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DIARY FOR MARCH.

2. Tues...Sittings of Court of Appeal, and Sittings C. C. of York for trials begin.
5. Fri......Holt, C.J., died 1710, æt. 68.
6. Sat......Lord Chan. Hardwicke died 1764, æt. 74.
7. Sun....*Quinquagesima Sunday.*
10. Wed...*Ash Wednesday.* First day of Lent.
13. Sat......Lord Mansfield born, 1704.
14. Sun.....*1st Sunday in Lent.*

TORONTO, MARCH 1, 1886.

We publish a letter in another place in reference to the recent Bar dinner. It needs no comment. We have not the pleasure of knowing the writer, but assume he is correct in saying that the article referred to was not read to the meeting which undertook to criticise its language. Our correspondent writes over his own signature in a manly, straightforward manner, and with a proper sense of what the profession owes to its own dignity.

We have seen no reason to retract or alter anything we said in reference to the dinner. We simply expressed the views which later enquiry would seem to shew to be those of all whose opinion is of most value in matters professional. Doubtless the members of the Osgoode Legal and Literary Society have by this time fervently ejaculated, "Save us from our friends." On *its* behalf we protest against the "fiery resolution" which was no doubt intended to put an end to our existence; but which has, we think, in the public opinion of the profession, consumed those men who proposed and carried it. Those who passed it thereby said, "the cap fits," and promptly put it on. For our own part we expressly said the Society's dinner of last year was not marred by such unseemly exhibitions as were noticed on the last occasion, and we do not believe and never said that its members were in any way, as a body or otherwise, responsible for them this year. As to the American Bar it is very well able to take care of itself. We know that there are many men of high feeling amongst its members, who would not have relished the "joke" of their representative, to which we referred, any more than we did. We feel sure that if our remarks, and not an incorrect summary of them, had been read at the meeting of the Society, that unhappy and most inapt resolution would have been laughed out of Court.

The Benchers of the Law Society would act wisely if they referred to Imperial Acts of Parliament before drawing up rules, especially any affecting Irish solicitors, or they will get the credit of sympathizing with the extremest type of Irish Home Rulers, by ignoring *in toto* the legislation of the Imperial Parliament for Ireland. In the new rules of 1885, providing for the admission of solicitors in "special cases" (published on p. 42 of the *Law Journal*), they allow "an attorney and solicitor in the Courts of Chancery, Queen's Bench, Common Pleas, or Exchequer, in Ireland," to apply for permission to practise in Ontario; thus virtually repealing or ignoring (as do Home Rulers) the Imperial Act of 1877, 40 & 41 Vict. c. 57, which abolished these Irish "Four Courts," and declared that thereafter they should be consolidated into one "Supreme Court of Judicature"; and which also abolished the title "attorney" and substituted for it

the more appropriate title of "solicitor." We trust we may assume that the Benchers of the Law Society of Ontario did not, by their ignoring Imperial legislation, intend to show their political leanings towards a policy which Lord Salisbury declares is a menace towards the "dismemberment of the Empire."

OUR ENGLISH LETTER.

Another change of Government has produced great excitement at the Bar, since a shuffling of the Cabinet cards involves not only a redistribution of honours, but also a diffusion of work. Sir Farrer Herschel is Lord Chancellor; in other words, business to the extent of £15,000 a year, or thereabouts, is cast loose. Some of it will go, no doubt, to those modest-looking chambers in Pump Court, where the late Attorney-General, Sir Richard Webster, carries on a tremendous practice. But it is doubtful whether this great lawyer can take in more business; he can only increase his fees. Then Mr. Charles Russell, Q.C., and Mr. Horace Davey, Q.C., have become respectively Attorney and Solicitor-General, which means, of course, that neither of them can manage to keep the whole of their private practice so long as Mr. Gladstone's Government endureth. One begins to look round among the Queen's Counsel to see who the coming men are. Honours appear to be about equally divided between Mr. Murphy, Q. C., Mr. Lockwood, Q.C., and Mr. Crump, Q.C. They are men of different types. Mr. Murphy is of the gently-humorous Irish type of advocate; a sound lawyer and an admirable man with a jury. Mr. Lockwood, who is something of a wit, with a failing for caricature. As one listens to one of his boisterous, but incisive speeches, it is impossible to forget those exquisitely funny sketches which he produces during his leisure moments in Court; and the next thought which suggests itself is that this is a Yorkshireman pure and simple. The latter impression is peculiarly strong when Mr. Lockwood cross-examines a reluctant witness; for there is no cross-examining counsel so crafty or so successful. Mr. Crump has been described in your columns before.

