Canada Law Journal.

VOL. XXIII. JUNE 15, 1887. NO. 12.

DIARY FOR JUNE.

15. Wed...Magna Charta signed, 1215.
18. Sat.....C. C. York term ends. Battle of Waterloo, 1815.
19. Sun ....*and Sunday after Trinity.*
20. Mon...Accession of Queen Victoria, 1837.
22. Wed...Longest day.. Slavery declared contrary to law of England, 1772.
26. Sun....*3rd Sunday after Trinity.*
28. Tues.. Coronation of Queen Victoria, 1838.
30. Thur...Acquittal of the seven bishops, 1688.

TORONTO, JUNE 15, 1887.

"BOYCOTTING," when applied to American citizens, does not appear to meet with any more favour in the courts of the neighbouring Republic than it does in Ireland. The Supreme Court of Errors of Connecticut recently decided in the case of *State* v. *Glidden* (see 15 Am. Law Record 649), that an agreement to "boycott" a firm, as that term is generally used by organizations of workingmen on this continent, and to injure and oppress certain employés who do not join with the boycotters, is a conspiracy at common law. The "boycott" in the case in question was directed against the Carrington Publishing Company; the conspirators were found guilty, and the conviction was unanimously affirmed.

AMONG the ingenious contrivances of the present day for turning an honest penny, it appears an automatic box has been invented, which is so contrived that by dropping into it a penny and pushing a knob, a cigarette will be presented to the depositor of the penny. These boxes it seems are, in England, placed in public places for the convenience of the public and the profit of the proprietor. Some youths, whose desire for cigarettes exceeded their notions of honesty and fair play, recently induced one of these boxes to disgorge some of its contents by dropping in discs of brass, instead of honest pennies. Such a brazen attempt at fooling the box was not suffered to go unwhipped of justice, for on being caught and carried before a magisterial court, the deceivers were found guilty of larceny, and the conviction was affirmed by a court composed of Lord Coleridge, C. J., Pollock, B., and Stephen, Mathew, and Wills, JJ., as may be seen by referring to *Regina* v. *Hands*, 56 L. T. N. S. 370.

AMONG the new comers to our editorial table is the first number of the *Harvard Law Review*, a monthly journal published during the academic year by the Harvard law students. The primary object of this *Review* is to set forth the work done in the Harvard Law School. Though the *Review* is managed by the students, the list of contributors comprises not only the names of six professors of the law school, but also of many other lawyers of distinction. The opening number is graced by an able article by Prof. J. B. Ames on the law affecting the rights of a "purchaser for value without notice." It may not be out of place to point out that the case of *Moyce* v. *Newington*, 4 Q. B. D. 32, to which he refers, was recently overruled by the Court of Appeal in *Vilmont* v. *Bentley*, 18 Q. B. D. 322 (see *ante* p. 142). The law of "tickets" is also ably discussed by Mr. J. H. Beale, jun., one of the editorial board. The proceedings in the Moot Courts are also reported. The *Review* is

admirably printed, and as a specimen of typography is, we believe, unrivalled among its contemporaries on this side the Atlantic. If it continues as it has begun it is deserving of a successful and honourable carecr.

MONEY IN COURT.

Under Rule 606 lately passed, no cheque is to be issued from the Accountant's office prior to the long vacation, unless the præcipe therefor is lodged in the Accountant's office on or prior to the 20th June. The 20th June therefore is the last day before the vacation on which cheques can be præciped. We believe it is not the intention of the Accountant to insist on the orders being left with the præcipes, as owing to the rush of business about that time there may be some delay in getting them drawn up and entered; at the same time the orders will have to be left before the cheques can be drawn up.

ERRATA.

In the article on "The Revised Statutes of Canada, published in our last issue, the following errata require correction:

Page 202, second line of second paragraph, for "June, 1885," read, "June, 1883."

Page 206, twenty-second line from bottom, for "Revised Statutes for Lower Canada," read, "Statutes of the Province of Canada."

Page 207, second column, fourteenth line, for "whence," read, "where."

A CODE OF PROCEDURE.

A scheme of a Code of Civil Procedure has been prepared and distributed under the auspices of a joint committee of the Law Associations of York, Middlesex and Wentworth. This scheme involves the further reorganization of the courts, and many radical changes in practice.

The Attorney-General has very properly pointed out that some of the proposals embodied in this scheme are only within the competence of the Legislature to deal with; and he has recommended that the Associations should confine themselves to suggesting such additions and alterations in the existing rules and practice as may be deemed substantially material, and as may give the judges the minimum of work in considering and adopting them.

The project of the Law Associations, as set forth in the scheme for a code of procedure, is ambitious, and we fear too ambitious to be at present successfully carried out. The manner in which they propose to deal with the matter is no doubt the correct one, but at present it is simply impracticable, and they have, we think wisely, resolved for the present to confine their attention to those matters within the limits suggested by the Attorney-General.

The first point to be aimed at is the more perfect assimilation of the practice in all the Divisions of the High Court. In order to do this the judges themselves require to be more thoroughly imbued than we think they are at present with the idea that they have ceased to be judges of different courts, and are now judges of one and the same court; that there are no longer any "Common Law Courts," or "Court of Chancery;" that the Queen's Bench and Common Pleas Divisions are just as much Courts of Equity as the Chancery Division; and that the Chancery Division is just as much a Court o

Common Law as the two other Divisions; and that neither of them is any more nor any less a Court of Equity or a Court of Common Law than the others.

When the judges are thoroughly indoctrinated with these ideas, and have ceased to talk about the "Court of Chancery," and the "Common Law Courts," then it is possible that the various officers of the court may also learn that they have ceased to be officers of different courts, and have become officers of the same court, in the offices of which the practice ought to be identical; and that it is their duty to facilitate, as much as lies in their power, the unification of procedure in their various offices. So long, however, as men have different ideas, and are resolutely bent on maintaining them, and no autocratic power exists by which harmonious action can be enforced, we despair of seeing perfect uniformity of practice, either on the bench or in the offices of the court. Even the self-same rule will be construed by different minds in different ways. The Law Associations, however, by calling attention to diversities where they exist, and pointing out the practice which they think would be most beneficial for universal adoption, would be doing substantial service.

So far as the diversity of practice is the result of express rules of court the course of the Law Associations is plainer, and something may be accomplished by their submitting drafts of rules which would have the effect of assimilating the practice in all the Divisions in the most convenient way. This, we are glad to notice, the Associations propose to do.

It is also proposed that one judge should sit weekly for the disposal of all chamber and court business in all the Divisions. This, as we pointed out in February last (see *ante* p. 61), would certainly be a saving of judicial strength and time, and we should think would be gladly welcomed by the Bench. The proposal to hold four permanent sittings at fixed dates in each county for the trial of actions is a proposition that may prove more difficult of acceptance. In some of the counties we are inclined to think the holding of four courts annually would be a waste of time, and it would probably be found a wiser plan to group some of the counties and provide for the holding of alternate sittings in the counties composing the group. All the advantages of the proposal of the Associations might in this way be realized without unduly increasing the expense of the administration of justice. Another proposal in the interest of country practitioners is to give the power to local taxing-officers to allow increased counsel fees at trials to the amount of $40 for senior, and $20 for junior counsel.

