, where the land is really the land of the person who has made the improvements, but is subject to a mortgage or prior charge of some kind, which from accident or neglect, he has failed to discover before he purchased it?" This question, he thinks, must be answered in the negative. The distinction which the Court of Appeal have thus drawn is rather a fine one. The existence of a prior encumbrance which a purchaser by mistake assumes to be discharged, may in many cases amount to the

virtual deprivation of the purchaser of the estate he has assumed to purchase. For if he pays his vendor the full value of the estate, and then discovers afterwards that there is an outstanding mortgage on the property for more than it is worth, although theoretically he has acquired some title to the property, viz., the equity of redemption, yet to all practical intents and purposes he has purchased nothing substantial, and his mistake of title is just as thorough and complete as though he had by mistake encroached upon the land of an adjoining proprietor. The law allowing a lien for improvements made by mistake of title to the extent to which the property is enhanced in value thereby, is based on eminently equitable principles, and it is to be hoped that it may not be "frittered away" by judicial decisions and fine-drawn distinctions. In *Fawcett* v. *Burwell*, 27 Gr. 445, a husband and wife had been in possession of land under the belief that the wife was entitled as heiress-at-law of her father, and the husband had expended a large sum of money in improvements. On a will subsequently turning up, the husband was allowed a lien for these improvements to the extent that they had enhanced the value of the property, and this enhanced value was allowed, although at a sale of the property under the decree it was not actually realized. In *McGregor* v. *McGregor*, 27 Gr. 470, an allowance was also made for improvements made under a mistake of title, under circumstances not very dissimilar to those in *Beaty* v. *Shaw*. The defendant McGregor, in 1863, had entered into possession of one hundred acres of land which belonged to his mother, under a promise that she would make him a conveyance of the property. The mother died in 1866, and the father, assuming that he was her heir, made a deed to the defendant. The father died in 1873, and the defect in the title being discovered in 1877, the defendant persuaded his brothers and sisters to give him a quit claim deed, which was subsequently set aside as having been obtained by fraud. The court, however, allowed the defendant a lien for improvements. In this case the defendant acquired some title, but not the full and absolute title he thought he was getting. By the deed from his father he acquired merely an estate for the life of his father as tenant by the curtesy instead of the fee simple. In *Skae* v. *Chapman*, 21 Gr. 534, the suit was brought by a mortgagor to redeem on the ground that the purchase of the equity of redemption by the mortgagee was invalid. The relief was refused, but in the course of his judgment, Spragge, C., at p. 549, refers to the Act authorizing the allowance for improvements made under mistake of title, and says, "Supposing the Act to apply, and probably it does;" and though he proceeds to show that compensation under the Act would be inadequate to meet the equities of the case, it is plain from the words quoted that his view was at variance with that arrived at by the Court of Appeal in *Beaty* v. *Shaw*. These cases do not appear to have been brought to the attention of the court in the latter case. Before concluding, we may notice *Till* v. *Till*, 15 Gr. 133. In that case the plaintiff and defendant, her husband, were married in 1865, the plaintiff being then the owner of the land in question in fee. The defendant was then carrying on business, which at his wife's request he sold out for $2,000 and expended the money on improving the lands in question, on which the plaintiff and her husband resided together until April, 1866, when they did

agreed, and the plaintiff left the premises, the defendant and their only child continuing to reside thereon. The action was brought by the plaintiff to recover possession, and the defendant claimed to be allowed a lien for improvements, but as to this latter claim, Rose, J., who delivered the judgment of the court, said: "I am also unable to see how his claim for moneys expended upon the place can be allowed. They were not made under any mistake as to title, and must, I think, be held to have been made with the knowledge that the property would reap the benefit, whenever possession passed away from him."

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

The case of *Klœpfer* v. *Gardner*, which was recently decided by the Supreme Court (see *ante* p. 499), has set at rest an important point regarding the law relating to assignments for the benefit of creditors, viz., whether a creditor, who has unsuccessfully disputed the validity of the assignment, can afterwards claim the benefit of it. The Supreme Court has answered this question in the affirmative. In this case the creditors who had disputed the assignment had failed in the contest on the ground that they were estopped by reason of their having previously assented to it; and although they failed in upsetting the assignment on the ground that they had previously assented to it, yet, when they afterwards claimed a dividend under it, they were met with the answer, that they had forfeited the benefit of it by their unsuccessful attack upon its validity. In the court of first instance (10 O. R. 415), Wilson, C.J., and Armour, J., were of opinion that the mere bringing of the adverse proceedings of itself constituted a forfeiture of the benefits of the assignment, entirely irrespective of the grounds upon which those proceedings were determined; but O'Connor, J., dissented from this conclusion, on the ground that the adverse proceedings had not been disposed of on their merits, and, as he forcibly put it, the opposite conclusion was the result of "reasoning in a vicious circle with a vengeance." But, though the common sense of the late O'Connor, J., appears to have rebelled against what he conceived to be a "palpably absurd and unjust" conclusion, owing to the peculiar circumstances of the case, he seems to have coincided with the rest of the court as to the general principles which they laid down. The Court of Appeal, however, though adopting the reasoning of O'Connor in this particular case, were able also to support their judgment reversing the Queen's Bench Divisional Court, on grounds having a more general application.

Osler, J.A., who delivered the judgment of the Court of Appeal, very clearly and ably points out the plain distinction which existed between the case in hand, and the case of *Joseph* v. *Bostwick*, 7 Gr. 332, and the English authority on which that case was decided, viz., *Field* v. *Donoughmore*, 1 Dr. & W. 227. In *Klœpfer* v. *Gardner* the assignment was unconditional, whereas in the cases above referred to, and in the later cases of *Watson* v. *Knight*, 19 Beav. 369, and *In re Meredith*, *Meredith* v. *Facey*, 29 Chy. D. 745, to the same effect, the assignment was subject to a condition, which the debtor could lawfully impose, but with which the con-

testing creditors had failed to comply. As Osler, J.A., puts it, "all these cases proceeded upon the ground that the assignor was at liberty to make terms with his creditors, and to insist that those who intended to participate in the benefit of the trust created by him should do so on the terms he proposed, in other words, should become parties to an agreement whereby, in consideration of the composition offered, or of the giving up by the debtor of his property, they should release him from further demand. In such a transaction, therefore, creditors are put to their election either to accept the terms offered or stand on their original rights. . . . Now, however, that a debtor is no longer at liberty to exact terms from his creditors, or to require their assent to an assignment, or to prefer one class of creditors to another, there is nothing to put a creditor to his election."

This reasoning of the learned judge appears to be so manifestly sound, that it seems somewhat surprising that it should have been thought advisable to take the opinion of the Supreme Court on the point.

Reviews and Notices of Books.

VOLUME I. of Mr. Evans' treatise upon the Law of Principal and Agent in Contract and Tort has just been received from the Blackstone Publishing Co., of Philadelphia. It is a republication of the second English edition, with American notes. This series of text-books contains each year from 3,000 to 10,000 closely printed pages of matter, and all for the small sum of $15 per annum in advance.

The History of Canada. By WILLIAM KINGSFORD. Vol. II. Toronto: Rowsell & Hutcheson; London: Trübner & Co.

Mr. Kingsford continues his important and laborious work; and we have before us the second volume of his "History of Canada." The first contained the story of our country under French rule, from the earliest date down to 1682; the present volume continues it down to 1725, embracing the events occurring in the first administration of De Frontenac, those of De la Barre and Denonville; the second administration of De Frontenac, and those of De Callières and Vaudreuil,—in the reigns of Louis XIV. and Louis XV. of France, and of Charles II., James II., William and Mary, William III., Anne and George I. in England; a period fraught with most important events for Canada and the British Colonies in America, as well as for the mother-countries of both; and very interesting has he made the story he had to tell, and has told, in the 518 pages of the book, and an appendix containing some notes by which he elucidates the events he has related.

It is impossible, in the limited space allowed us, to give more than a very summary account of the scope of this important work, and to mention some few of the matters as to which we think it relates facts not generally known, or gives them with fuller details, or places them in a new light. It continues the account of the disruptions in the council and the occurrences which led to the recall of De Frontenac, and the changes following it until his re-appointment as governor, and then deals with those stormy times and events in Canada and the neighbouring colonies during his second administration, the effect of which still is, and will be long deeply felt. The ancient feud between the mother-countries was continued with increased intensity and bitterness between New France and New England and the other English settlements, and to the suffering and horrors attendant on war in the older countries were added the atrocities of barbarism and savagery; for both sides employed the Indian, and war was conducted after the Indian fashion—cruel, pitiless and unsparing—by attacks generally in the dead of night, when neither women nor children were spared, and when prisoners were given up by Christian leaders, at the demand of their savage allies, to Indian revenge and torture. Plans were laid by each side for the destruction of the other; by the English for the conquest of Canada, and by the French for that of New York, with intentions as to a mode of dealing with the conquered less lenient than that adopted towards Canadians when they became British subjects. Both plans came to naught.

A separate chapter is devoted to the history of Acadia during the period to which the volume relates, and the war carried on between it and New England, in which the Indian tribes of the Abenaquis and Canabas were employed on the French side, and many attacks made on New England villages, including Cocheco and Pemaquid, in which the spirit of Indian warfare was fully developed, and murder, arson and pillage reigned supreme, as they did in the massacres at Schenectady and Lachine, by the Iroquois as allies of the English. Mr. Kingsford has partly supplied a want we noticed in our account of his first volume, by a long note about the Iroquois, or Five Nations, and the several tribes which comprised the Mohawks, Oneidas, Onondagas, Cayugas and Senecas, and the tracts of country occupied by them. These tribes generally took part with the English. We think the note should have included the Algonquins, Abenaquis, and others who sided with the French.

The account given of the abortive attempt at the conquest of Quebec by Phips in 1690, is very interesting, and the scene between his party and De Frontenac, who was given, by the New England Major, one hour to consider the surrender of the Fort and its stores, is very picturesque, and by no means to the credit of the New Englanders. Phips was a brave man and an excellent sailor, and found his way safely up the St. Lawrence and out of it, but he had no skill as a soldier or a diplomatist, and his discomfiture and retreat show the impolicy of New York in sending him. There is also a graphic and detailed narrative of the unfortunate attempt to attack Quebec by the English fleet under Admiral Hovenden Walker in 1711, when by strange want of seamanship and precaution,

eight ships and nearly one thousand men were lost at the entrance of the St. Lawrence, which Phips had passed with ease and safety.