Meanwhile, let me turn for a moment to the admirable almanac which has recently arrived from the Canada Law Journal. Politics have rendered it inaccurate as regards the English Judiciary. For Lord Halsbury insert Baron Herschel; for Sir Richard Webster, Q.C., insert Sir Charles Russell, Q.C.; and in the blank place left for the Solicitor-General let the name of Sir Horace Davey, Q.C., appear. Also, as regards the judges of the Queen's Bench Division, Sir John Eldon Gorst did not accept the vacancy created by the elevation of Sir Henry Lopes to the Court of Appeal, and the change which has been made will be best indicated by saying that it will be a futile enterprise for any Canadian firm to send a Privy Council brief to him who was Mr. Grantham, Q.C., since that gentleman has changed his silk gown for a red one with an ermine tippet.

Were it not that the Divorce Court during the trial of a *cause célèbre* is the most intolerable place on this earth, your correspondent would at this moment be listening to the argument in *Crawford* v. *Dilke*. But the discomfort of being packed like a herring in a barrel is too much to be counterbalanced by the pleasure of hearing a statesman's character ripped up before a bevy of fair and titled spectators. Nor is the business of the Divorce Court a savoury one at the best of times; and perhaps it is hardly creditable to English ladies that on an occasion of this sort the President of the Probate, Divorce and Admiralty Division should be inundated

with petitions for reserved seats. Still the fact remains that he is so inundated, and that the petitioners are for the most part ladies of high degree who do not hesitate to show in the most public manner their keen love for scandal. I am informed, however, on good authority, that the case is not likely to last long, that the arguments for the petitioner are likely to fail by their inherent weakness, and *mesdames et mes demoiselles* are highly likely to endure a bitter disappointment.

Of the legal topics of the day the prevailing and the most interesting are the law in relation to riots and in relation to bills of sale. As every one in Canada must ere this have been well aware, Monday, the 8th of February, was a memorable day in the history of London. For several hours the mob was in undisputed possession of the richest streets in the West End, and an enormous amount of damage was done. In everybody's mouth is the question, whether or not the hundred is liable for the damage, and the answer is that according to the present state of the law the shopkeepers must make good their own losses. For one thing the Riot Act was not read; therefore the rioters, *qua* rioters, were guilty, not of a felony, but of a misdemeanour. This, however, would not exclude the shopkeepers from their remedy if the demolition of their houses had been felonious. But for some inscrutable reason the Court of Appeal has chosen to say, in connection with an election riot at Great Marlow, that partial demolition is not *per se* felonious, unless the rioters had a defined intention of completing the demolition unless they were interrupted. Whether this decision, which is a well-known one, would be reversed if the shopkeepers had recourse to that Supreme Appellate tribunal known as the House of Lords, is more than one can venture to say. But it is at least open to argument that the sound common-sense view of the question is that where through the gross and culpable neglect of the civil authority rioters are enabled to inflict terrible loss upon the trading community, it is grossly unfair that the trading community should bear the entire consequences.

With regard to bills of sale there is an appalling strictness in the decisions of the Court of Appeal. It has been laid down that the smallest material deviation from the form given in the schedule to the Bills of Sale Act, 1882, shall be fatal; and amongst other things the forms prescribed by most of the leading text-books have been held to be hopelessly bad. The net result is a panic among the money-lenders which delights the rest of the world, since these gentry are, to quote the words of that eccentric genius, Mr. Commissioner Kerr, the curse of the country. For the rest there are no complaints, except that perennial one, "the judges are away on circuit, and business is almost at a standstill."

Temple, February 13.

MECHANICS' LIENS.

[COMMUNICATED.]

THE cases of *Lang* v. *Gibson*, 21 C. L. J. 74, and *McCully* v. *Ross*, *ante* p. 63, are conflicting decisions upon a point of Mechanics' Lien law of some importance. In both cases, after sub-contractors had acquired liens under the Mechanics' Lien Act, an execution creditor of the contractor under whom these sub-contractors claimed, applied for and obtained an attaching order against the owner in respect of the moneys due by him to the contractor before the liens were registered, or any suit brought to enforce them. In neither case, however, had the time for registering the liens, or bringing suit to

enforce them, expired when the attaching order was obtained. In the former case Macdougall, Co. J., York, held the lien-holders were entitled to priority over the attaching creditor, but in the latter case Hughes, Co. J., Elgin, held that they were not.