The Associations also suggest that the proposed consolidation of the rules of practice and procedure, as set forth in the printed draft now under consideration of the judges, should be deferred, so that when ultimately consolidated the rules may supersede all existing rules, and form a complete code of practice. But this suggestion, we fear, will not be at present entertained by the powers that be. The necessity of searching orders in Chancery and rules of the former Common Law Courts, together with the Judicature Rules, in order to ascertain the practice, is no doubt an anomaly; but the compilation of a complete Code of Procedure is a very difficult matter, and one requiring more time, and greater care and attention and practical knowledge of the subject, than a committee of judges have in their power to bestow.

We observe that the Law Society has voted a sum of $2,000 towards the expense of drafting a Code of Procedure. This expenditure seems open to serious objection The Law Society is already so crippled in funds that it has for some time past

been compelled to stop supplying the profession with the Supreme Court reports, and when legitimate expenses are thus cut down, it seems a little strange that the funds of the Society should be applied towards objects which it is the duty of the Government of the Province to provide for, and which are in no sense within the legitimate sphere of the Law Society. Such an expenditure of the funds of the Society, we should think, is clearly *ultra vires*. The profession pay taxes enough to the Government in the shape of law stamps, and we do not see that their governing body should go out of its way to assume a burthen which ought properly to be borne by the Provincial exchequer.

THE PROVINCIAL LEGISLATION OF 1887.

DURING the past session the Legislature added about one hundred new Acts to the Statute Book. About one-half of these are public Acts and the rest are private. These Statutes cost the country, at a moderate computation, about $1,000 a piece; but we very much doubt whether any individual in the community would think that the whole batch is worth anything like the average cost of one of them.

A more senseless waste of public money than is presented year by year in the pages of the Statute Book of Ontario it is difficult to conceive.

Those Acts which are considered of public importance are printed, as usual, in a supplement of the *Ontario Gazette*, and they number, all told, thirty-six—and many even of these have merely a local importance. The first of general interest is styled "An Act for Further Improving the Law," and consists of a dish of scraps, compiled very much on the principle of every member dropping into a bag a section on any subject which happened to come into his mind. We suppose when the Revised Statutes come out at the end of the year this strange chaotic medley will be reduced to order. At present it is a confused jumble of every conceivable subject. It begins by amending the Interpretation Act in some trifling particulars, then it touches up the Election Act, then it provides for the division of the Shrievalty of York in order to make two offices instead of one—a step which the Attorney-General is probably already sorry for. Then we see that some man who wishes further to decrease poor Sheriff McKellar's fees has got in a section to compel Sheriffs to include any number of names in the same certificate. Then we have a delicious little piece of legislative blundering, which, if literally construed, virtually repeals the Petition of Right Act. The section in question amends R.S.O. c. 59, and provides that that Act shall not entitle a subject to proceed by petition of right in any case in which he would not be so entitled under the Acts heretofore passed by the Parliament of the United Kingdom, and inasmuch as in no case did the Acts of the United Kingdom enable a subject to sue by petition of right in Ontario, it follows that the petition of right procedure is virtually abolished, but for the rule laid down by the Privy Council in *Salmon* v. *Duncombe*, 11 App. Cas. 627, which will possibly enable the courts to construe the Act to mean what the Legislature intended, and not what it has said. Another section enables the court to order a sale of lands taken under a writ of attachment before the lapse of twelve months. Then the Act relating to the transfer of real property comes in for attention, and persons having powers are enabled to validly contract not to exercise them. The Act respecting trustees and executors and the administration of estates is amended by the next section. The amendment

enables an insurance company to pay the insurance money payable on a policy on the life of a deceased person to the personal representative appointed by the courts of the Province where the deceased was domiciled, "after the expiration of two months," if no personal representative has been appointed in Ontario. But it does not appear from what time the two months is to count, whether the death of the assured, or the appointment of the representative by the Court of the Province where the deceased was domiciled, and in other respects the section is badly drawn.

The next section amends R.S.O. c. 107, s. 31. This section requires a person having a claim against a deceased person's estate, which is disputed by the personal representative, to bring an action to enforce the claim within six months after notice that the personal representative disputes the claim. The amendment requires the personal representative, in his notice disputing the claim, to refer to the section, and his intention to avail himself of its provisions, and also gives the claimant a further period of one month to bring a new action, in the event of being nonsuited.

Last year, when referring to 49 Vic. c. 16, s. 23, enabling actions for torts committed by deceased persons to be brought against their personal representatives, we pointed out that no limit of time had been prescribed within which such actions should be brought. This defect is now cured by a section which requires the action to be brought within one year after the decease. But suppose no personal representative be appointed within that period, what then?

The Act for facilitating the transmission of timber, R.S.O. c. 153, s. 44, is amended in some trifling particulars; and then the Registry Act is amended by the addition of a clause enabling instruments which have been registered by memorial to be registered in full. This is a useful provision. Persons insuring their lives for the benefit of their wives and children are next enabled to make and alter an apportionment of the insurance money among the beneficiaries. The Assessment Act and Cemetery Act receive amendment; and then the poor little English sparrow is ruthlessly outlawed! Well, if the people of Ontario can stand it, it is probable he can. It would be a useless waste of time to enumerate all the subjects dealt with in this Act "for improving the law." One or two other sections, however, deserve special notice. The Married Woman's Property Act, 1884, is amended first, by a provision that that Act shall not be construed to deprive a woman married prior to its commencement of any right or privilege which she then had, or would thereafter have had if the Act had not been passed, the effect of which, of course, is to revive in favour of women married prior to 25th March, 1884, the prior Statutes which by section 22 of the Act of 1884 were repealed—and is, we think, an unwise provision. The Act of 1884 was based on the English Act of 1882, which contained no such clause. In addition to this amendment a clause is added, enabling married women to enjoy their separate earnings, which seems to be entirely unnecessary, inasmuch as it appears already sufficiently covered by the 3rd and 5th sections of the Act of 1884. The next section validates all conveyances by a married woman since 29th March, 1883, which her husband signed or executed, or shall sign or execute. We observe in the side note to this section it is stated to relate to conveyances made since 29th March, 1873; which of the two dates is the one really intended we do not know. An amendment next section will probably reveal the mystery. A saving clause follows

excepting conveyances made to the prejudice of any title lawfully acquired from any married woman prior to the Act, also conveyances made *mala fide*, and conveyances of land of which the married woman or those claiming under her are in actual possession contrary to the terms of the conveyances; and the rights of litigants in pending actions are also saved.

Section 30 amends 48 Vict. c. 13, s. 23, by providing that in County Court cases, tried by a judge, a motion may be made for a new trial at the quarterly sittings, on any ground except that upon the evidence given, the judgment is wrong in law.

Sections 34 and 35 are evidently intended to be supplementary to the Devolution of Estates Act of 1886. The first provides that letters of administration may be granted to the personal estate alone—which is a power we should have thought the Surrogate Courts could have exercised without the aid of this section, by virtue of the power they possess to grant limited administration. Williams lays it down that there may be a grant of administration limited to certain specific effects of the deceased; and the general administration may be committed to a different person. But he goes on to say this sort of grant is entirely exceptional, and should not be made unless a very strong reason be given. The section seems to indicate that the Legislature did not feel very sure of its ground. One session it passes an Act virtually making real estate personalty, and the next session it tries to revive the distinction which the previous session it had abolished. This section, we think, is a blunder.