The account of the tragic death of De la Salle is touching and sad, and the summary of his adventures and discoveries very interesting, as is that of his character as a man equal to any amount of adventurous daring, but deficient in that power of winning and keeping respect and affection which ensures unhesitating obedience and faithful service, while he had a haughty manner which excited anger and dislike, under the influence of which he was murdered by two of his own followers. Mr. Kingsford states his belief as to the manner in which De la Salle's movements and conduct were probably influenced by the Spaniard Penatossa, and the expedition under his command.

A short extract from Charlevoix gives a pleasant description of life and society in Canada in 1720 as compared with that in the English settlements, very prettily translated, and by no means unfavourable to our countrymen of that date, and still less to our own countrywomen of the same period.

The account of the death and character of De Frontenac are graphic and fair, with "nothing extenuated nor aught set down in malice;" our author defends him against the charges of extravagant pretensions to power and the adoption of a policy for private ends, of violence of temper, and of exaction of personal consideration without true dignity; adding, that even if these faults be conceded, he still stands forth the most prominent of French Governors, and that the great stain on his name is the ruthless character of the massacres which he authorized; and of this he says: "His nature was genial and kindly, and the fault may be attributed to the school in which he was reared, and the maxim of war there recognized—that anything whatever that caused disaster to an enemy was permissible." Our historian calls him the "Second Founder of Canada," and winds up with Charlevoix's epitaph: "After all, New France owed to him all she was at the time of his death, and the people soon perceived the great void he had left behind him."

As an appendix, Mr. Kingsford has added a full and detailed account of the negotiations and events which led to the Treaty of Utrecht, which had so important effects upon the boundaries of Canada and the then English Colonies, and the terms of which he believes would have been much more favourable to England, if the conduct of the latter years of the war to which it put an end had been left to the Duke of Marlborough, of whom he speaks in terms of the highest admiration, as a general and a man of honour and unswerving fidelity to his country, and whom he holds to have been removed by the sovereign from his command under the influence of mean jealousy and intrigue, and defends from all the charges which had been brought against him, though he acknowledges his love of money to have been inordinate. The chapter is interesting as an essay on a moot point in English history, as well as in relation to Canada. The account is not flattering to the courts and sovereigns engaged—corruption was at least as flagrant then as now.

Mr. Kingsford has thus performed the promise he made, and given us a history of Canada during the time over which his two volumes extend, which

leaves little to be desired in extent of scope or fulness of detail, ably, and, as we believe, conscientiously written, with as much impartiality as human frailty admits of, after a faithful and indefatigable examination of trustworthy authorities. His style is simple and clear, preferring truth to rhetorical effect. He appears to have spared no pains to think rightly, and to say intelligently what he thinks. We can say of this volume, as of the first,—No student of Canadian history can afford to be without it. G. W. W.

Notes on Exchanges and Legal Scrap Book.

OWNER OF VICIOUS ANIMALS.—In *Warthen* v. *Love*, reported in the *American Law Register*, the Supreme Court of Vermont gave judgment in regard to the liability of the owner of a vicious dog, for damage done by it to the plaintiff. The court found that the defendant knew the vicious propensities of the animal, and had kept it chained in his barn, and that it broke away and injured the plaintiff by reason of being unlawfully provoked by the latter, who had no lawful occasion to go to the barn where the dog was. The court held that the owner, knowing the dog to be vicious, has the right to keep it if he exercises proper care and diligence to secure it, so that it will not injure anyone who does not unlawfully provoke or intermeddle with it.

INSANITY AS A DEFENCE.—In *State* v. *Mowry*, reported in the *American Law Register*, the Supreme Court of Kansas held the following to be a proper direction to the jury in a trial for murder in the first degree where the plea of insanity was set up: "If he was labouring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know that what he was doing was wrong, then the law does not hold him responsible for his act. On the other hand, if he was capable of understanding what he was doing, and had the power to know that his act was wrong, then the law will hold him criminally responsible for it. . . . If this power of discrimination exists he will not be exempted from punishment because he may be a person of weak intellect, or one whose moral perceptions are blunted or illy developed, or because his mind may be depressed or distracted from brooding over misfortune or disappointment, or because he may be wrought up to the most intense mental excitement from sentiments of jealousy, anger, or revenge. . . . The law recognizes no form of insanity, although the mental faculties may be disordered or deranged, which will furnish one immunity from punishment for an act declared by law to be criminal, so long as the person committing the act had the capacity to know

what he was doing, and the power to know that his act was wrong." The court seems to have no sympathy with the too frequently used plea of "irresistible impulse" or "moral insanity." It was also further held, that where a person is charged with having committed murder in the first degree whilst intoxicated, the jury may take his intoxication into consideration, not as an excuse, but in determining whether he was capable of that premeditation and intent to kill which are the necessary elements of the crime.

MEANING OF BILL OF LADING.—In *Brown* v. *Cunard Steamship Company*, the action arose out of the damage done to the plaintiff's goods on board the defendants' vessel, *en route* for Boston, the damage having arisen through the fault of the company. The bill of lading provided that, "in the event of loss or damage for which the ship is responsible, the liability shall not exceed the invoice, or the declared value for the United States customs." It did not appear that the market value of the goods, as damaged, was less than their original invoice value, with the cost of importation added. The question was whether, in view of these facts, and of the language of the bill of lading, the company was exempt from liability. The defendants relied on *The Lydian Monarch*, 23 Fed. Rep. 298, and *Pearse* v. *Steamship Co.*, 24 Ind. 285, to establish that, under such a contract as the present, the liability of the ship-owner is limited to the excess of the invoice price of the goods, increased by the cost of importation, over the actual proceeds of the sale of the damaged goods; and that if the sale had realized the invoice price, after deducting costs of importation, sale, etc., there could be no cause of action. The Supreme Court of Massachusetts, however, decided that this was not the meaning of the contract, and that damages should be ascertained by finding the difference between the value of the goods as damaged, and as undamaged; and these damages should be paid by the defendant up to, but not exceeding, the invoice price of the goods. As the damage was less than the invoice price of the plaintiff's goods, judgment was for him for the whole amount claimed.

THE MARRIED WOMEN'S PROPERTY ACT, 1882.—Since we gave a summary of the principal decisions on the Married Women's Property Act, 1882, 85 L. T. 62, 81, several cases have been decided upon that statute, and the general tendency shown is still further to cut down its effect. When the Act first passed it was said that a married woman had become "a *femme sole* as to her property." This was soon seen to be too widely stated, and then the phrase usually employed was that the married woman "had become a *femme sole* with regard to her *separate* property" (*Thompson* v. *Krise*, 75 L. T. 235; *Re Queade's Trust*, 53 L. T. Rep. N. S. 77), so that with reference to property which was not "separate" her position was left untouched: see *Re Price, Stafford* v. *Price*, 58

L. T. Rep. N. S. 430; 28 Chy. D. 709. But now, according to Mr. Justice Kay, in *Re Jupp, Jupp* v. *Blackwell*, 59 L. T. Rep. N. S. 129, "the Act shows no intention of altering her legal position in respect of property, except altering her right to property as between herself and her husband." In support of this view, the learned judge referred to the remarks of Lord Justice Cotton in *Re March*, 51 L. T. Rep. N. S. 380, 382; 27 Chy. D. 166. In *Downe* v. *Fletcher and Wife*, 59 L. T. Rep. N. S. 181; 21 Q. B. D. 11, it was held by the Lord Chief Justice and Mr. Justice Mathew that, in an action against husband and wife to recover a debt contracted by the wife before marriage, where the marriage had taken place between the passing of the Married Women's Property Acts of 1870 and 1874, judgment could be entered against the wife, to be recovered out of separate estate, etc., without proof of existence of separate estate at the time of judgment. "The common law position of the wife," said Mr. Justice Mathew, "as regards contracts entered into before coverture has not been altered by the Legislature." In *Re Roper, Roper* v. *Doncaster*, 59 L. T. Rep. N. S. 202, Mr. Justice Kay held (p. 206) that sec. 1 (4) of the Act only applied to contracts made after the passing of the Act, and expressed an opinion that in cases falling within the Act, "to make property appointed by the will of a married woman liable to her engagements under that Act, it seems necessary to hold that the appointment by her will makes the property appointed her separate property" (p. 208). But, in the judgment, his Lordship does not appear to refer to sec. 4 of the Act. Among the difficulties of the Act not the least is sec. 19, relating to marriage settlements, and excluding (subject to a proviso in favour of ante-nuptial creditors) marriage settlements from being affected by the Act. In *Re Armstrong, Ex parte Boyd*, 21 Q. B. D. 264, which was a case on this section, Lord Eshe. said: "It would not be right to suppose that the Legislature, when they passed this Act, did not understand it, but unquestionably its construction by the court presents the most serious difficulties." No doubt the Act is not a simple one, but we cannot help thinking the difficulties have been partly occasioned by the restrictive interpretations placed upon it by the court. In the above case, however, the majority of the Court of Appeal decided (contrary to the judgment of Lord Esher) that when real property was vested in a trustee for a married woman for life for her separate use, and she carried on a trade separately from her husband, the Act was effectual to carry over the life estate to the trustee in bankruptcy. Of course there was no restraint on anticipation. The Lords Justices Lindley and Lopes held that the trustee was claiming under, and not in derogation of the settlement. Also in *Re Onslow's Settlement, Plowden* v. *Gayford*, 59 L. T. Rep. N. S. 308, the Act was held to have effect on property comprised in a settlement notwithstanding sec. 19. In *Otway* v. *Otway*, 59 L. T. Rep. N. S. 159, 13 P. D. 141, a doubt was raised as to whether the practice in the Divorce Court as to costs of an adulterous wife should be varied in consequence of the Married Women's Property Act. It will be seen that of the recent cases *Jupp* v. *Blackwell* gives the least, and *Re Armstrong* or *Re Onslow* the widest, effect to the Act. When will the Legislature undertake its revision?—*Law Times.*