The point in question is by no means free from difficulty; and the difficulty arises from the wording of the section of the Act conferring the right of lien. The third section of the Mechanics' Lien Act gives a mechanic, in the position of a sub-contractor, a lien on the land on which his work is done, or for which materials are provided, by "virtue of being employed or furnishing" materials; but his lien against the land is limited to the amount due from the owner of the land to the contractor through whom he claims. Under this section the lien is not created by its registration, or by the bringing a suit to enforce it. On the contrary the lien is created and exists without registration, or any suit, for the space of thirty days from the completion of the work or the furnishing of the materials for which the lien is claimed, simply by virtue of the sub-contractor being employed, or furnishing materials. But it will be observed that this section is in terms confined to giving a lien on the land on which the work is done, or on which the materials are supplied. It says nothing about giving a lien on the moneys in the hands of the owner due to the contractor, except indirectly. It does do so indirectly, by limiting the lien on the land to the amount due by the owner to the contractor, so that if the owner, having notice of the liens, would discharge the lien on his land, he must apply the money due to the contractor, in paying the claims of the sub-contractors having such liens, so far as it will extend.

By section 8 of the Act, however, the sub-contractor is also expressly given a charge upon the money coming from the owner to the contractor, through whom such sub-contractor claims; but then under that section this charge seems to be confined to those sub-contractors "who notify the owner of the premises sought to be affected thereby, within thirty days after such material is furnished or labour performed" of their claims. But the object of this section, we think, is explained by section 11, which, as amended, protects all payments, up to ninety per cent. of the price to be paid for the work, which are made by the owner without notice in writing of the lien of the sub-contractor. Taking these three sections together I am inclined to think that the proper construction of the Act leads to the conclusion that the lien of the sub-contractor under section 3 is not to be understood as simply confined to the land, but that under that section his lien also extends to the money due by the owner to the contractor through whom such sub-contractor claims; but the right to the lien on the money is subject to the provision that the owner may discharge it by *bona fide* payments to the contractor before he, the owner, has written notice of the existence of the lien of the sub-contractor. If, as the writer is inclined to think is the case, the lien of the sub-contractor under section 3 extends both to the land and the money, then it follows that the case of *Lang* v. *Gibson* is the more correct exposition of the statute.

That section 3 does, in fact, create a lien in favour of a sub-contractor on the money due by the owner to the contractor through whom the sub-contractor claims, notwithstanding the terms in which it is worded we think, after all, is reasonably clear. Suppose by any deed or instrument it was declared that A. should have a lien on the lands of B. for the amount due by B. to C. could it be contended that A. had no lien on the money due by B. to C? We

are disposed to think that it could not, and that is exactly the position in which a sub-contractor is placed under section 3. He is declared to have a lien on the land of the owner to the extent of the money due by the owner to the contractor by whom he (the sub-contractor) is employed. If this be the proper view of section 3, then it is plain that the decision in *McCully* v. *Ross* has proceeded on a wrong basis in assuming the attaching creditor to be prior in point of time, because the lien created by section 3 in favour of the sub-contractor was, according to the statement of the case, plainly prior in time to the obtaining of the attaching order.

No doubt under section 8, if money were attached and paid over under order by the owner before he had written notice of the liens of the sub-contractors upon it, he would be protected. Possibly, however, the money even in such a case could be recovered by the lienholder from the attaching creditor to whom it had been paid. If the owner had written notice of the lien of the sub-contractor it is clear that he would be bound to set up this *jus tertii*, and if he neglected to do so and suffered an order to be made for payment of the money to the attaching creditor, it would be no discharge to him as against the claim of the lienholder.

RECENT ENGLISH DECISIONS.

The *Law Reports* for December comprise 15 Q. B. D. pp. 561-711: 10 P. D. pp. 137-199; 30 Chy. D. pp. 191-657; and 10 App. Cas. pp. 437-679.

WILL—CONSTRUCTION—SUPPLYING BLANK IN WILL.

The case of *In re Harrison, Turner* v. *Hellard*, 30 Chy. D. 390, arose out of the negligent use of a blank form in drawing a will. The will, after providing for payment of debts by the executrix thereinafter named, gave all the testatrix' real and personal property "unto —— to and for her own use and benefit absolutely; and I nominate and constitute and appoint my niece, Catharine Hellard, to be executrix of this my last will and testament."