For the purpose of getting over the technical difficulty which arises from the Legislature persisting in preserving the old feudal law of tenure, Section 35 is passed, providing that in the case of any person dying after 1st July, 1886, his personal representative for the time being shall, in the interpretation of any Provincial Statute, or in the construction of any instrument to which the deceased was a party, or in which he was interested, be deemed in law his "heirs and assigns," unless a contrary intention appears.

We presume the personal representative here mentioned is the general personal representative, not an administrator whose grant is limited to the personal estate. It is possible, however, it would include an administrator whose grant is limited to the real estate; but this is not certain. The effect of limited administration has evidently not been thought out, and these sections are a specimen of the crude and ill-digested legislation which our Local House annually treats us to.

The concluding clauses of this wonderful conglomerate Act deal with the right of mortgagees under mortgages thereafter executed to distrain for arrears of interest, and limits the right of distress as against creditors of the mortgagor and persons in possession under the mortgagor to one year's arrears. But this restriction is not to apply unless one of the creditors is an execution creditor, or unless an assignee for the general benefit of creditors shall have been appointed before sale, and unless notice is given by the officer executing the writ, or by the assignee to the distrainor before sale of the distress, which is not to be made except after public notice, as is now required to be given by landlords.

The Act which follows is another of the same description as the last, and it is passed to give effect to certain amendments suggested by the Statute Commissioners, the most noticeable features of which are the alteration in the dates of the quarterly sittings of the County Courts, the only change made being in the January sittings, which are hereafter to be held on the second Monday in January instead of the first.

The right to sell under an execution an inchoate right of dower has been taken away. It was formerly held in the much litigated case of *Allen* v. *Edinboro' Life Assurance Co.*, 19 Gr. 248, that such a right was not saleable in execution; then 40 Vict. c. 8 (O.) was passed, and in the same case it was held that the effect of that Statute was to enable such interests to be sold in execution; *Allen* v. *Edinboro' Life Assurance Co.*, 25 Gr. 306; now the *status quo ante* is regained. It seems like a game of battledore and shuttlecock.

By Chapter 9, the law relating to libel actions against newspapers is amended. And by chapter 10 further amendments are made in favour of the exemption of goods from execution. A debtor is now entitled to hold free from execution all his beds, bedsteads and bedding in the ordinary use of himself and family, and all his or their necessary wearing apparel; furniture to the value of $150, fuel and provisions to the amount of $40; live stock to the value of $75; besides food therefor for thirty days; tools and implements to the value of $100; besides 15 bee-hives:—or $365 worth of property in addition to beds, etc., wearing apparel, and bee-hives. The impecunious debtor cannot surely complain of any want of consideration.

Chapter 14 is an Act providing for the deposit of title deeds in the Registry Offices for safe custody. We very much doubt whether it will prove of much practical value. Nine persons out of ten think they can take care of their own title deeds much better than any public official; the trifling expense of depositing them in the Registry Office will probably deter a good many from taking advantage of the Act.

Provision is made by Chapter 15 for the extension of the Land Titles Act to other counties, cities and towns in Ontario. The conditions on which any county, city or town can secure the extension of the Act to such county, city or town are: (1) The passing of a by-law declaring it expedient that the Act should be extended to such county, city, or town. (2) The providing of suitable accommodation for the officials. Having done this, the Lieut.-Governor in Council may extend the Act to such county, city, or town, and the county, city, or town, then becomes responsible to pay such part of the salaries of the officials and expenses of the office, as the fees of the office prove insufficient to defray. It will not be very surprising if the Act, under these circumstances, is not very widely and eagerly adopted.

After vainly endeavouring for a good many years past to introduce the Torrens system into England on the voluntary principle, we see Lord Halsbury, by his Bill now before Parliament, has at last boldly "taken the bull by the horns" and proposes to establish district registries throughout the country and to make the system compulsory. This, at all events, shows that the Imperial Government is satisfied that the Torrens system is really an improvement. The legislation in this Province seems rather to indicate that our Legislature is not quite convinced of the benefits of the measure, and discredit is practically cast upon it in advance by the timorous way in which the matter is dealt with. If the Legislature is not thoroughly convinced that the Torrens method of registration is an immense improvement, it had no business to introduce it at all. If, on the other hand, it is so convinced, it seems absurd to legislate as if the matter were one of doubtful expediency. Owing to the fact that our Act is not compulsory, it is certain that it will be a work of time to get people to see its advantages, and even when introduced into any locality, applications under it will probably be few until some practical

experience has been gained of its operations. In the meantime the municipality is burthened with the expense of a staff of officers, and office expenses, for some years while the public are learning the advantages. We are afraid that the Torrens system, by next session, will find itself no further extended than it is at present. Another Statute has also been passed, extending the Land Titles Act to the outlying districts of the Province, but as this Act is not printed in the *Gazette* we are unable to state its effect.

Some amendments are made to the Creditors Relief Act, and a slight amendment is also made to the Mechanics' Lien Act.

An Act has also been passed relating to the guardianship of minors. This Act, which appears to be based on a recent English Statute, very properly gives the mother a voice in the custody of her children, and enables her to appoint a guardian for them, and to be herself their guardian alone, or jointly with others. When guardians are appointed by both parents they are to act jointly. The Act appears to be remedial in its provisions, and intended to remove a grievance. The Legislature has, however, with careful forethought, provided that its provisions, shall not apply to any children, as to whom any application has heretofore been made to any court or Judge with respect to their custody or maintenance, whether such application is, or is not, now pending. But why this particular class of children should be deprived of the benefit of the Act it is not very easy to divine.

The only other Act we think it necessary to mention is an Act respecting distress for rent and taxes. We have already seen that the Legislature has provided a pretty liberal bill of exemptions from execution, and this Act provides that all property exempt from execution shall also be exempt from distress for rent in respect of a tenancy hereafter created, and also for distress for taxes, unless such goods are the property of the party assessed. The Act also contains clauses exempting the goods of third parties. As against an assignee for benefit of creditors, the landlord's right to distrain is restricted to a year's arrears of rent. The tenant is given a right of set-off against his landlord. Tenants claiming exemption are to give up possession, and the necessity of a strict demand of rent in arrear, is done away with as a condition of re-entry.

No session would be complete without an amendment of the Municipal Act. This year an Act of only fifty-five sections is the monument of Legislative industry in this respect.

RECENT ENGLISH DECISIONS.

The *Law Reports* for May comprise 18 Q. B. D. pp. 573-569; 12 P. D. pp. 117-137, and 34 Chy. D., pp. 579-769.

PRACTICE—DISCOVERY IN AID OF EXECUTION—EXAMINATION OF PERSON OTHER THAN DEBTOR—ORD. XLII. R 32 (ONT. R. 366, 367).

The first case calling for notice in the Queen's Bench Division is *Ivacll* v. *Eden*, 18 Q. B. D. 588, in which the Court of Appeal (affirming the judgment of a Divisional Court) held that under Ord. xlii. r. 32 (see Ont. R. 366, 367) there is no power to make an order for the examination of any person other than the debtor, or, in the case of a corporation aggregate, other than an officer of such corporation, for discovery of debts, etc., owing to such debtor, in aid of execution.

CHURCH—FREE SEATS—CHURCHWARDEN, RIGHT OF AS TO SEATS IN A FREE CHURCH.