RIGHT TO STOP A TRAIN TO MAKE AN ARREST.—The following account of a somewhat unusual case is from the *Albany Law Journal*:—An officer having a process issued in a civil action, by which he is commanded to arrest the body of the defendant, a railroad engineer, may lawfully stop a train of cars run by such engineer for the purpose of making the arrest. It is conceded by the plaintiff that an officer having proper process might lawfully stop a train to arrest its engineer in a criminal proceeding; but the argument is that in civil proceedings the consequences are, or in conceivable cases might be, so detrimental to the public using the railroad, the court should hold on grounds of public policy that the right does not exist. The process was a legal one, commanding the officer to arrest Collins. The command in the process was the command, not of Hunt, but of the law. The officer did not act in making the arrest because Hunt commanded him, but because the law commanded him. Hunt, to be sure, had invoked the issue of the process, but the sheriff's justification and authority was the command of the process. Cases may easily be conceived in which, upon consideration of relative conveniences and inconveniences, the stopping of a train to serve a justice's writ upon its engineer would seem to be ridiculous. But on principle, would it be any more so if the train was stopped to serve a writ upon the engineer, claiming $10 in damages for an assault and battery, than stopping it to arrest him in a criminal proceeding seeking to impose a fine of $10 upon him for the same assault? It will hardly do to rest the question upon conjectural difficulties. If it is a question of public policy, it is so because its usual, normal and legitimate consequences are hurtful to the public. As a practical fact, there is little danger that officers will have occasion to stop a train for the service of process of any kind. Again, it is conceded that the officer might arrest the engineer at a station on the road. But this would delay the train just as long, and work precisely the same inconvenience to the public, as stopping it between stations. It is admitted that an officer might stop a stage coach to arrest the driver. This conceivably might delay the passengers on their way to a railroad station, so that they fail to reach a train that their business requires them to take. What is the difference in principle between an act which hinders the passenger on a public conveyance to the train and an act which hinders him while on the train? If the question is one of public policy, it must apply generally to public carriers. But we think the right to arrest cannot be defeated upon any considerations that public policy forbids its exercise in the case of locomotive engineers. The command of the process is the voice of the law speaking to its officer. It is the order of the State of Vermont to do the act complained of. There is no room for the doctrine of public policy in such a case. It is illogical and absurd to say that the command of the law cannot be executed because, on grounds of public convenience or expediency, the court thinks it better to nullify the law. The plea alleges that the defendant's cause of action existed against the plaintiff as well as Collins. The suit for the injury to the heifer might have been maintained against the railroad company. Had it been so brought, and had the officer stopped the train to attach railroad property on board, the same mis-

chievous consequences to the public would have resulted as those now portrayed. C: n it be claimed that process against a railroad company is not to be served as it may be against other defendants because it will work inconvenience to the public? Process served upon an individual may work incidental injury to others. If a physician is arrested, his patients may suffer. It is quite apparent that the argument that policy forbids the service of process as made in this case is unsound and illogical. The Legislature can establish any regulations in the premises that may be needed. Vt. Sup. Ct., Sept. 24, 1888. *St. Johnsbury & L. C. R. Co.* v. *Hunt.* Opinion by Powers, J.

TIME FROM WHICH SENTENCE OF IMPRISONMENT RUNS.—"I must exercise common sense in dealing with authorities," said Manisty, J., as reported in the *Law Times*, and certainly if *Henderson* v. *Preston* be regarded from that point of view, it must be allowed to be no less satisfactory than in point of law it is sound. The plaintiff was on the 24th August, 1887, sentenced at the petty sessions at Rochdale to a fine of 5s. and costs, for obstructing a public highway, or in default to be imprisoned for seven days. There not being sufficient distress to satisfy the fine and costs, the plaintiff wa. imprisoned in the police cell at Rochdale until the 25th August, when he was taken under a warrant to Strangeways prison, where he was detained in custody till the 1st September. Thereupon he took an action against the governor of Strangeways prison, claiming damages by reason of his being wrongfully, and without just or proper cause, imprisoned and kept and detained as a prisoner under sentence of imprisonment by the defendant in the said prison on the 31st August, 1887. The question was, whether the plaintiff's detention on the 31st August was justifiable, he having been, according to his contention, detained a day longer than the term of seven days for which he was sentenced by the magistrate, counting the time of imprisonment from the day of his arrest, the 24th August. It was on the 25th, however, that the defendant received him into his custody, and as his justification the defendant relied on the terms of the warrant of commitment. It ran as follows:—

"In the county of Lancaster—Petty Sessional Division of Middleton.—To each and all of the constables of the township of Spotland, in the county of Lancaster, and to all other constables and police officers in the said county, and to the governor of Her Majesty's prison at Strangeways, Manchester, Alexander Henderson (hereinafter called the defendant) was this 24th day of August, 1887, before the Court of Summary Jurisdiction, sitting at the Town Hall, Rochdale, in the said county, convicted for that he, on the 11th day of August, 1887, at the township of Spotland, in the said county, unlawfully and wilfully did obstruct the free passage of a certain public highway there situate, called Church Street, Whitworth, contrary to the statute in such case made, and it was adjudged that the defendant for his said offence should forfeit and pay the sum of 5s., and should also pay the sum of 14s. 6d. costs forthwith; and default having been

made in payment, and it appearing to this court that the defendant has not sufficient goods whereon to levy distress, it is ordered that the defendant be imprisoned in Her Majesty's prison aforesaid, and there kept for the space of seven days, unless the said sum and all costs and charges of his commitment and of his conveyance to the said prison be sooner paid, and you the said constables are hereby commanded to take the defendant and convey him to the said prison and there deliver him to the governor thereof, together with this warrant; and you, the governor of the said prison, to receive the defendant into your custody and keep him for the space of seven days, unless the said sum and all costs and charges of his commitment and of his conveyance to the said prison be sooner paid.

"Dated the 24th day of August, 1887.

"(Signed) J. I. HEAPE, J.P., for the county of Lancaster.

"Conveyed to prison on the 25th inst.

"(Signed) HENRY GREEN, P.C., 121 D.

"Endorsed, 25/8/87—4134.

"ALEXANDER HENDERSON. 7 days—31/8/87."

Now, contended the plaintiff's counsel, that the term of imprisonment dates from the day of arrest is established by *Migotti* v. *Colvill*, 4 C. P. D. 233, and *Re Bowdler*, 12 Q. B. 614; and it is the gaoler's duty to ascertain the time of arrest —failing to do which, he would detain the prisoner at his peril; citing *Re Fletcher*, 1 Dow. & L. 726; *Braham* v. *Joyce*, 4 Ex. 487; *R.* v. *Cutbush*, 36 L. J. M. C. 70. And indeed, but for those authorities (to which on our part we may add *Newman* v. *Lord Hardwick*, 8 A. & E. 124) the court would have entertained no doubt whatever that the defendant, who had detained the plaintiff for seven days and no more, was strictly justified by the plain and special language of the warrant. Suppose a constable should arrest a man at 11.55 p.m., and take ten minutes conveying him to prison, could it be contended that that should count as one day? "The officer bearing a warrant," observed Lord Denman in *Bowdler's* case, "may not be able to find the party named, and if it were held necessary that the warrant should contain a date from which the imprisonment is to run, it might as well be said expressly that a debtor shall be relieved from imprisonment if he is not to be found. The debtor is to be confined from the time when he is actually taken, and the time of taking is matter of evidence." And in reference to the decision in *Re Fletcher*, he observed, "With respect to the want of date on the warrant, my brother Patterson thought this a fatal objection in the case of *Re Fletcher*, but the subject has been much canvassed since, and he is now of a different opinion, and in that I agree." Indeed, we have always understood that it has long been settled law that in England, if the date be omitted, the warrant will not thereby become null and void, for the period of imprisonment will be reckoned from the time of the defendant being taken into custody, on the authority of *Bowdler's* case, *Ex parte Foulkes*, and *Braham* v. *Joyce*, overruling *Re Fletcher* in this respect. But *Henderson* v. *Preston* now places the law on a still more unquestionable footing. Said Manisty, J., "In the case of *Re*

Fletcher, 1 Dow. & L. 726, decided in 1843, the warrant was held bad because it had no date. In *Re Bowdler's* case, 12 Q. B. 612, decided in 1848, it was held that the time of imprisonment was to be calculated from the time the prisoner was taken into custody, but in that case the order for commitment was not in the same language as the warrant in the present case. In 1846, in the case of *Ex parte Foulkes*, 15 M. & W. 612, it was held that the time was to run from the time of lodgment in prison. In the case of *Braham* v. *Joyce*, 4 Ex. 487, decided in 1849, Parke, B., referred to *Re Bowdler*, and held that the period of imprisonment was to be calculated from the time the party was taken into custody. In that case the warrant had no date, and it strikes me as highly probable that the prisoner was taken to gaol when he was given into custody, but there is a great deal of ambiguity surrounding the case. In the case of *Migotti* v. *Colvill*, 40 L. T. Rep. N. S. 747; 4 C. P. D. 233, decided in 1879, the terms of imprisonment were cumulative, and I do not think that that case touches the present one. It is plain that under the terms of this warrant the plaintiff was to be imprisoned in Strangeways prison, and there kept seven days. I think, therefore, that judgment should be entered for the defendant." Stephen, J., concurred in this judgment, and pointed out that in *Re Bowdler* (and the same remark would apply to *Braham* v. *Joyce*) the order of commitment was less special than it was in the present case, and the attention of the court was not drawn to the distinction of time. But, it must also be borne in mind that the form of warrants given by our Petty Sessions Act (14 & 15 Vict. c. 93) expresses that each warrant of committal should be dated, else it would not be complete and would be a warrant issued in blank, which would be void under the statute, whereas there is no provision in the English statute against issuing the warrant in blank.—*Irish Law Times.*