Both Kay, J., and the Court of Appeal held that the original will might be looked at for the purpose of aiding the construction, and looking at the will and seeing that it was a printed form with blank spaces left by the printer, one of which occurred after the word "unto," which the testatrix had not cancelled or drawn her pen through but left as she found it, they came to the conclusion that the will might be read as elliptically conferring a gift on Catharine Hellard. Lord Esher, M.R., laid down what he termed a golden rule of construction, viz., "that when a testator has executed a will in solemn form, you must assume that he did not intend to make it a solemn farce—that he did not intend to die intestate when he has gone through the form of making a will. You ought, if possible, to read the will so as to lead to a testacy, not an intestacy."

EQUITABLE MORTGAGE BY DEPOSIT—VOLUNTARY PAROL TRANSFER OF CHARGE.

In re Richardson, Shillitto v. *Hobson*, 30 Chy. D. 396, was a case in which an equitable mortgagee by deposit of a deed had handed over the deed as a gift to his nephew, and by parol assigned him the money due in respect of it, and the question was whether this amounted to a valid assignment of the equitable mortgage, and Kay, J. (who was affirmed by the Court of Appeal), held that it did not, and that as the transferee of the deed had not a valid transfer of the charge he was not entitled to retain the deed as against the administrator of the deceased equitable mortgagee.

UNDER-LEASE — EFFECT OF AGREEMENT THAT UNDER-LEASE SHALL CONTAIN THE SAME COVENANTS AS ORIGINAL LEASE.

The Court of Appeal in *Haywood* v. *Silber*, 30 Chy. D. 404, had to consider the effect of an agreement between the plaintiff and defendant whereby the plaintiff agreed to grant the defendant an under-lease of certain property "to contain all usual covenants (including a covenant not to assign or underlet without the consent of the plaintiff, such consent not to be withheld if the proposed assignee or

tenant be respectable and responsible,) together with such other covenants, clauses and provisoes as are contained in the lease under which the premises are held." The original lease contained (1) a covenant that if any dispute arose between the plaintiff and any other tenant of the lessors, it should be referred to the arbitration of the lessors; (2) that the lessee, his executors, administrators and assigns, would not sublet without the license of the lessors; (3) and that all demises and assignments should be prepared by the solicitors of the lessors. The under-lessee claimed that these latter covenants should be merely taken as models of covenants to be inserted in the under-lease, substituting the names of the under-lessor and lessee for those of the original lessors and lessee; but Pearson, J., and the Court of Appeal came to the conclusion, having regard to the special circumstances of the case, that the under-lessor was entitled to have the covenants in the under-lease so framed, that the under-lessee should be bound to refer disputes between himself and any tenants of the original lessors to the latter; and also not to assign or sublet without the consent of the original lessors, and also to have all demises and assignments made by him of the demised premises, prepared by the solicitors of the original lessors.

Appeal by a person not a party—Setting aside judgment obtained by collusion.

In re Youngs, Doggett v. *Revett*, 30 Chy. D. 421, presents some points of similarity to the recent case in our own Court of *Glass* v. *Cameron*, 9 O. R. 712, inasmuch as the appellant was a third party claiming the right to apply to vary or set aside a judgment on the ground of being injuriously affected thereby. The parties to this "triangular duel" stood in the following positions: The plaintiff, Mrs. Doggett, was the residuary legatee of a Mrs. Young, who was the executrix of Mr. Young. Revett was the executor of Mrs. Young, and therefore also the personal representative of Mr. Young. Mrs. Vollum claimed to be a creditor of Mr. Young, and brought a suit against Revett for administration, alleging breaches of trust by Mrs. Young. Revett consented to a decree in this suit. Mrs. Doggett had previously commenced a suit against Revett for administration of Mrs. Young's estate. She now claimed to be injuriously affected by Mrs. Vollum's judgment, and, to use the words of Lindley, L.J., she said in substance:—"I had an action against you, Revett, in which I was claiming the residue of Mrs. Young's estate to which I was entitled, and in order to diminish that residue and make it disappear, you and Mrs. Vollum concocted a suit which was a conspiracy to cheat me; and you, Revett, have, by collusion with the solicitor of Mrs. Vollum, consented to a decree which robs me of every chance of getting a farthing." It was this judgment in the case of *Vollum* v. *Revett* that the appellant claimed to set aside. The Court on the merits held that no case for interference was made out, and dismissed the application. Mrs. Doggett, besides moving to set aside the judgment in *Vollum* v. *Revett*, also appealed from it, claiming to be a party on whom the judgment should have been served, but the Court held that she had no *locus standi*, as she, not being directly interested in Mr. Young's estate, was not a necessary or proper party to proceedings to administer that estate, and therefore had no right to be served with the judgment in *Vollum* v. *Revett*.