In the case of *Asher* v. *Calcraft*, 18 Q. B. D. 607, a case was stated by magistrates for the opinion of the Court on a question of church law, which is of some interest in this country, where free churches are not uncommon. The respondent was the churchwarden of a church in which the seats were all free. Some young

men and boys had been in the habit of sitting together in the north aisle and misbehaving themselves, and in order to prevent further disturbance, the respondent directed the appellant, a young man, to take a seat in another part of the church; this he declined to do, and resisted the respondent, and pushed past him. He was subsequently convicted of violent behaviour in church, and the question submitted by the magistrates was whether or not the churchwarden had exceeded his authority, and the court (A. L. Smith and Grantham, J.J.) unanimously determined that he had not.

PRACTICE—DISCOVERY—ACTION FOR PENALTIES.

Adams v. *Batley*, 18 Q. B. D. 625, was an action to recover for the infringement of the plaintiff's sole right of representing a dramatic piece. The 4 & 5 Wm. IV., c. 15, s. 15, provided that every person infringing on such right should be liable, for each and every representation, to pay an amount of not less than 40*s.*; and the question arose whether this section did not impose a penalty upon the offender, so as to preclude the plaintiff in an action to recover the specified amount, from examining him for discovery. The Court of Appeal (affirming Day and Wills, JJ.) held that it did not. Lord Esher, who delivered the judgment of the court, being of opinion that it was clear that the payment of the 40*s.* was intended by the Act to be by way of damages, and as compensation to the plaintiff, and not by way of penalty. None of the other cases in the Queen's Bench Division require notice.

WILL—MUTILATION OF WILL—REVOCATION OF APPOINTMENT OF EXECUTORS.

The only case in the Probate Division which seems to call for remark is *In the Goods of Maley*, 12 P. D. 134. By his will a testator appointed two executors. Some time afterwards he had a dispute with one of the persons named as executors, and there was evidence that he had said that he "had cut that rascal Clark out of his will with a pair of scissors." On his death the will was found with the clause appointing the executors cut out, the piece cut out being found with it in the same bag. The president, Sir James Hannen, held that this mutilation of the will amounted to a revocation of the appointment of the executors, and administration with the will annexed was granted to the sole legatee.

PARTNERSHIP—RESCISSION OF CONTRACT—INDEMNITY.

The first case to be noticed in the Chancery Division is *Newbigging* v. *Adam*, 34 Ch. D. 582, in which the Court of Appeal decided (affirming Bacon, V.-C.) that when a person has been induced to enter into a contract of partnership by misrepresentations not of such a character as to entitle him to bring an action for damages for deceit, he has a right, on the contract being rescinded by the Court, to be indemnified against the debts and liabilities of the partnership. This relief he was held entitled to, not by way of damages, but simply for the purpose of putting him back in the position he was in before the making of the contract which is rescinded.

PERSONAL REPRESENTATIVE CARRYING ON TRADE—GOODS BOUGHT BY PERSONAL REPRESENTATIVE—RIGHTS OF VENDOR.

In re Evans, *Evans* v. *Evans*, 34 Chy. D. 597, an administratrix had carried on the trade of the intestate, and for the purpose of such trade, bought a quantity of cement. An administration action having been brought against the administratrix, in which a receiver and manager was appointed, this cement was sold with other effects under an order in the administration action. The vendors of the cement had recovered a judgment against the administratrix, but execution had not issued thereon, and they applied to be paid the amount of their judgment out of the proceeds of the sale of the cement. Kay, J., refused this relief, but declared them entitled to a lien on the beneficial interest of the administratrix in the intestate's estate, from which order the vendor appealed; and it was held by the Court of Appeal that the cement, as between the vendors and the administratrix, was the property of the administratrix, she being a debtor to them for the price, and that as between the administratrix and the estate the cement belonged to the estate, subject to the right of the administratrix to be indemnified for the price, if she was not a debtor to the estate; and that the vendors could not have any higher claim than hers, and were not entitled to any more than the order of Kay, J., gave them. The Court of Appeal, however, expressed some doubt whether the order was right in declaring the vendors entitled to a lien.

APPOINTMENT OF NEW TRUSTEE—"PERSON OF UNSOUND MIND"—TRUSTEE ACT, 1850.

In re Martin, 34 Chy. D. 618, North, J., held (and his decision was affirmed by the Court of Appeal) that a person is of "unsound mind" within the meaning of the Trustee Act, 1850, when, from permanent incapacity of mind, he is incapable of managing his affairs, though his state of mind is not such that he would be found lunatic on inquisition. A contrary opinion expressed by Lindley, L.J., *In re Phelps*, 31 Ch. D. 351, was considered to be erroneous, Lindley, L.J., himself concurring.

COMPANY—WINDING UP—DISTRESS—PROPERTY MORTGAGED BEYOND ITS VALUE—R. S. C. c. 129, ss. 16, 17—COSTS OF SALE.

A question arose *In re New City Constitutional Club Co.*, 34 Chy. D. 646, whether property of a company mortgaged for more than its value is the property of the company, so as to prevent its being sold under distress for rent due by the company. After a winding-up order, Kay, J., held that the landlord was entitled to distrain, notwithstanding 25 & 26 Vict. c. 89, ss. 87, 163 (R. S. C. c. 129, ss. 16, 17). On appeal from the order of Kay, J., the mortgagees consented to release their rights as mortgagees, and to rank as ordinary creditors; but the Court of Appeal, notwithstanding this consent, affirmed the order of Kay, J. The goods had been sold by the liquidator, pending the application for leave to distrain, and the proceeds paid into Court by agreement, less the auction charges. The liquidator claimed to be entitled to be paid out of the proceeds his costs of the sale, but this was refused by Kay, J., and the Court of Appeal affirmed the refusal.

MORTGAGE—LUNATIC MORTGAGEE—APPOINTMENT OF PERSON TO CONVEY—TRUSTEE ACT, 1850, s. 3.

In re Nicholson, 34 Chy. D. 663, was an application under the Trustee Act, 1850, s. 3, for the appointment of a person to convey a mortgaged estate, in the stead of the mortgagee, who was of unsound mind, for the purpose of effectuating a transfer of the mortgage. The application was granted.

PRACTICE—AMENDMENT OF NOTICE OF APPEAL—EXTENDING TIME TO APPEAL.

In re Crosby, Munns v. *Burn*, 34 Chy. D. 664, the Court of Appeal somewhat relaxed the stringent rules which have been laid down respecting the right to appeal after the time has elapsed. In this case the party desiring to appeal within the proper time gave a four days' notice of appeal. After the time for appealing had elapsed, the respondent wrote to say that the notice was bad, as it ought to have been a fourteen days notice. The appellant then applied to amend, by substituting fourteen days for four days in the notice of appeal, but at this time more than fourteen days from the service of the notice had elapsed. The Court of Appeal, although holding that the notice of appeal was bad, and could not be amended as asked after the fourteen days had expired, nevertheless, as the applicant had given a distinct notice of appeal within the proper time, extended the time for appealing so as to allow a proper notice to be served.

SOLICITOR TRUSTEE PROFIT COSTS.