WHAT IS AN INN?—The Supreme Court of Alabama construes the law against gaming strictly, as will appear from the judgment of Somerville, J., reported in the *Albany Law Journal*. It is well that no flimsy pretexts should stand in the way of enforcing such laws. The following is the judgment mentioned: A house at which transient as well as regular boarders are entertained is an inn, though not licensed, and a room therein, the only entrance to which is through the house, and which is let by the proprietress to a tenant who cooks and eats as well as sleeps there, is part of the inn within the meaning of the Code of Alabama, 1886, section 4052, which prohibits playing cards at a tavern, inn or public place. An inn is a house of entertainment for travellers, being synonymous in meaning with hotel or tavern. It was formerly defined to mean "a house where a traveller is furnished with everything he has occasion for while upon his way": *Thompson* v. *Lacy*, 3 Barn. & Ald. 283; *People* v. *Jones*, 54 Barb. 311. But this definition has necessarily been modified by the progress of time, and the mutations in the customs of society and modes of travel in modern times. An inn, however, was always, and may now, when unlicensed, be distinguished from a Loarding-house, the guest of which is under an express contract,

at a certain rate, and for a specified time; the right of selecting the guest, or boarder, and fixing full terms, being the chief characteristic of the boarding-house as distinguished from an inn, except as to inns or hotels specially licensed under the statute, where general contracts with guests are expressly authorized: Code 1886, s. 1324 *et seq.*: *Willard* v. *Reinhardt*, 2 E. D. Smith, 148; *McDaniels* v. *Robinson*, 62 Am. Dec. 586, note. There is nothing inconsistent or unusual, however, in a house of public entertainment having a double character, being simultaneously a boarding-house and an inn. In respect to those who occupy rooms and are entertained under special contract it may be a boarding-house; and in respect to transient persons, who without a stipulated contract remain from day to day, it is an inn, tavern or hotel: *Cromwell* v. *Stephens*, 2 Daly, 15, 24; *Chamberlain* v. *Masterson*, 26 Ala. 371. The house occupied by Mrs. Schoolcraft was clearly both an inn and a boarding-house within the above definitions, partaking of a dual character in this particular. The playing was done in a room in the third story of this house, which had been rented from the proprietress by one Bibb by the year, and was occupied by him as a bedroom, in which he, having no family, prepared his meals, ate and slept. There was no connection between said room and inn or boarding-house, except that it was part of the building occupied by Mrs. Schoolcraft, and the entrance to the room was through that to the boarding-house. Was the room a part of the inn so as to be brought within the prohibition of the statute directed against playing cards at an inn? It has been uniformly held in this State, where a house is public, as a store, and a bedroom in the same building is under the control of the proprietor of the building, the room, though used for private purposes, is *prima facie* within the prohibition of the statute as to playing at a public house, "unless it affirmatively appears that it is not used as an appendage to the store, nor in the prosecution of its business, nor in connection with the store for the mere convenience or accommodation of the owner, his employees or his customers, but it is occupied for some justifiable private purpose entirely disconnected from the business of the store, or the convenience of its customers": *Brown* v. *State*, 27 Ala. 47; *Huffman* v. *State*, 29 id. 40; *Arnold* v. *State*, id. 46. Yet when the playing is at a public house, inn, tavern, or any other of the places specially enumerated in the statute, no matter what secrecy may be observed in the playing, those who participate in the game will be held to be violators of the law, and subject to the penalty: *Windham* v. *State*, 26 Ala. 69; *Bythwood* v. *State*, 20 id. 47. So when a case is embraced in the words of a statute, and clearly falls within the mischief intended to be remedied by it, such case will be construed to come within the prohibition of the statute, however penal its terms may be: *Huffman* v. *State*, 29 Ala. 40. The room in question was in the same building occupied as an inn, and was rented by the occupant from the proprietress of the inn. It must, therefore, be construed to be appurtenant to it, so as to be a part of it within the prohibition of the statute: *Russell* v. *State*, 73 Ala. 222. There can be no difference between the case of a room in a hotel or inn engaged by the year, the month, the week or the day, so far as the question before us is concerned. In the Elizabethan inns travellers paid separately for

their apartments, and for each meal. In modern times there are hotels kept on what is known as the "European plan," where rooms may be engaged for a specified price and time, without meals or other accommodations. In fact, the modern guest often rents his room from the inn or hotel proprietor, and takes his meals at a restaurant; or obtains his meals there and his lodging elsewhere —there being at this day any amount of diversity as to the contracts and relations of the various patrons to the building and business of the proprietor. As observed in a recent case, and as we have substantially said above, "as the customs of society change, and the modes of living are altered, the law as established, under different circumstances, must yield and be accommodated to such changes": *Carpenter* v. *Taylor*, 1 Hilt. 195. Any other construction of the statute would easily enable persons to evade its provisions by the most flimsy devices. Ala. Sup. Ct., July 18, 1888. *Foster* v. *State*.

SOME NOTES OF CASES.—In *Sherman* v. *Sherman*, Iowa Supreme Court, September 7, 1888, it was held in an action on a note, the issue being whether plaintiff, the payee, had made defendant a gift of the note, and declarations made by plaintiff to defendant of an intent to make such gift having been admitted in evidence, that declarations by plaintiff, made to a third party shortly before the time of the alleged gift, expressing an intention to collect the note by legal means, there being no evidence of special design in making such statements, are not inadmissible as declarations made in plaintiff's interest, since they were made before any right had vested in defendant, and they tended to show that an intention to make the gift, if such existed, was changed before it was consummated. The court said: "The only object of the evidence introduced by the defendant tending to show that the plaintiff at some future time intended to give the note to the defendant was to strengthen and increase the probabilities that the gift was made at the time and as claimed by the defendant. Such evidence tended to show an intent to give only, and without more did not tend to establish the defence relied on. An unexecuted gift, it will be conceded, is not valid. In fact it cannot exist. But the evidence was material as showing an intent to give, and therefore had an important bearing on the question whether such intent had been consummated. The evidence proposed to be introduced had just an opposite tendency, and made it probable that while the plaintiff may have had the intent to make a gift, such intention had been changed, and that about two hours prior to the time the gift is claimed to have been made the plaintiff intended not to make a gift, but to insist on the payment of the note. Was the proposed evidence admissible? Counsel for the appellee insist it was not, because it was a declaration in favour of the plaintiff, and against the interest of the defendant. The declaration preceded the gift, and prior to the time any right had vested in the defendant, and we think the evidence was explanatory of the prior declarations of the plaintiff that he

intended to give the note to the defendant. The intent of a person to do or not to do any given thing can only be shown by his acts, declarations and conduct, and when declarations are introduced in evidence tending to show such intent, other and subsequent declarations tending to show a contrary intent, made prior to the consummation of the act, are admissible for the purpose of enabling the jury to determine what in fact the name of the person was, and thus making it probable or improbable that the act, whatever it may be in controversy, was consummated in accordance with the expressed intent of the party. This class of evidence constitutes an exception to the general rule, and may or may not be admissible, according to the circumstances of each particular case. It is difficult to establish a general rule applicable to all cases. The circumstances under which the declaration is made, its possible object, and whether made with an evident design and purpose, may affect its admissibility, and certainly will have an important bearing on the weight to be attached thereto. In the case at bar we discover no suspicious circumstances indicating an object or purpose on the part of the plaintiff except to express to a relative, with whom he was visiting, his then intention in relation to the note and what he intended to do with it, contradictory of and to any previous intent he may have had to give it to the defendant. Of course, if a controversy had arisen at the time the declaration to Mathews was made between these parties as to the proposed gift or intention to do so—if such intent amounted to a vested right—a different rule might prevail. The foregoing views, to a greater or less extent, are sustained by the following authorities: *Darby* v. *Rice*, 2 Nott & McC. 596; *Miller* v. *Eatman*, 11 Ala. 609; *Stone* v. *Stroud*, 6 Rich. Law, 306; *Whitney* v. *Wheeler*, 116 Mass. 490; *Whitwell* v. *Winslow*, 132 id. 307; *Joyce* v. *Hamilton*, (Ind.) 12 N. E. Rep. 294; *Shailer* v. *Bumstead*, 99 Mass. 112; *Barthelemy* v. *People*, 2 Hill. 248, note. Counsel for the defendant have cited many cases in support of this theory, but we think they are all distinguishable. In some the declaration was subsequent to the gift, and in none of them, we think, was the declaration sought to be introduced in evidence because contradictory to or as bearing on the question as to the existence of an unexecuted intent."—*Albany Law Journal.*

DIARY FOR NOVEMBER.

1. Thur....Co. Ct. non-jury sittings in York. All Saints' Day. Sir Matthew Hale born, 1609.
3. Sat.....O'Connor, J., Q.B.D., died, 1887.
4. Sun.....*23rd Sunday after Trinity.*
6. Tues....First intermediate examination.
8. Thur....Second intermediate examination.
9. Fri.....Prince of Wales born, 1841.
11. Sun.....*24th Sunday after Trinity.*
12. Mon....W. B. Richards, 10th C.J. of Q.B., 1868. J. H. Hagarty, 12th C.J. of Q.B., 1878.
13. Tues....Ct. of Appeal sits. Solicitors' examination.
14. Wed....Barristers' examination. Falconbridge, J., Q.B.D., appointed 1887.
15. Thur....Sir M. C. Cameron, J., Q.B., 1878. Macaulay, 1st C.J. of C.P., 1849.
17. Sat.....Lord Erskine died, 1823, æt. 73.
18. Sun.....*25th Sunday after Trinity.*
19. Mon....L. S. Michaelmas Term begins. H.C.J. sittings begin. Armour, J., gaz. C.J., Q.B.D., 1887. Galt, J., gaz. C.J., C.P.D., 1887.
21. Wed....J. Elmsley, 2nd C.J. of Q.B., 1796. Princess Royal born, 1840.
25. Sun.....*26th Sunday after Trinity.*
30. Moss, J. A., appointed C.J. of Appeal, 1877. Street, J., Q.B.D., and McMahon, J., C.P.D., appointed 1887.

Reports.

ONTARIO.

COUNTY OF ONTARIO.

[Reported for the CANADA LAW JOURNAL.]

BROWN *v.* BROWN.

Married Woman's Maintenance for Desertion Act — Evidence of desertion — Rule of decision.

Order of magistrates set aside, where the evidence does not show a wilful desertion, ability to support, in whole or in part, and wilful refusal or neglect to do so.

[WHITBY, October, 1888.

The facts of this case appear in the judgment.

DARTNELL, J.J.—I do not think that the provisions of the above Act were either meant or intended to give the magistrates any larger powers than a court would have in decreeing alimony. The evidence shows that the alleged desertion could be explained as arising from an accident and illness, and that when the husband did return he was received by his wife in such a way as to justify his leaving his home again and going to live with his daughter. The wife says she never asked him to return, and the husband swears that she told him to go, and that if he stayed she would not cook his meals for him; and she carried out this threat, so that he had to board at a neighbour's. The house and eight acres of land belong to the husband, and the wife is in occupation of it without molestation. The pair are poor and well advanced in years, and their joint exertions afford them but a scanty living. There appear to be faults on both sides, and it is impossible to say who is most to blame. I am satisfied from the authorities that no court would decree alimony upon such evidence as here adduced, and it seems to me this new court has no greater power.