Solicitor and client—Conditional delivery of bill.

In re Thompson, 30 Chy. D. 441, was a case very similar to *In re Spencer and McDonald*, 19 Gr. 467. A firm of solicitors delivered to their client a bill of costs accompanied by a letter saying that there were certain charges which, owing to haste, had not been included in the bill, but that they were willing to accept a stated sum in full discharge, though if such sum were not paid in eight days they reserved the right to withdraw the bill and deliver another. The client, however, insisting on being furnished with the particulars of the further charges, the solicitors wrote withdrawing the bill. The client then obtained a common order for taxation, and for delivery and taxation of a further bill. On motion by the solicitors, Bacon, V.C., discharged this order, holding that there had been no delivery of the bill, but ordered the solicitors to deliver a bill. In pursuance of this order the solicitors delivered a second bill of considerably less amount than the first. On appeal by the client from V.C. Bacon's order the Court of Appeal held that the first bill was conditional, but that the con-

dition was one which a solicitor could not impose on his client, and that therefore the original order for taxation must stand, but no costs in the Court below were given because the client, under the circumstances, should not have taken the common order for taxation, but should have applied on petition raising the question of the right of the solicitors to withdraw their bill. The Court was, however, of opinion that a solicitor might deliver a bill stating that there were charges in it which the client could not be forced to pay, but which represented work fairly done, with a suggestion that these charges should be paid, but intimating to the client that if he did not like to adopt the bill he would deliver a bill including only those charges which would bear taxation and could be enforced against the client, and that such a condition would be valid.

TREES—WINDFALLS—PERSONAL REPRESENTATIVE.

In re Ainslie, *Swinburn* v. *Ainslie*, 30 Chy. D. 485, is an illustration of the maxim "*quicquid plantatur solo, solo cedit.*" A testator devised estates upon which there were plantations of larch trees. At the time of his death a number of these trees had been more or less blown down by wind. Pearson, J., held that as between the devisee and the executors the latter were entitled to the trees which had been blown down to such an extent that they could not grow as trees usually grow, and that the trees which were merely lifted, but would have to be cut for proper cultivation, belonged to the devisee. The Court of Appeal refused to assent to this rule. Cotton, L.J., says: "Larch trees naturally grow upright, but it may well be that a larch tree is absolutely fixed to the soil, though it may grow in a position in which, if the wind had not occurred, it would not have naturally grown. That is not the test;" and the Court was of opinion that the only rule which could be laid down was, that if the tree is severed it belongs to the executors, but if it is not severed it belongs to the inheritance; and whether the severance had taken place is a question of fact regarding each tree, but they agreed that if the roots were broken in the soil, so that the tree and its roots were in truth, and in fact, severed from each other, then although some of the broken parts of the tree might still remain covered with earth it would be severed, though to a casual observer it might seem to have some of its roots in the ground.

TRUSTEE—INVESTMENTS ON DEFICIENT SECURITY.

In *Smethurst* v. *Hastings*, 30 Chy. D. 490, the defendants were trustees who, with the consent of a tenant for life, were authorized to make investments upon leaseholds. Investments were made with the consent of the tenant for life, who subsequently died, the parties then becoming entitled to the trust fund took assignments of the securities. It was afterwards discovered that the investments had been made without any proper valuation, that the property was of a speculative value, houses being in course of erection thereon, and unproductive, and that the security was insufficient. The present action was brought to make the trustees liable for the deficiency; and their conduct of the trust, being judged by "the prudent man" standard, was found wanting, and they were held liable by Bacon, V.C., notwithstanding the acceptance of the transfer of the securities by the *cestuis que trust.* It appears by the report that notice of appeal was given but that the case was subsequently compromised.

WILL—BEQUEST OF INCOME TILL MARRIAGE, AND CORPUS ON MARRIAGE.