The case of *In re Corsellis, Lawton* v. *Elwes*, 34 Chy. D. 675, is an appeal from the decision of Kay, J., 33 Chy. D. 160, which we noted *ante* vol. 22, p. 414. The Court of Appeal made two important variations in the judgment appealed from. In the first place, the profit costs made on an application for maintenance under the summary procedure of the Court, to which the solicitor trustee and his co-trustee were respondents, and in which the latter's firm acted through their London agents, as solicitors for both trustees, were allowed. In this respect, the Court of Appeal considered the case governed by *Cradock* v. *Piper*, 1 Mc. & G. 664, which, though not approved, had, nevertheless, been so long acted on, that the Court of Appeal held it could not now be overruled. The attempt to limit the effect of that decision to the case of costs incurred in a hostile suit was repudiated. The exception to the general rule that a solicitor trustee may not make profit costs out of the trust estate established by *Cradock* v. *Piper* is thus stated by Cotton, L.J.:

> When there is work done in a suit not on behalf of the trustee who is solicitor alone, but on behalf of himself and a co-trustee, the rule will not prevent the solicitor or his firm from receiving the usual costs, if the costs of appearing for and acting for the two have not increased the expense; that is to say, if the trustee himself has not added to the expense which would have been incurred if he or his firm had appeared only for his co-trustee. For that there is an obvious reason; that it is not the business of a trustee, although he is a solicitor, to act as solicitor for his co-trustee. But the excep-

tion in *Cradock* v. *Piper* is limited expressly to the costs incurred in respect of business done in an action or a suit.

In the second place the Court of Appeal held (reversing Kay, J.) that the fees received by a member of the solicitor trustee's firm as steward of a manor, to which office he had been appointed by the trustees, and which fees were brought into the partnership account of the solicitor trustee's firm, should be allowed, because such fees were not received by the solicitor *qua* solicitor, and it was no part of the trustees' duty to act as steward of the manor.

The Court of Appeal, however, affirmed Mr. Justice Kay in holding that the solicitor trustee must account for profit costs made by his firm in proceedings, in which they had acted as solicitors for the receiver of the trust estate; on the ground that by acting for the receiver the solicitor trustee had put himself in a position adverse to his duty as trustee; and the Court of Appeal also held that Kay, J was right in holding that profit costs incurred by the solicitor trustee's firm in preparing leases of the trust estate, the costs of which had been paid by the lessees, must be accounted for by the solicitor trustee to the trust estate.

ARREST OF DEBTOR—FIDUCIARY CAPACITY—AUCTIONEER

In *Crowther* v. *Elgood*, 34 Chy. D. 691, the Court of Appeal affirmed the decision of Kay, J., holding that an auctioneer is a person acting in a fiduciary capacity within the meaning of the Debtors Act, 1869, s. 4, ss. 3, and if he makes default in payment of the money produced by the sale of goods entrusted to him for sale when ordered to pay it by a Court of Equity, he is liable to attachment, whether he still holds the money or has parted with it.

WILL—CONSTRUCTION—MARRIED WOMAN—RESTRAINT ON ANTICIPATION.

In re Grey, Acason v. *Greenwood*, 34 Chy. D. 712, is a decision of the Court of Appeal (affirming the judgment of North, J., noted *ante* p. 68).

WILL—GIFT AT TWENTY-FIVE—CONTINGENT GIFT—REMOTENESS.

In re Beavan's Trusts, 34 Chy. D. 716, was an application to determine the right to a trust fund which had been paid into Court under the Trustee Relief Act. The fund in question had been bequeathed by a testatrix by her will to her sister for life, and after her death the interest to be paid to the testatrix's daughter (she having first attained twenty-five); if the daughter married with consent of the executors, and died, "leaving children, the interest to be appropriated for the maintenance and education of such children," "and the principal to be divided amongst them as they shall severally attain twenty-five; after the death of the sister, and in the event of the daughter marrying without consent, or marrying with consent and dying without issue," then over. The daughter survived the testatrix, attained twenty-five, and in 1842 married with the necessary consent. The sister died in 1854, and the daughter in 1886, having had two children who survived her. These children claimed to have a vested interest in the fund, and their right was contested by the next of kin who claimed that the gift to them did not vest until they attained twenty-five, and was therefore void for remoteness. Kay, J., held that the fund vested in the children who survived the daughter.

MORTGAGE—SALE—INTEREST—RIGHT OF MORTGAGEE SELLING UNDER POWER TO RETAIN MORE THAN SIX YEARS' INTEREST—STATUTE OF LIMITATIONS.

In re Marshfield, Marshfield v. *Hutchings*, 34 Chy. D. 721, Kay, J., following *Edmunds* v. *Waugh*, L. R. 1 Eq. 418, held that when a mortgagee sells under a power of sale in his mortgage he is entitled, as against a second mortgagee, to retain more than six years' arrears of interest. See *Ford v. Allen*, 15 Gr. 565, to the same effect.

PRACTICE—STRIKING OUT PLEADING—NECESSARY PARTIES—REASONABLE CAUSE OF ACTION.

In *Shafto* v. *Bolckow*, 34 Chy. D. 725, the action was brought by a copyholder to restrain the working of coal under his land by A, who claimed to be entitled to do the acts complained of by virtue of a lease from B, the lord of the manor. B was, by amendment, added as a defendant, it being alleged in the statement of claim that he claimed the right by himself and his lessees to work the coal; that he justified the acts of A, and had received and claimed to be entitled to receive from A rents and royalties in respect of such wrongful working. B applied to strike out the amended statement of claim on the ground that it disclosed no cause of action against

him, and that the action might be dismissed as against him; but this application was refused by Chitty, J., who said, at p. 729:

I have always understood it to be the settled practice that where a person claims a right, that is a ground for making him a party to an action for an injunction.

COMPANY—ACTION BY DEBENTURE HOLDER ON BEHALF OF HIMSELF AND OTHERS—JUDGMENT—RECEIVER.

In *Hope* v. *Croydon & Norwood Tramways Co.*, 34 Chy. D. 730, the action was brought by a debenture holder, on behalf of himself and other debenture holders of the same class, to realize the amount of his claim. On a motion for judgment, a question arose as to the proper form of judgment, the plaintiff being himself a creditor for £1,400, while the whole amount of the debentures of the same class amounted to £15,000. North, J., thought it would be improper to give judgment in the ordinary form for £15,000, or to give judgment for the plaintiff for £1,400, as that would be putting him in a better position than the other debenture holders on whose behalf he sued; he therefore declared that the debenture holders were entitled to stand in the position of judgment creditors for the sum of £15,000 and interest, and appointed a receiver.

MORTGAGE DEBT—MORTGAGE IN JOINT NAMES—JOINT TENANCY, OR TENANCY IN COMMON—JOINT ACCOUNT CLAUSE.

A question arose *In re Jackson, Smith* v. *Sibthorpe*, 34 Chy. D. 732, as to whether a mortgage which had been taken in the joint names of three sisters, as joint tenants, and which contained a clause declaring the mortgage money belonged to the mortgagees on a joint account in equity, as well as at law, was, notwithstanding this declaration, the property of the mortgagees as tenants in common. It appeared by the evidence that the money advanced on the security of the mortgage formed part of the proceeds of the estate of a deceased brother of the mortgagees, to w[illegible] the mortgagees were entitled under his will as tenants in common. It also appeared that the mortgagees, in making their wills, treated the mortgage money as belonging to them as tenants in common; and it was therefore held by North, J., that notwithstanding the terms of the mortgage, and notwithstanding that it was sworn that it had been explained to them by their solicitor, the mortgagees were entitled to the mortgage money as tenants in common.

WILL—CONSTRUCTION—CONDITION PRECEDENT.

In re Hartley, Stedman v. *Dunster*, 34 Chy. D. 742, a testator bequeathed his residuary personal estate to such persons as should, within one year from his death, establish their right or title thereto as his next of kin, with a gift over in default. An order for limited administration, including an inquiry as to next of kin, was made shortly after the testator's death. The persons who were next of kin did not bring in a claim within the year. The question then arose whether the gift over took effect, and North, J., held that it did. The fact that the administration order was not for a general administration of the estate, in his opinion, distinguished the case from *Tollner* v. *Marriott*, 4 Sim. 19.