The question of what amounts to desertion is one of great difficulty. The statute, as taking away in certain cases an ancient prerogative of Equity Courts, must be considered strictly.

The husband, from the evidence, is almost a pauper, and from age and infirmity is not capable of earning a living by manual labour. But for his daughter he would be homeless. The order made for payment of $5 a week is excessive, or impossible of fulfilment.

Under these circumstances, and for the reasons above stated, I allow the appeal.

The Act provides that the husband shall pay the costs, and the procedure of the Masters' and Servants' Act (R. S. O. c. 139), being made applicable to this Act, I suppose they are collectable in the manner therein provided.

R. McGee, for the appellant.

N. F. Paterson, Q.C., for the respondent.

MUNICIPAL LAW.

VOTERS' LISTS ACT.

Voters' Lists—Non-compliance with directions as to advertising—"Next" municipality.

The Clerk of Brock certified to the County Judge the due posting and distribution of the Voters' Lists for 1888, and the insertion of the advertisement of such in the *North Ontario Observer*, a newspaper published in the "village of Port Perry."

Held, under the circumstances detailed in the judgment, that the statute had not been complied with as to advertising.

[WHITBY, October 15th, 1888.

Sec. 9 of R. S. O. c. 8 (the Voters List Act), provides that in case no newspaper be published within the municipality for which the lists are prepared, notice of the date of

the first posting up in the clerk's office, and of the distribution thereof, "shall be inserted in some newspaper published in the municipality; and in case no newspaper is published in the municipality, then in some newspaper published in the municipality next thereto, or in the county town." There is no newspaper published in Brock, but there is one at the incorporated village of Cannington, which is wholly surrounded by the territory of Brock. The incorporated village of Port Perry is in the same way surrounded by the territory of Reach, which is *next* to the south to Brock.

DARTNELL, J.J.—I am of opinion that the requirements of the statute have not been complied with. Several miles of the territory of Reach intervene between Brock and Port Perry; and, in fact, it would not be possible to travel from Brock to Port Perry without passing through other municipalities. In no sense is Port Perry *next* Brock. The advertisement should have been published in the Cannington newspaper, or in one published in Whitby, the county town.

Early Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

COURT OF APPEAL.

COYNE *v.* BRODDY.

Trustee and cestui que trust—Statute of Limitations.

In 1877, B. having become aware that plaintiff held some promissory notes of one F., for whom B. was effecting a loan, suggested that plaintiff should hand over the notes to him, as money was going through his hands for F., and that he would collect them and save the amount for herself and children. Plaintiff having acted on such suggestion, and the money having been received by B. in that year was retained by him until 1886, when he became insolvent and made an assignment under the Act to trustees, who, in distributing the assets, refused to recognize the plaintiff's claim, and pleaded the Statute of Limitations to an action brought to enforce payment.

Held, reversing the judgment of the Chancery Division (13 O. R. 73), that the transaction was such as created the relation of trustee and *cestui que trust* between the plaintiff and B., and that the right to recover from B.'s estate was not barred by the lapse of time.

McPHERSON *v.* WILSON.

Parol evidence—Fraud—Misrepresentation—Written agreement.

In an action for not delivering promissory notes for the price of a harvesting machine as stipulated for in a writing signed by the defendant, who swore at the trial that he never agreed to give such notes, and that by the agreement verbally entered into by him with plaintiff's agent no such stipulation was made, and that when the writing was read over by the agent no mention was made of such notes; and defendant sought to call witnesses present at the bargain to prove these facts, but the judge refused to permit such evidence to be given, as fraud was not set up as a defence; and also refused to allow an amendment setting up such defence, by reason of which judgment was entered against defendant for $200, which the judge in term refused to set aside.

On appeal, this court, whilst expressing no opinion as to the effect the evidence, if given, ought to have with the jury, were of opinion it ought to have been submitted to them, and if necessary for that purpose that an amendment should have been permitted at the trial, allowed the appeal with costs, and ordered a new trial without costs.

In re MACDOUGALL.

Solicitor, certificate to practise as—Uncertificated solicitor allowing his name to be used—R. S. O. c. 140.

Held, affirming the judgment of the Q. B. D. (BURTON, J.A., dissenting) that a duly admitted and enrolled solicitor, but who does not take out his annual certificate as such, cannot allow his name to be used in legal proceedings as partner by a firm of practising solicitors, even though he does not derive any emolument therefrom, without rendering himself liable to the fines and penalties imposed by R. S. O. c. 140.

HIGH COURT OF JUSTICE FOR ONTARIO.

Queen's Bench Division.

Divisional Court.] [Sept. 7.

TRICE *v.* ROBINSON.

Personal representative—Letters of administration issued after action brought—R. S. O. (1887), *c.* 194, *s.* 122.

In an action (which had to be brought within three months) under R. S. O. c. 194, s. 122, by the administratrix of the deceased, it appeared that the accident from which the cause of action arose happened on June 1st, the writ of summoms was issued August 31st, but the letters of administration to the plaintiff were not issued until September 3rd

Held, that by the old rule in Chancery proceedings it was sufficie it for the administrator to obtain letters of administration before the case was heard, as they, when obtained, related back to the death, and that now by R. S. O. (1887), c. 44. s. 53, s.s. 12, the equitable doctrine as opposed to that at law must prevail, and that the plaintiff's letters of administration were issued in time.

T. H. A. Begue, for the appeal.

Moss, Q.C., contra.

[Oct. 24.

In re SOLICITOR.

Solicitor and client—Costs, taxation of—Disallowance of costs of unnecessary proceedings—Interest—Appeal—Time.

The mere non-communication by a solicitor to his client of an offer of settlement does not prove that proceedings after the offer were unnecessary, and that the costs of them should be disallowed, under Con. Rule 1215, unless it is shown that the offer was an advantageous one, the acceptance of which the solicitor ought to have advised, and it can be fairly inferred that he refrained from communicating it and advising its acceptance merely for the purpose of putting costs into his own pocket and without regard to the interests of his client.

A taxing officer has no authority to charge a solicitor with interest upon moneys in his hands belonging to his client.

The time for appealing from a taxation of costs begins to run from the date of certificate of taxation, not from the date of each ruling in the cause of taxation.

Aylesworth, for the solicitor.

W. H. P. Clement, for the client.

Armour, C.J.] [Nov. 1.

PRICE *v.* GUINANE.

Landlord and tenant—Overholding Tenants' Act—Powers of County Judge—"Colour of right"—Writ of possession—Stay of proceedings.

The expression "colour of right" in the Overholding Tenants' Act, R. S. O. c. 144, means such semblance or appearance of right as shows that the right is really in dispute.

The Act confers no authority upon the County Judge to try the question of the tenant's right or title; as soon as it is made to appear that the right is really in dispute, there is then that colour of right which the Act contemplates, and the judge is bound to dismiss the case.

Gilbert v. *Doyle*, 24 C. P. 60, and *Woodbury* v. *Marshall*, 19 U. C. R. 597, not followed.

Upon the proceedings before the County Judge being commanded to be sent up, the High Court has power to stay proceedings upon the writ of possession under the Act.

Chancery Division.

Boyd, C.] [Oct. 16.

Re HARVEY *v.* PARKDALE.

Damages, measure of—Strip of land reserved by owner in laying out street—Expropriation by municipality arbitration—Notes of evidence—Appointment of arbitrator.

Two owners of adjoining blocks of land laid out streets through the centre thereof, to within one foot of the boundary line between their respective blocks, each reserving one foot to himself, thus forming an obstruction to the street of two feet of land, and laid out and

sold off their respective blocks in building lots. Subsequently the corporation of the town in which the land was situate passed a by-law to expropriate these two feet as a local improvement, to be paid for by the owners of the property benefited by the opening through of the street, and an arbitration was held under said by-law with one of the owners, and an award made fixing the value of his one foot at one dollar. On a motion to set aside this award. It was

Held, that it is only damages necessarily resulting from the exercise of the power of expropriation which can be taken into account under R. S. O. (1887), c. 184. s. 483.

Held, also, that the true rule is that when Parliament gives compulsory powers and provides that compensation shall be made to the person from whom the property is taken for the loss that he sustains, it is intended that he shall be compensated to the extent of his loss, and that his loss shall be tested by what was the value of the thing to him, not by what will be its value to the persons acquiring it. *Stebbing* v. *Metropolitan Board of Works*, L. R. 6 Q. B. at p. 42, quoted with approval.

Held, also, following *Re Muskoka* v. *Gravenhurst*, 6 O. R. p. 337, that the objection that notes of evidence were not taken by the arbitrators and filed as directed by sec. 401 of the Act, should not be held irremediable.

Held, also, following *Re Eldon* v. *Ferguson*, 6 U. C. L. J. 207, that the award should not be interfered with on the ground that the arbitrator was not appointed under seal, as that objection, if a valid one, could be taken by the appellants on any proceeding to enforce the award if so advised; *Re Gifford* v. *Bury Town Council*, 20 Q. B. D. 368, and *Re Smith* v. *Plympton*, 12 O. R. at p. 31, referred to and distinguished.

Maclennan, Q.C., for the appeal.

Jas. H. Macdonald, Q.C., contra.

Robertson, J.] [Oct. 19.

NIHAN *v.* ST. CATHARINES AND NIAGARA CENTRAL RAILWAY COMPANY

Railways—Notice to expropriate—Notice of desistment—Bond—Ultra vires—Injunction.

On June 13th, 1887, the defendants, who were originally incorporated under an Ontario Act, gave notice of their intention to expropriate certain lands, and also executed a bond in a penal sum of $1800, which was duly allowed by the County Judge, and possession taken by the plaintiffs. Subsequently, the Act 51 Vict. c. 78 D. was passed, bringing the railway under the legislative authority of the Dominion, and incorporating the provisions of the Dominion Railway Act as to expropriation of lands, but ratifying all acts already done in that regard. On August 22nd, 1888, the arbitrators who had been appointed in the matter of the above lands to give the compensation therefor, gave notice of intention to proceed with the arbitration, immediately after which the defendants gave notice of desistment, and then a new notice of intention to expropriate the same with other lands, and subsequently another notice specifying the original land only.