The question in *In re Wrey*, *Stuart* v. *Wrey*, 30 Chy. D. 507, was a very simple one, arising on a will whereby a testatrix bequeathed the residue of her stocks and shares upon trust to pay the income to G. until his marriage, and at the time of his marriage to hand over the stocks and shares to him—there was no gift over in the event of his not marrying. Kay, J., held that the legacy was vested and that the legatee, being of age, was entitled to an immediate transfer of the stocks and shares to him though he had not married.

WILL—SECOND COUSINS—FIRST COUSINS ONCE REMOVED—GIFT OVER.

In *Wicks* v. *Bannister*, 30 Chy. D. 512, Kay, J., held that under a gift to second cousins first cousins once removed would take—the testator not having in fact any second cousins, either at the date of his will or when he died, and that a gift over on death "before payment" of the bequest was to be construed as "before becoming entitled to payment."

RECENT ENGLISH DECISIONS.

PARTNERSHIP—MORTGAGE OF SHARE OF PARTNER.

In *Whitham* v. *Davey*, 30 Chy. D. 574, the question arose as to the date at which a mortgagee of a share of a partner in the partnership, was entitled to have the account of the mortgaged share taken. North, J., held that the proper date at which the share should be ascertained, was the date of the commencement of the action to enforce the mortgage, but if there had been a prior dissolution of the partnership, then the date of such dissolution would have been the proper date.

BILL OF EXCHANGE—FOREIGN ENDORSEMENT—CONFLICT OF LAWS.

A question of mercantile law came up *In re Marseilles Extension Ry. Co., Smallpage's and Brandon's cases*, 30 Chy. D. 598. Bills of exchange were drawn in France by a domiciled Frenchman, in the French language in English form, on an English company who duly accepted them. The drawer endorsed them to an Englishman in England. The acceptors disputed their liability to the latter on the ground that the endorsements were invalid according to French law, but it was held by Pearson, J., that the endorsements being valid according to English law the endorsee was entitled to recover; the form of the bill leading to the conclusion, that, as between the drawer and acceptors, they were intended as English bills. The contest arose upon the winding up of a company, and though the liquidator failed in the contest, it was held that the costs should not be awarded against him personally, but should be borne by the estate.

WILL—DEVISE OF ONEROUS PROPERTY.

The simple question in *Syer* v. *Gladstone*, 30 Chy. D. 614, was whether a person entitled under a will to a freehold house and the furniture and effects therein for life, could—there being a mortgage on the house—enjoy the use of the furniture without also keeping down the interest on the mortgage, and Pearson, J., held that he could.

FORFEITURE CLAUSE ON BANKRUPTCY.

Robertson v. *Richardson*, 30 Chy. D. 623, is a case turning upon a clause in a settlement for forfeiture, in case of bankruptcy. The property in question was settled upon the husband of a married woman after her death for his life, with a gift over in the event of his bankruptcy or liquidation. In 1881 he filed a liquidation petition under which, in October, 1881, a trustee was appointed. In January, 1883, he obtained a discharge. In April, 1884, the wife died. In March, 1885, the trustee assigned to the husband, for value, all the property belonging to him at the commencement of the liquidation, and devolving on him subsequently up to the date of the discharge, other than that which had been already received by the trustee. The liquidation was never formally closed, but the trustee had never made any claim to the settled fund. Pearson, J., held that the forfeiture had taken effect, for the reason that the wife having died in April, 1884, the bankrupt in June, 1884, would have been entitled to receive an apportioned part of the income, or, at any rate, would have been entitled to receive the income six months after his wife's death, and at that time he had no protection from the trustee in the liquidation, who, therefore, but for the forfeiture clause, would have been entitled to receive the income, and was the only person who could have given a discharge for it, and on this ground, viz., that a right to receive the income had accrued during the bankruptcy, he distinguished the case from *Whyte* v. *Chitty*, 1 Eq. 372; *Lloyd* v. *Lloyd*, 2 Eq. 722; and *Ancora* v. *Wadell*, 10 Chy. D. 157.

EXPROPRIATION OF LAND—TAKING MORE THAN IS NEEDED.

Teuliere v. *St. Mary Abbotts*, 30 Chy. D. 642, is a case very similar to *Gard* v. *Commissioners of Sewers*, 28 Chy. D. 486, noted *ante*, vol. xxi., p. 210. A municipal body, for the purpose of widening a street, required part of the buildings and site of an orphanage, leaving a substantial part of the premises not actually required, and it was held by Pearson, J., that the owners wishing to sell only the part actually required, the municipality could not take the whole.