SALE OF BUSINESS AND GOODWILL—COVENANT BY VENDOR NOT TO CARRY ON BUSINESS UNDER HIS NAME—INJUNCTION.

Vernon v. *Hallam*, 34 Chy. D. 748, was an action against the vendor of a business and goodwill, who had contracted not to carry on business either by himself or jointly with any other person, under the name of the business he had sold,—to restrain him from carrying on business contrary to such covenant, and also from soliciting the customers of the old house to deal with him. Stirling, J., granted the injunction restraining the defendant from using the name of the business he had sold; but, following *Pearson* v. *Pearson*, 27 Chy. D. 145, which he considered overruled *Labou[illegible]* v. *Dawson*, 13 Eq. 322, he refused to enjoin the defendant from soliciting customers.

RECTIFYING SETTLEMENT.

Tucker v. *Bennett*, 34 Chy. D. 754, is a decision of Kekewich, J., in an action brought by a married woman to rectify the trusts of her marriage settlement. The settlement was drawn by the wife's brother, who was a solicitor, who settled the terms with the father and the husband, but did not refer to the intended wife, and she was not informed of its terms. The settlement dealt with money given by the father of the wife, and money of the husband, and there was a covenant to settle the wife's after-acquired property on her for life, and after her death, in default of issue, on her next of kin. The rectification sought was the

introduction of a power to the wife to appoint her after-acquired propertyby will, in default of issue, and giving it to her absolutely in case she survived her husband. No issue had been born of the marriage, and the action was brought fourteen years after the marriage. Kekewich, J., held that the father could not be considered the agent of the daughter so as to bind her by the settlement: that the settlement was in an unusual form; that the husband's assent to the settlement did not, as he was not affected by the proposed rectification, preclude its being made; and he therefore decreed the rectification as prayed.

POSSESSION—INFANTS' PROPERTY—BAILIFF FOR INFANTS.

The only remaining case to be noticed is *Wall* v. *Stanwick*, 34 Chy. D. 763, which is a decision of Kekewich, J., on the rights of infants as against persons in possession of their real property. The owner of a public house and cottages devised them to his widow for life, or widowhood, with remainder to his four infant children. His widow married again, but continued to reside in, and manage the public house; and she received the rents of the cottages, and maintained the children. One of the children, whilst an infant, married, but she and her husband, for some months, lived in the public house. They then left it, and had not since received anything from the estate of the testator, and she and her husband brought this action against her mother for one-fourth of the rents and profits. Kekewich, J., held, that after her second marriage the mother was in possession as bailiff for her infant children, and not as guardian by nurture, or by leave of her children, or as a trespasser; and though on her daughter's marriage the right to receive her share of the rents passed to her husband, that this did not change the character of the mother's possession, nor was it changed when the daughter came of age, and that the mother was therefore a trustee, and liable to account for the rents and profits.

REPORTS.

FIRST DIVISION COURT OF THE COUNTY OF ONTARIO.

MILNE v. CANADIAN PACIFIC RAILWAY CO.

Railway tickets—Duty of station agents as to care thereof—Liability for deficiency without reasonable explanation—Omission to date ticket.

A railway station agent, to whom tickets are issued for sale, is bound to account therefor, in cash or tickets, and must give a reasonable explanation for any deficiency, or otherwise be charged the amount which the company would have earned if the tickets had been sold.

The omission by a station agent to date a passenger ticket does not invalidate it.

[Whitby—October 23, 1886.

The plaintiff had been agent of the defendants at a station on their line named Pontypool, at a salary of $35 per month.

Among his other duties, he had charge of the passenger tickets from his station to others on the line, and was required to make returns of the amount sold, and to pay over the cash proceeds. He gave receipts for all tickets received from the Head office.

On leaving the defendants' employ, the incoming agent took over his office, and tickets were found short amounting to $14.60. The plaintiff refused to be charged with this, and sued the Company for the full amount of his arrears of salary. The defendants paid the claim with costs into court less the above sum of $14.60.

The plaintiff gave no evidence to account for the loss of the tickets. It was admitted that the missing tickets had not turned up at the central office.

G. Y. Smith, for plaintiff.

R. M. Wells, for defendants.

DARTNELL, J.J.—Although the amount involved in this action is comparatively small, the principle involved is of serious import to corporations and employes. The *ad captandum* argument was used that it was beneath the dignity of a large corporation to resist this claim; but it is obvious that the larger the corporation the greater should be the vigilance in guarding against little leaks. A multitude of such will sink a large ship. A pin-scratch may be but a trifling wound, but a man may bleed to death if pricked all over his body. Upon the faithful and efficient performance of every duty by

all the units of the vast army of the employees of an immense corporation, will depend the earning powers of the company.

It was stated that no express authority can be found upon the matter in controversy, and I myself have been unable to find any after diligent search. I think, however, it is not difficult to arrive at a judgment, based upon general and well-defined principles of law.

It will be necessary in the first place to consider and ascertain what is the nature of the documents (for such railway tickets are) in respect of which the defendants seek to make a deduction from the plaintiff's claim; and how far possession and user of such tickets by parties who obtain them unlawfully may affect the defendants' interests.

"Tickets issued by a railway company are *prima facie* evidence of a contract between the railway and the passenger to transport the latter, and his personal baggage, from the station named therein as the place of departure to the station named therein as the place of destination; and is held to be a receipt, token or voucher, showing payment for the passage, rather than a contract; and by its purchase the relation of passenger and carrier is said to be consummated." Wood on Railways, vol. 2 chap. 21, sec. 346, page 1394. See *Bradshaw & South Boston R. R. Co.*, 135 Mass. 407; *Happord v. Grand Rapids R. R. Co.* (Mich.) 18 N.-W. Rep. 580; *Frederick v. Marquette R. R. Co.*, 37 Mich. 342.

Regina v. Boulton, 3 Cox C. C. 576, decides that a railway ticket is a chattel; and in *Regina v. Beacham*, 6 Cox C. C. 181, it was held that the fraudulent taking of a railway ticket for the purpose of using it to travel, and so defrauding the railway company, is larceny; although the ticket would, if used, be returned to the company at the end of the journey.

By our own Larceny Act (sec. 19), the stealing of a railway ticket is made a felony.

A railway agent is allowed a reasonable time to remit money received for tickets or freight, otherwise he would not be liable if robbed. *Robinson v. Illinois Central Ry. Co.*, 30 Iowa 401.

From these cases, and the well known usages and customs of railway corporations, it may be deduced that a railway ticket is a valuable security; the holder of it has a right to travel upon its production (subject to any limitations expressed upon its face), and, to a certain extent, it is as much negotiable by delivery as a bank bill.

The latter is redeemable in gold, the former is redeemable in so many miles of travel. Indeed, in certain cases, it is redeemable in cash; for by "The Railway Passengers Ticket Act," of 1882, popularly known as the "Scalpers Act," (45 Vict. cap. 41), it is provided "That the company shall repay to any ticket holder the cost of his ticket if unused in whole or in part, less the ordinary and regular fare for the distance for which such fare had been used."

It would be a dangerous thing for a conductor to enquire into the title of each passenger to the ticket he produces, and it would be against the general interests of the public that he should do so.