Held, that the notice of desistment served avoided the original bond, and the defendants must now give security by deposit of money in a bank instead of a bond, that being the mode of giving security under the Dominion Railway Acts, and unless they did so, the plaintiff was entitled to an injunction restraining the defendants from using the land.

Where a railway company gave notice of their intention to expropriate certain lands, and the evidence showed grounds for supposing that the powers were to be exercised for other than those purposes which the railway laws of this country permit and allow,

Held, that they should be enjoined from proceeding with the expropriation.

S. H. Blake, Q.C., and *Collier*, for the plaintiff.

Aylesworth and *Ingersoll*, for the defendants.

Boyd, C.] [Oct. 22.

GOODERHAM *v.* TRADERS' BANK.

Mortgage—Redemption of previous mortgage—Assignment in place of a discharge or reconveyance—Form of assignment—R. S. O. 1887, c. 102, s. 2.

The Traders' Bank held a mortgage on certain lands of W. to secure his current account, which was also secured by commercial paper, much of which paper consisted of notes

made by other customers of the bank for the accommodation of W.

G. had a mortgage on the same lands subsequent to the T. Bank, and made a tender to the T. Bank (who were threatening to sell the land under the power of sale in their mortgage) of what they claimed as due to them, but also insisted on the execution at once by them of a simple assignment of the mortgage debt and mortgaged lands to G., with a covenant that the amount claimed was really due. The T. Bank refused to accept the tender as so made, and G. now moved for an interim injunction to restrain the bank from dealing with their security until the trial of this action, in which G. sought an account of what was due the T. Bank, and on payment, an assignment to him.

Held, that the motion must be dismissed with costs, which might be added to the claim of the T. Bank.

Under R. S. O. (1887) c. 102, s. 2, G. was entitled to demand an assignment to himself if he wished, but he could not insist on the execution of the assignment tendered, as the T. Bank was entitled to have the assignment show the precise character in which G. was paying the money, and also the notes in respect to which the bank were claiming, and who were accommodation makers thereof, and the bank was not bound to give a covenant as to what was due. G., however, was entitled to an account and re-payment of any excess.

T. P. Galt, for the plaintiff.

Lash, Q.C., and *Lefroy*, for the defendants.

Practice.

C. P. Div'l Court.] [Sept. 11.

BALL *v.* CATHCART.

Ejectment—Res judicata—Judgment by default of appearance — Divisional Court, powers of.

Since the Ontario Judicature Act, a judgment recovered in an action of ejectment by default of appearance will sustain a defence of *res judicata* to an action subsequently brought by the defendant to try the same question.

Cochrane v. *Hamilton Provident and Loan Society*, 15 O. R. 138, followed.

A Divisional Court has no power to hear an appeal direct from the Master in Chambers, or a substantive motion to set aside a judgment by default of appearance.

Masten, for the plaintiff.

Aylesworth, for the defendant.

Armour, C.J.] [Oct. 3.

ROWLAND *v.* LURWELL.

Reference, scope of—Judgment—Pleadings—Con. Rules 56, 57.

A judgment directed that the Master should take the usual accounts for redemption or foreclosure of mortgaged premises, and should also take the accounts in respect to certain other matters set out in the pleadings. Under this the defendant contended that the Master should take into account a certain sale by the plaintiff, as mortgagee to a person who, it appeared, had not paid his purchase-money. There was no specific mention of this sale in the pleadings or judgment.

Held, that the proposed inquiry was not within the scope of the pleadings or the judgment or of Con. Rules 56 and 57; and the questions which it would raise were questions which ought to have been raised by the pleadings and determined by the court, and not delegated to the Master. *Bickford* v. *Grand Junction R. W. Co.*, 1 S. C. R. at p. 725; *McDougall* v. *Lindsay Paper Mill Co.*, 20 U. C. L. J. 133; *Wiley* v. *Ledyard*, ib. 142, referred to.

E. R. Cameron, for the plaintiff.

R. M. Meredith, for the defendant.

Armour, C.J.] [Oct. 26.

SCOTT *v.* DALY.

Costs—Party and party—Status of solicitor.

The defendant in this action was represented by a firm, purporting to be a firm of solicitors, one of the members, however, not being a duly admitted or certificated solicitor. The plaintiff objected to the costs awarded the defendant in the action being taxed to him.

Held, that in the absence of proof that these costs had not been paid by the defendant to the persons who acted as his solicitors, the objection could not prevail; nor could it even if that proof had been given. *Reeder* v. *Bloom*, 3 Bing. 9; —— v. *Sexton*, 1 Dowl. 180, followed.

D. W. Saunders, for the plaintiff.

Delamere, for the defendant.

Mr. Dalton.] [Oct. 26.

MACARA *v.* SNOW.

Counter-claim—Close of pleadings—Notice of trial.

A counter-claim must be a defence in the action in which it is pleaded, and it is as much a part of the defence as any of the other pleas. And, therefore, where the plaintiff took issue on the defence, not mentioning the counter-claim,

Held, that the pleadings were closed, and a notice of trial served thereafter was regular.

Douglas Armour, for the plaintiff.

Masten, for the defendant.

Mr. Dalton.] [Oct. 31.

TENNANT *v.* MANHARD.

Partnership—Judgment against firm—Execution against alleged partner—Con. Rules 756, 876.

The plaintiffs recovered judgment against the defendants, a partnership firm, by default of appearance after service of the writ of summons upon M., a member of the firm, and then moved under Con. Rule 876 for leave to issue execution upon such judgment against D., as a member of the firm. D. disputed his liability, but upon his cross-examination upon an affidavit filed on the motion, such fact appeared as convinced the Master in Chambers that he was a general partner, and he made the order asked for. The Master

Held, that the admissions of D. in his cross-examination justified the order under Con. Rule 756, and avoided the necessity of sending an issue to be tried under Con. Rule 876.

Held, also, that Con. Rule 756 was applicable at this stage of the cause, *i.e.*, after judgment obtained without pleadings.

Shepley, for the plaintiffs.

E. T. English, for one Doddridge.

Mr. Dalton] [Nov. 1.
Galt, C. J.] [Nov. 10.

TORONTO AND HAMILTON NAVIGATION CO. *v.* SILCOX.

Jury notice—Action to rescind contract—R. S. O. c. 44 s. 77—Parties—Joint contractors.

The action was brought to rescind a contract for the sale of a vessel by the plaintiffs to the defendant, on the ground that the defendant had failed to perform his part of the contract, and for damages for breach of the contract, and for injuries to the vessel, which had been delivered to the defendant, and to restrain the defendant from dealing with it, and for delivery up thereof.

Held, that this was an action over the subject of which, before the Administration of Justice Act, 1873, the Court of Chancery had exclusive jurisdiction, and a jury notice was therefore improper, under s. 77 of the Judicature Act, R. S. O. c. 44.

The defendant applied to add as a co-defendant one W., on whose behalf, as well as his own, he had made the contract in question, and who with knowledge of it had ratified and adopted it, but who was not formally a party to it.

Held, following *Kendal* v. *Hamilton*, 4 App. Cas. at p 513 *et seq.*, that the defendant had no right to force W. upon the plaintiff as a defendant, in the character of a joint contractor.

Quære, whether W. would have a right to be brought in as a defendant on his own motion.

Shepley, for the plaintiffs.

Hoyles, for the defendant.

Armour, C.J.] [Nov. 2.

WORMAN *v.* BRADY.

Costs—Jurisdiction of County Court—Title to land—Pleading.

The statement of claim alleged that the defendant was a monthly tenant of the plaintiff's land, and that the plaintiff on a certain day terminated the tenancy by notice, and claimed damages for injuries to the demised premises. The statement of defence denied the allegation that the plaintiff terminated the tenancy, etc.

Held, that the title was put in issue by such denial, and as a County Court would, therefore, have no jurisdiction, the costs should be on the scale of the High Court, although the plaintiff recovered only $75.

Held, also, that the question whether the title was in issue must be determined according to the pleadings and not according to what took place on the trial or reference.

D. C. Ross, for the plaintiff.

E. T. English, for the defendant.

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

KEAN *v.* EDWARDS.

Award—Appeal from—Time—Trinity Term.

An award must be moved against within the term following its publication, or within the period which such term formerly occupied.

And where an award was published on the 13th August, 1888, notice of appeal dated 7th September, 1888, but not served till 10th September, 1888, was

Held, too late, and the appeal dismissed.

Lash, Q.C., and *Kean*, for the plaintiff.

Pepler, for the defendant.

Court of Appeal.] [Nov. 13.

In re SMART INFANTS.

Infants—Custody—Habeas corpus—Petition—Amendment—Con. Rule 444—Appeal—Waiver.

The order of the Chancery Divisional Court, 12 P. R. 435, affirmed on appeal.

Held, that the infants' father had waived his right to appeal from the order directing the filing of a petition by having complied with such order.

Semble, but for the waiver, the appeal of the father must have succeeded; for the power given by Rule 474, Ontario Judicature Act (Con. Rule 444), is to amend any defects or errors, not to compel a litigant to adopt a different form of remedy for one which is in itself competent and regular.

S. H. Blake, Q.C., and *H. Cassels*, for the infants' mother.

J. Maclennan, Q.C., *and J. K. Kerr*, Q.C., for the father.

Court of Appeal.] [Nov. 13.

BETTS *v.* GRAND TRUNK RAILWAY CO.

Discovery—Production of documents—Railway accident—Report and evidence on investigation.

The decision of the Common Pleas Divisional Court, 12 P. R. 86, affirmed substantially on the same grounds.

Lyell v. Kennedy, 27 Ch. D. 1., and *Kyshe v. Holt*, W. N. 1888, p. 128, referred to in addition to the cases cited in the judgment appealed from.

Osler, Q.C., for the appellants.

Robinson, Q.C., and *Shepley*, for the respondent.

Law Students' Department.

The following papers were set at the Law Society Examination before Trinity Term, 1888.

CERTIFICATE OF FITNESS.

REAL PROPERTY AND WILLS.

1. A bequest is made of "$100 each to the three children of A. B." At the time of the testator's death, A. B has five children. How is the bequest to be construed?

2. How do you construe a devise "to A or his heirs?"

3. A owns three lots of land, which he specifically devises in three parcels to three persons. He has not enough personalty to pay his debts, but he bequeaths it to his executors for payment of his debts? How will the estate be administered, having regard to the Devolution of Estates Act?

4. An execution is in the sheriff's hands against the lands of A. He buys land from B, pays part of the purchase-money, takes a conveyance and gives a mortgage on the land for the balance at the same time. Does the execution take priority over the mortgage? If so, explain how the transaction can be carried out without paying the execution, without giving it priority, and without the intervention of trustees?

5. State the chief characteristics of the present registry law.

6. When is it necessary for a husband to join in the conveyance of his wife's property, and when not?

7. A purchaser agrees to pay his purchase-money by instalments stretching over ten years. There is a mortgage on the land which matures in five years. Nothing is said in the agreement about title. What are the purchaser's rights as to title and removal of incumbrance, having regard to his liability to pay the purchase-money?

8. What is meant by a doubtful title?

9. When are covenants for title implied in a conveyance?

10. In what securities may a trustee invest the trust funds when there is no direction in the trust deed?

SMITH ON CONTRACTS AND BENJAMIN ON SALES.

1. In consideration of previous seduction, a man makes a promise to pay a sum of money to a woman. Is the promise binding, and would it make any difference if a bond were given? Reasons.

2. A for good and valuable consideration makes a *verbal* promise to B that he will pay a debt of $100, which B owes to C. Is the promise binding? Why?

3. If there is a discrepancy between the amount mentioned in the body of a promissory note, and the figures in the margin, will parol evidence be admitted to prove what amount was intended? Why?

4. If a contract to marry is made between a man of full age, and a woman under age, can an action be maintained by either of them for a breach of such contract? Reasons.

5. Up to what time may an offer *by letter* to sell goods be retracted?

6. May an *unsigned* writing ever be used in evidence to satisfy the Statute of Frauds? If so, when, and how?

7. What different remedies may be had by a vendee for breach of a warranty of the quality of the goods sold?

8. When a vendor exercises the right of *stoppage in transitu*, what effect has such exercise upon the title to the goods?

9. What is the difference between a *condition precedent* and a *warranty*, and how may the former be changed into the latter by the conduct of the vendee?

10. What effect will be produced upon the validity of a tender; (*a*) if it be accompanied by a protest that nothing is due; (*b*) if it be made upon condition that a receipt be given for the amount tendered?

EQUITY.

1. A client brings you a binding agreement with another party for the sale to him of property in Manitoba, which that party refuses to carry out. How would you advise him to act? Explain.

2. A mortgagee of certain lands on which the mortgage is in arrears, proceeds to serve a notice of sale on the mortgagor, and at the same time issues a writ on the covenant for the money. The mortgagor comes to you for advice. How would you advise him? Give reasons for your answer.

3. A dies in Toronto possessed of personal property there and in New York; letters of administration are taken out in Toronto, also in New York; discuss the question as to which law will prevail in administering the estate in New York.

4. What was the law as to the liability of a purchaser seeing to the application of the purchase-money? What, if any, Provincial legislation has there been bearing on the same?

5. A enters into a binding contract with B for the purchase of Blackacre, on which is situate a dwelling-house, which B describes as being surrounded with a fine park well wooded. A, discovering that this is not the case, refuses to carry out the contract. B sues for specific performance. Who should succeed, and why?

6. What are the provisions of 27 Eliz. c. 4? Is there any Provincial legislation dealing with the same, if so, what?

7. What was a Bill for Discovery? Is such a remedy necessary now? Explain.

8. Is there any statutory provision as to claims against an estate of which the executor has given the creditor notice of rejection, if so, what?

9. A, who is a public reciter, agrees with B to recite for the season at a place to be named by B. He afterwards refuses to do so. What, if any, remedy has B?

10. How, if in any way, is consolidation of securities affected by Provincial legislation?

MERCANTILE LAW—PRACTICE—STATUTES.

1. A and B are in partnership. They have a difficulty with C, which B, on belalf of the firm and C, refer to the arbitration of D. How far is the firm bound by the submission? Why?

2. A is a broker in Toronto. B, an English customer, endorses to him a bill of lading of goods. A is in debt to C for moneys advanced by C to A, and to secure such debt, A transfers to C the bill of lading; C obtains the goods, sells them, and proposes to deduct his claim fr·· the proceeds as against B. Can he do so? Why?

3. A husband being in embarrassed circumstances wishes to insure his life for the benefit of his family. He obtains a policy of insurance made payable to his wife and children. His creditors claim the amount of the policy. What rights have they?

4. On a contract of affreightment, what are the duties of the merchant?

5. A is a grocer, and wishes to obtain credit from B. C writes a letter to B agreeing that if B will give A credit in the purchase of grocery goods he, C, will be liable to the amount of $1,000. A obtains $500 worth of the goods from B, when C dies. B then continues furnishing the goods to the amount of another $500, and proposes to claim on C's estate for the whole $1,000. Can he do so? Why?

6. Explain what is meant by *general lien*. What statutory provision have we protecting mechanics for work done on chattels?

7. What is the procedure for determining a claim under the Creditor's Relief Act where such claim is disputed either by the debtor himself, or by another creditor?

8. What provision is made for security for costs in actions for libel?

9. A has a claim against B on a store account. At the time the claim arises B is in the United States, and continues to live there for six years. On his return to Canada A sues him. B sets up the Statute of Limitations. Can he protect himself thereby? Why?

10. Under what circumstances will a transfer made by a debtor to a creditor of the property of such debtor be good, the debtor being at the time in insolvent circumstances?

CALL.

REAL PROPERTY AND WILLS.

1. What is the law as to the validity or invalidity of a voluntary conveyance against a subsequent conveyance for value?

2. When is an abstract said to be perfect?

3. What are the respective offices of *particulars* and *conditions* of sale?

4. An uninsured house is burned down after a judicial sale, but before the report on sale is made. Who bears the loss? Why?

5. Can a mortgagee buy the mortgaged land (1) at a sale under the power in his mortgage; (2) at a sale under an execution against the mortgagor's lands? What is the result in each case, supposing that he does buy?

6. A, domiciled in Canada, dies in France, but first makes a will. Should it be executed according to French law or Canadian law? Why?

7. Draft a clause devising land to A for life, and after his death, to his children as tenants in common, so that the rule in *Shelley's Case* will not apply.

8. Land is conveyed to A for life, remainder in fee to C B, a married woman, by deed dated 2nd January, 1870. On 1st August, 1888, she contracts to sell her estate, the tenant for life still living, but her husband refuses to join in the conveyance. Can she make a good title? Why?

9. An auctioneer verbally gives notice of an alteration in a condition of sale, and then sells The purchaser signs the contract without having the alteration made in writing. What are his rights and liabilities (1) in an action of specific performance by him; (2) in an action against him?

10. Is there any difference between proof of title in quieting a title, and that required of a vendor? Explain fully.

HARRIS ON CRIMINAL LAW—BROOM'S COMMON LAW, BOOKS 3 AND 4—BLACKSTONE, VOL. I.

1. Under what circumstances may one man become liable for the tort of another by *ratification*?

2. Give an example of a wrongful act for which the wrongdoer may be proceeded

against in an action *ex contractu*, in an action *ex delicto*, or in a *criminal prosecution*.

3. Give an instance of a wrongful act which renders the wrongdoer liable to two separate actions by two different plaintiffs for injury to the same person or property.

4. Mention any exceptions to the rule that a man can only be tried once for the same crime.

5. Distinguish *burglary* from *housebreaking*.

6. On a trial for murder, on whom does the burden of proof lie, as to the question of malice aforethought? Why?

7. Distinguish *riot* from *unlawful assembly*.

8. What is the present doctrine of our criminal law as to *insanity* forming a defence to an indictment for murder?

9. Under what circumstances may a *dying declaration* not made upon oath be received in evidence on a criminal trial?

10. What is the general rule as to the way in which *penal* statutes, and statutes *against fraud* should be construed? Reasons.

EQUITY.

1. State the general rule as to the liabilities of trustees for the acts of their co-trustees. What, if any, difference is there in such liability in cases of private trusts and those of a public nature?

2. In cases of election what do you understand by the statement, "The intention to dispose must in all cases appear in the will"?

3. A sells a building lot to B, exhibiting to him at the time a plan made by him showing a portion of his land as a public park. Some time after A proceeds to build on the land shown on the plan as a park; has B any remedy, if so, what?

4. What, if any, distinction is there in the relief granted by equity in an action for the delivery up of void and voidable instruments respectively?

5. A, who is lessee from B of a certain farm, contracts verbally with him, B, for the purchase of it. B refuses to carry out the contract, and A brings an action for specific performance, setting up possession as sufficient to take the contract out of the statute. State who should succeed, giving reasons.

6. What, if any, Provincial legislation is there providing for improvements made under mistake of title?

7. Under what circumstances will a Court of Equity allow a separate debt to be set off against a joint debt?

8. An infant representing himself to be of full age conveys a property to B, and seeks, afterwards to have contracts set aside on account of his nonage. Can he succeed? Explain general law.

9. Distinguish between a mortgage and a pledge.

10. What do you understand by the term subrogation?

CONTRACTS—EVIDENCE—STATUTES.

1. "A proposal when accepted becomes a contract." How far may a proposal, before acceptance, become a contract in English law?

2. What exception is there to the rule that the revocation of a proposal takes effect only when it is communicated to the other party?

3. How far is a contract made by a man who is drunk, valid?

4. "No third person can become entitled by the contract itself to demand the performance of any duty under the contract." What exceptions are there to this rule?

5. When conditions are prescribed by statute for the conduct of any particular business, and such conditions are not observed, when are agreements made in course of such business void or valid?

6. How far, and under what safeguards, is the evidence of children admissible?

7. What are the presumptions which the law makes against misconduct?

8. What are the exceptions to the rule excluding second-hand evidence? Explain the principle on which each exception is allowed.

9. In what cases may agreements be made with residents out of Canada for service in Ontario?

10. In a proceeding before a County Court a counter-claim of the defendant involves matter beyond the jurisdiction of the court. How far does this affect the competence of the court to deal with the case?

LORD NORBURY, while on circuit, being attacked by illness, sent to the Solicitor-General to ask for the loan of a pair of slippers. "Take them," said the Solicitor-General to the servant, "with my respects, as I expect soon to have his lordship's shoes."