It was argued that as the missing tickets were not dated that they were invalid. I do not agree with this. I do not think a conductor would be safe in rejecting an undated ticket. The date is placed upon it for the convenience of the company, to show the time from which may be calculated the limit of their liability, in accordance with the terms endorsed upon the ticket, or by operation of law. Again, by sec. 3 of the Act above quoted, it is provided that when tickets are sold by authorized agents other than station agents, the name of such agent and the date of sale must be written or stamped upon the ticket; and sec. 7 provides in effect that the sale of tickets in the ordinary way by station agents shall not be affected. By implication, therefore, the dating and countersigning of a ticket is not necessary in the latter case, but is confined to the issue of tickets by agents other than station agents. Nor is there force in the argument that, because the missing tickets have not turned up at the audit office (it being the duty of the conductor to transmit them on taking them up) they have not been used, and that, therefore, the company has lost nothing. It is well known that a large percentage of tickets, *bonâ fide* bought and used, for various reasons, are not presented to or taken up by the conductors, and so never reach the audit office. These missing tickets are even now liable to be presented, and the holders travel thereon, and the defendants defrauded of the fare which would have reached their treasury, if accounted for in the usual way.

If I am intrusted with a number of tickets to sell for a charitable concert, I must account in cash or tickets for the whole number, or give some reasonable explanation for any deficiency. Or if a friend hand me $500 to take care of, and on returning, even the identical package, with a shortage of several bills, surely I must give some satisfactory reason for the shortage. In these cases I would be a gratuitous bailee, but none the less liable.

But the plaintiff in this case was a bailee for hire. It was just as much within the scope of his duties to take reasonable care of these tickets, the loss of which and their subsequent user would deprive the defendants of so much earnings, as stationery, books, office furniture or other property

of the defendants, intrusted to his care. He would not be liable for loss by fire or robbery, unless caused by his neglect. I see no distinction in this case and that of a teller in a bank in charge of so much cash. Such a bailee must give a reasonable explanation of any deficiency, and as the plaintiff does not attempt in any way to account for the four missing tickets it appears to me beyond doubt that he was properly charged with the sum of $14.60, and I give judgment for him for the amount paid into court only. The defendants will be entitled to charge against the latter amount any witness fees paid by them in order to establish their defence.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

COURT OF APPEAL.

SMITH v. CITY OF LONDON INSURANCE CO.

Insurance—Misdescription of premises—Waiver—Arbitration—Statutory conditions.

The judgment of the Q. B. D., 11 O. R. 38, was affirmed on appeal (10th May, 1887).

Robinson, Q.C., and *C. Miller*, for the appellants.

Osler, Q.C., and *Wallace Nesbitt*, for the respondent.

ARSCOTT v. LILLEY.

Magistrate, action against—Conviction not quashed—R. S. O. c. 73, s. 19—O. J. A.—Dismissal of action against magistrate—Costs—Appeal—Irregularity.

The judgment of the Common Pleas Division, 11 O. R. 285, was affirmed as regards the dismissal of the action, but

Held, reversing the judgment below, that R. S. O. c. 73, s. 19, has not been repealed by any of the provisions of the O. J. A., or otherwise, any doubt on the subject having been removed by the re-enactment of s. 19 in the new Revised Statutes of Ontario; and therefore the dismissal of the action should be with costs to the defendant, Lilley, the magistrate, as between solicitor and client.

Held, also, that the plaintiff could not object to the appeal as irregular, on the ground that having been begun by both defendants, it was continued by only one, inasmuch as the plaintiff had availed herself of the appeal for the purpose of bringing on a cross-appeal.

Per OSLER, J.A.—If there was anything in the objection it should have been taken by way of substantive motion to strike out the appeal for irregularity.

EASTMAN v. BANK OF MONTREAL.

Assignment—Proof of claims—Collateral securities.

An appeal from the judgment of BOYD, C. (10 O. R. 79), was dismissed by reason of the members of the Court being divided in opinion.

Per HAGARTY, C.J.O., and OSLER, J.A.—The judgment below should be affirmed.

Per BURTON and PATTERSON, J.J.A.—The appeal of the plaintiff against the Bank of Montreal, so far as it relates to the character of the debts upon the discounted notes, should be allowed.

IN RE O'MEARA AND THE CORPORATION OF THE CITY OF OTTAWA.

Municipal Act, 1883, *s.* 503, *s.* 497 *s. s.* 4.6—*By-law—Sale of meat.*

The judgment of WILSON, C.J., 11 O. R. 603, was affirmed.

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

J. Maclennan, Q.C., for the respondent.

MCKENNA v. MCNAMEE.

Executory contract—Destruction of subject-matter of executory contract by vis major—Rescission of contract.

Where an executory contract is entered into respecting property or goods, if the subject-matter be destroyed by the act of God or *vis major*, over which neither party has any control, and without either party's default, the parties are relieved. The defendants, who had had a contract with the Government of British Columbia for the performance of a public work, but had forfeited it, after a part of the work

had been done, agreed with the plaintiffs that the latter should do the remainder of the work under the contract, and should receive ninety per cent. of the amount of every estimate issued till the completion of the work. The written instrument embodying the agreement referred to the contract as an existing one, but the fact was, as was fully shown by all the parties, that at the time of making the agreement the contract had been forfeited, and the Government had taken possession of the works. No advantage was taken by the defendants; the plaintiffs had examined the contract with the Government, and understood as well as the defendants the exact position of affairs; but all trusted to the possession of certain influence by which they hoped to get back the contract, and resume work upon it.

Held, affirming the judgment of the Queen's Bench Division (not reported), that the failure to obtain a restoration of the contract destroyed the whole consideration for each party's agreement or undertaking.

NEVITT v. MCMURRAY.

Sale—Estoppel — Registration of plan — Vendor and purchaser.

M., being the owner of land adjoining lot 40 on registered plan 396, which belonged to B., on the 5th August, 1880, filed a plan, 327, in which he included lot 40 as part of lot M on plan 327. M., the next day, mortgaged lot M to the O. Co., who sold under power of sale to W., taking back a mortgage. The O. Co. and W. had notice from the registry office that M. had no title to the part of lot M otherwise described as lot 40. On the 29th July, 1880, B. had written to M.: "I hereby offer to sell to you lot 40 . . . for the sum of $250, to be paid six months after this date, otherwise this offer to be null. I agree to pay off incumbrances on this when paying off whole"; and M. had written at the foot, "I hereby accept the above offer." This agreement was not carried out within six months; but on the 1st January, 1883, B. sold and conveyed lot 40 to M. for $400, of which $100 was paid in cash, and $300 secured by a mortgage made by M. (at the request of B.) to the plaintiff.

Held, reversing the decision of PROUDFOOT, J., that the original contract between B and M. was not binding on M.—it was merely an option given to M.—and he not having signified his acceptance within six months the land was free at the time he registered his plan and mortgaged to the O. Co.; and the subsequent sale and conveyance was upon a new bargain and contract.

No interest in lot 40 passed by M.'s mortgage to the O. Co., and the subsequent conveyance to M. went to "feed the estoppel" created by M.'s prior mortgage, only to the extent of M.'s interest, which was that of owner of the equity of redemption, or of the lot charged with $300, and it made no difference that the $300 mortgage was taken to the plaintiff instead of to B., the effect being that W. was the owner of lot 40, subject to a first mortgage of $300 in favour of the plaintiff, and to a second mortgage in favour of the O. Co.