Obituary.

The late Hon. James Patton, Q.C., LL.B., whose sudden death on the 12th ult. was so painful a surprise to his many friends and to the people of this Province generally, was one of a generation of Canadian public men whose ranks are being rapidly thinned.

Mr. Patton was born in Prescott, Ont., on June 10th, 1824. He was the fourth and youngest son of Major Patton of Her Majesty's 45th Regiment, and formerly of St. Andrew's, Fifeshire, and received his education at Upper Canada College. In 1840 he began the study of the law in the office of the Hon. John Hillyard Cameron, Q.C., and in 1845 he was enrolled as a matriculant in King's College, now the University of Toronto, and in the same year he was admitted as an attorney and called to the Bar. In 1847 he took the degree of LL.B., and in 1862 was made a Q.C.

Mr. Patton commenced the practice of his profession at Barrie, in the county of Simcoe, and he soon acquired a large practice. He devoted himself to his professional life with the same energy and thoroughness that characterized him in the various spheres of usefulness which he subsequently filled. An ardent politician of the old Loyalist type, he always took an active interest in public matters, and was known in the agitation which took place over the Rebellion Losses Bill. In 1856, when the Legislative Council was made elective, he was chosen as the Conservative candidate for the Northern Division, comprising the counties of Bruce, Grey and North Simcoe, and was elected by a large majority. In 1862 he became a member of the Cartier-Macdonald Ministry, taking the portfolio of Solicitor-General for Upper Canada. On the fall of that Government he retired from parliamentary life, and resumed the practice of his profession in Toronto, taking as his partner Mr. Featherston Osler, now one of the Judges of the Court of Appeal. Subsequently he practised in Kingston, and again in Toronto in partnership with Hon. Sir John Macdonald. On giving up the legal profession he became Manager of the British Canadian Loan Company, and was subsequently appointed Collector of Customs in Toronto. He found in this position much to be done, and he applied himself most zealously to the discharge of the duties of the office.

Mr. Patton was a man of literary tastes, and his active brain and untiring energy found time to devote to other matters besides his professional or business duties. Amongst his many fields of usefulness not the least was the part he took in connection with University Education. He was also a journalist. Whilst in Barrie he started the *Barrie Herald*, the organ of the Conservative party in the North country, and for several years he was the editor of that paper. In 1855, inspired by Judge (now Senator) Gowan, and assisted by Hewitt Bernard (afterwards Deputy Minister of Justice) he founded this journal, which first appeared as the *Upper Canada Law Journal*. To him, therefore, belongs the credit of being the pioneer in legal journalism in this Dominion.

A man of unsullied honour, of high intelligence, of great mental and physical energy, the public has suffered a great loss in the death of the Honourable James Patton. His funeral was largely attended. Amongst the pall bearers, named by him long before his sudden death, were two of his old law students in Barrie, Hon. Mr. Justice Osler and Mr. Henry O'Brien, the present editor of this journal.

Appointments to Office.

JUDGE OF THE SUPREME COURT CANADA.

Hon. C. S. Patterson, one of the judges of the Court of Appeal for Ontario, Puisne Judge of the Supreme Court of Canada, *vice* Hon. W. A. Henry, deceased.

ONTARIO.

JUDGE OF THE COURT OF APPEAL.

James Maclennan, Q.C., Toronto, Judge of the Court of Appeal for Ontario, *vice* Hon. C. S. Patterson.

POLICE MAGISTRATE.

Lanark.

F. A. Tallman, Merrickville, Police Magistrate for the township of Montague, in the county of Lanark.

DIVISION COURT CLERKS.

Brant.

David Baptie, St. George, Clerk of the Third Division Court of the County of Brant, *vice* J. P. Galloway, resigned.

York.

John Linton, township of York, Clerk of the Eighth Division Court of the County of York, *vice* John Paul, deceased.

Elgin.

A. N. C. Black, Dunwich, Clerk of the Fourth Division Court of the County of Elgin, *vice* F. McDiarmid, resigned.

DIVISION COURT BAILIFFS.

Peterborough.

R. Elmhirst, of Anstruther, Bailiff of the Fifth Division Court of the County of Peterborough, *vice* A. Graham, resigned.

Dundas, Stormont and Glengarry.

Wm. Cameron, of Lancaster, Bailiff of the Ninth Division Court of the united Counties of Dundas, Stormont and Glengarry, *vice* J. A. Robertson, resigned.

QUEBEC.

JUDGE OF THE SUPERIOR COURT.

P. G. Malhiot, Q.C., Three Rivers, a Puisne Judge of the Superior Court of the Province of Quebec.

Miscellaneous.

A KLEPTOMANIAC has been recently defined as one who does automatically what his ancestors did deliberately.

LITTELL'S LIVING AGE.—The numbers of *The Living Age* for the weeks ending October 27th and November 3rd contain State Socialism, *Contemporary Review;* Under Canvas in a Proclaimed District, *Blackwood's Magazine;* Our Diplomatists, *Temple Bar;* Impressions of Petersburg, *Contemporary Review;* Aut Diabolus, aut Nihil, *Blackwood;* A Winter in Syria, Part II., *Contemporary Review;* The Great American Language, *Cornhill Magazine;* Shakepeares Unawares, *Macmillan;* The Emperor Frederick's Diary, *Spectator;* An Autumn Evening in Whitechapel, *Daily News;* Savage *versus* Brute, *Times;* Mental Laziness, *Spectator;* The Centenary of the Calcutta Botanic Garden, *Nature;* The Saville Letters, 1660-1689, *Macmillan;* The Australian Dingo at Home, *Chambers's Journal;* Bishop Ken, by Archdeacon Farrar, *Good Words;* An Adventure in the Flooded Theiss, *Chambers's Journal;* Poor Harry, *Longman's Magazine;* "The First Son of Death," *Nineteenth Century;* and the usual amount of select poetry.

For fifty-two numbers of sixty-four large pages each (or more than 3,300 pages a year) the subscription price ($8) is low; while for $10.50 the publishers offer to send any one of the American $4.00 monthlies or weeklies with *The Living Age* for a year, both postpaid Littell & Co., Boston, are the publishers.

Law Society of Upper Canada.

CURRICULUM.

1. A Graduate in the Faculty of Arts, in any University in Her Majesty's Dominions empowered to grant such Degrees, shall be entitled to admission on the Books of the Society as a Student-at-law, upon conforming with Clause four of this curriculum, and presenting (in person) to Convocation his Diploma or proper Certificate of his having received his Degree, without further examination by the Society.

2. A Student of any University in the Province of Ontario, who shall present (in person) a Certificate of having passed, within four years of his application, an examination in the subjects prescribed in this Curriculum for the Student-at-law Examination, shall be entitled to admission on the Books of the Society as a Student-at-law, or passed as an Articled Clerk

(as the case may be) on conforming with Clause four of this Curriculum, without any further examination by the Society.

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

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

5. The Law Society Terms are as follows:—

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

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

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

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

6. The Primary Examinations for Students-at-law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity, and Michaelmas Terms.

7. Graduates and Matriculants of Universities will present their Diplomas and Certificates on the third Thursday before each Term at 11 a.m.

8. Graduates of Universities who have given due notice for Easter Term, but have not obtained their Diplomas in time for presentation on the proper day before Term, may, upon the production of their Diplomas and the payment of their fees, be admitted on the last Tuesday in June of the same year.

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

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

11. The Solicitors' Examination will begin on the Tuesday next before each Term at 9 a.m. Oral on the Thursday at 2.30 p.m.

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

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

14. Full term of five years, or, in the case of Graduates, of three years, under articles must be served before Certificates of Fitness can be granted.

15. Service under Articles is effectual only after the Primary Examination has been passed.

16. A Student-at-law is required to pass the First Intermediate Examination in his third year, and the Second Intermediate in his fourth year, unless a Graduate, in which case the First shall be in his second year, and his Second in the first seven months of his third year.

17. An Articled Clerk is required to pass his First Intermediate Examination in the year next but two before his Final Examination, and his Second Intermediate Examination in the year next but one before his Final Examination, unless he has already passed these examinations during his Clerkship as a Student-at-law. One year must elapse between the First and Second Intermediate Examination, and one year between the Second Intermediate and Final Examination, except under special circumstances, such as continued illness or failure to pass the Examinations, when application to Convocation may be made by petition. Fee with petition, $2.

18. When the time of an Articled Clerk expires between the third Saturday before Term, and the last day of the Term, he should prove his service by affidavit and certificate up to the day on which he makes his affidavit, and file supplemental affidavits and certificates with the Secretary on the expiration of his term of service.

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

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

21. Candidates for Call or Certificate of Fitness are required to file with the Secretary their papers, and pay their fees, on or before the third Saturday before Term. Any Candidate failing to do so will be required to put in a special petition, and pay an additional fee of $2.

22. No information can be given as to marks obtained at Examinations.

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

FEES.

Notice Fee	$1 00
Student's Admission Fee	50 00
Articled Clerk's Fee	40 00
Solicitor's Examination Fee	60 00
Barrister's Examination Fee	100 00

ntermediate Fee	$1 00
Fee in Special Cases additional to the above	200 00
Fee for Petitions	2 00
Fee for Diplomas	2 00
Fee for Certificate of Admission	1 00
Fee for other Certificates	1 00

BOOKS AND SUBJECTS FOR EXAMINATIONS.

PRIMARY EXAMINATION CURRICULUM, For 1888, 1889, and 1890.

Students-at-Law.

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

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

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

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

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

MATHEMATICS.

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

ENGLISH.

A paper on English Grammar.
Composition.
Critical reading of a selected Poem:—
1888—Cowper, The Task, Bb. III. and IV.
1889—Scott, Lay of the Last Minstrel.
1890—Byron, The Prisoner of Chillon; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

HISTORY AND GEOGRAPHY.

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

Optional subjects instead of Greek:—

FRENCH.

A Paper on Grammar.
Translation from English into French Prose.

1888 / 1890 — Souvestre, Un Philosophe sous le toits.
1889 — Lamartine, Christophe Colomb.

or NATURAL PHILOSOPHY.

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

Articled Clerks.

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

RULE *re* SERVICE OF ARTICLED CLERKS.

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

For Certificate of Fitness.

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

For Call.

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

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

Trinity Term, 1887.