B., having by his bargain with M. and the conveyances in pursuance of it, created in M. the status of owner, and in the plaintiff that of mortgagee, was not in a position, nor was the plaintiff, to complain of the registration of plan 327.

CANADA ATLANTIC RY. CO. v. TOWNSHIP OF CAMBRIDGE.

By-law—Assent of electors—Equality of votes—Casting vote—R. S. O. c. 174, s. 52.

The by-law in question was one to raise upon the credit of the defendant municipality money not required for their ordinary expenditure, and not payable within the same financial year, in order to grant a bonus to the plaintiff.

At the voting of the electors upon the by-law, the ballots for and against it were equal, and the clerk of the municipality, who also acted as returning officer, verbally gave a casting vote in favour of it. This occurred in 1880, and therefore before the enactment contained in 46 Vict. ch. 18, s. 321.

Held, reversing the judgment of the Common Pleas Division, 11 O. R. 392, that the Municipal Act, R. S. O. c. 174, s. 152, is not applicable to the case of voting on a by-law, therefore the casting vote of the clerk was a nullity, and the by-law did not receive the assent of the electors of the municipality within the meaning of R. S. O. c. 174, s. 317

Such a defect could not be cured by promulgation of the by-law.

Per BURTON, J.A.—The provisions of s. 248 of the Municipal Act of 1873, 36 Vict. c. 48, do not apply to by-laws for granting bonuses to railways, and the judgment of the Supreme Court of Canada in *Canada Atlantic Ry. Co.* v. *City of Ottawa*, 12 S. C. R. 377, does not so decide.

WOODRUFF v. MCLENNAN.

Foreign judgment—Defence to action on foreign judgment—Evidence.

In an action upon a foreign judgment the defence was that the plaintiff fraudulently misled the foreign court by swearing what was untrue, to his knowledge, at the trial of the original action. The matter in dispute was a claim for extra services in hauling logs for a greater distance than required by a certain contract between the plaintiff and defendants, and the contest was upon the question whether the services were within the contract or were extra. On this question the evidence of the plaintiff and of one of the defendants, and of one or two other witnesses, was given at the trial in the foreign court, the contract and certain letters were put in, and the Judge's charge to the jury showed that the whole evidence was fully before the attention of the court. The verdict in the foreign court was in favour of the plaintiff, but it was now sought to establish the falsehood of the plaintiff's statements with regard to the extra services.

Held, affirming the judgment of the Common Pleas Division (not reported) (Burton, J. A., dissenting), that evidence under the defence was properly rejected at the trial, for what the defendant proposed to do was to try over again the very question which was in issue in the original action. The charge of fraud was superadded, but that charge involved the assertion that a falsehood was knowingly stated, and before the question of scienter was reached a conclusion of fact adverse to that arrived at by the Michigan jury would have to be adopted.

Per BURTON, J. A.—In admitting evidence under the defence the court would not be assuming to re-try the issues disposed of in the foreign court. The finding upon these issues is conclusive, and cannot be questioned here, but it can be shown that the decision arrived at was obtained by fraud practised upon the foreign court, and that right cannot be defeated because, in order to establish it, it becomes necessary to go into the same evidence as was used on the former trial, to sustain or defeat that issue. The issues are not the same, although if the facts now discovered could have been shown at the former trial they would have secured a different result.

The authority of the decisions of the English Court of Appeal, and the case of *Abouloff* v. *Oppenheimer*, 10 Q.B.D. 395, discussed.

CHANCERY DIVISION.

Robertson, J.] [May 18.

STUART v. GROUGH ET AL.

Demurrer—Action in name of receiver.

S. recovered a judgment against S. S., and plaintiff was appointed the receiver in that suit to receive S. S.'s share of his father's estate which he was entitled to under his father's will. The share not being paid over, plaintiff brought action in his own name against the father's executors to recover the amount. The defendants demurred, on the ground that the cause of action, if any, was vested in S. S., and that plaintiff had no right to bring the action.

Held, that the right of action was in S. S., and not the plaintiff; by his appointment he became entitled to receive the amount, and the defendants, the executors, having notice of his appointment, could not safely pay over the money to any other, and in case they refused to pay over, then the plaintiff should apply for leave to bring an action in S. S.'s name.

The plaintiff, on receipt of the amount, could give a proper discharge of the claim to the executors, but when it became necessary to litigate in order to recover, it should be done in the name of S. S., he being the only person having title to recover at law; *McGuin* v. *Fretts* (not reported) cited and followed.

Moss, Q.C., for the demurrer.

Mackelcan, Q.C., contra.

PRACTICE.

Wilson, C. J.] [May 6.

RE MONTAGUE AND THE TOWNSHIP OF ALDBORO'.

Costs—County Court scale—Arbitration—Counsel fees.

In taxing the costs of an arbitration upon the County Court scale, no greater counsel fee can be allowed than is provided by the County Court tariff, viz.: $25, although the attendance of counsel upon the arbitration has been for several days.

F. E. Hodgins, for the township of Aldboro'.

C. J. Holman, for Montague.

Boyd, C.] [May 25.

APPLEMAN V. APPLEMAN.

Will—Counter-claim—Propounding earlier will—Fraud—Particulars.

The defendant contested the validity of a will propounded by the plaintiff, and also propounded two earlier wills of the testator's, under which, in the event of the last in date being invalidated, he claimed.

Held, a proper matter of counter-claim.

A general defence of fraud is admissible in an action to establish a will; but where such a defence was pleaded the defendant was required to give particulars forthwith after the examination of the plaintiff, and in default, to be debarred from giving evidence on that issue.

Browne v. *Thomas*, 1 Spinks Ec. & Ad. 31, followed.

F. W. Hill, for the plaintiff.

F. E. Hodgins, for the defendant.

Law Society of Upper Canada.

OSGOODE HALL.

CURRICULUM.

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

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

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

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

5. The Law Society Terms are as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FEES

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

BOOKS AND SUBJECTS FOR EXAMINATIONS.

PRIMARY EXAMINATION CURRICULUM FOR 1887, 1888, 1889 AND 1890.

Students-at-law.

CLASSICS.

1887.	Xenophon, Anabasis, B. I. Homer, Iliad, B. VI. Cicero, In Catilinam, I. Virgil, Æneid, B. I. Cæsar, Bellum Britannicum.
1888.	Xenophon, Anabasis, B. I. Homer, Iliad, B. IV. Cæsar, B. G. I. (1-33.) Cicero, In Catilinam, I. Virgil, Æneid, B. I.
1889.	Xenophon, Anabasis, B. II. Homer, Iliad, B. IV. Cicero, In Catilinam, I. Virgil, Æneid, B. V. Cæsar, B. G. I. (1-33)
1890	Xenophon, Anabasis, B. II. Homer, Iliad, B. VI. Cicero, In Catilinam, II. Virgil, Æneid, B. V. Cæsar, Bellum Britannicum.

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

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

MATHEMATICS.

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

ENGLISH.

A Paper on English Grammar.
Composition.

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

HISTORY AND GEOGRAPHY.

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

Optional Subjects instead of Greek:—

FRENCH.

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

or, NATURAL PHILOSOPHY.

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

ARTICLED CLERKS.

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

RULE RE SERVICE OF ARTICLED CLERKS.

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

First Intermediate.

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

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

Second Intermediate.

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

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

For Certificate of Fitness.

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

For Call.

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

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

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