CONVERSION—REAL ESTATE—ELECTION TO TAKE PERSONALTY AS REALTY.

The only remaining case to be noticed in the Chancery Division is *In re Lewis, Foxwell* v. *Lewis*, 30 Chy. D. 654. In this case a testator being entitled to a house, of which he had agreed to grant a lease for twenty years

with an option to the tenant to purchase the reversion at any time during the term, devised the property to trustees on trust to sell and pay the income to his wife during her life or widowhood, and after her death or second marriage to divide the trust fund equally between his children who should survive him. The testator died in 1869, leaving his widow and two children. The latter died without issue and unmarried in the lifetime of the widow. The property subject to the lease was not sold, and the tenant had not exercised the option to purchase. The widow continued in the receipt of the rents of the house until 1885, when she died without having married again. The question then arose whether the house passed to her heir or next of kin, and Pearson, J., held that it went to the next of kin as personalty, and that the wife could not be deemed to have elected to take the property as realty by reason of the existence of the tenant's option to purchase, and on this ground he distinguished the case from *Re Gordon*, 6 Chy. D. 531. In doing so he gave expression to a regret that it is not the law that property is always to be taken in the character in which it is actually found at the time when it is to be distributed.

RESTRICTIVE COVENANT—WHAT AMOUNTS TO.

Turning now to the Appeal Cases we find none of them requiring notice here, and we only propose briefly to refer to *Russell* v. *Watts*, 10 App. Cas. 590, not for the purpose of drawing attention to the point decided, but for the sake of extracting an observation of Lord Blackburn on the form and effect of covenants. He says, at p. 611:—

> I take it to be clear that any form of words which, when properly construed with the aid of all that is legitimately admissible to aid in the construction of a written document, indicates an agreement, forms, when under seal, a covenant, and that a covenant may, if it is necessary, in order to carry out the intention, operate as a grant.

As illustrative of the expedition of the English reporters we may say that the report of the appeal of the late rebel Riel to the Privy Council, which was heard in the latter part of October, appears in this number of the Appeal Cases.

This concludes our review of the December number of the *Law Reports*.

REPORTS.

ONTARIO.

COUNTY COURT OF THE COUNTY OF ONTARIO.

RE CREDITORS' RELIEF ACT AND DUNCAN ET AL. V. TURNER; SMITH, Garnishee, and MADELL V. TURNER.

Creditors' Relief Act—Payment to the Sheriff by a debtor of the defendants, and by a garnishee—Moneys in Court.

Held, 1, that a payment into Court, in anticipation of an attaching order, by a party having moneys in his hands belonging to the debtor, was properly made and constituted a levy within the meaning of the Act.

Held, 2, that an order directing the Clerk of a Division Court having moneys in his hands (paid into Court by a garnishee) to pay the same over to the Sheriff was properly made, even if the prior payment to the Sheriff was not sufficient to bring the matters within the scope and meaning of the Act.

The summons to set aside the order having asked costs, and having charged collusion and misconduct against the opposing solicitor and his client and officers of the Court, was discharged with costs.

[Whitby—January, 1886.

On 17th December, 1885, Duncan and Parsons recovered judgment against the defendant, R. H. Turner, in the 5th Division Court of the County of Ontario for $86.04, and against George Smith, the garnishee, in the same action for $87, which the latter paid into Court. On the same day Madell recovered his judgments against Turner, executions upon which were returned *nulla bona*, and these judgments were subsequently made County Court judgments, and writs against goods and lands placed in the Sheriff's hands.

Previous to the recovery of these judgments, Turner had assigned to his father, William Turner, all his book debts and the sum due to him from Smith. William Turner intervened in the garnishee proceedings, claiming the money in Smith's hands as garnishee under his assignment, and the claim was disallowed; it being held that the assignment was void under R. S. O., c. 118.

Mr. Hayes, acting as solicitor for William Turner, collected book debts to the amount of $9.75, and as it had been decided in effect that these moneys were the moneys of the defendant R. H. Turner,

he, on 2nd January, 1886, paid the sum into the hands of the Sheriff, who thereupon, made an entry in his books under "The Creditors' Relief Act."

On the 7th January, 1886, Duncan and Parsons applied to the Clerk of the 6th Division Court for payment to them of the amount paid in by Smith, which payment he declined to make, having been notified by Madell's solicitor not to do so, as he claimed a share of the moneys.

Madell's solicitor, on 13th January, 1886, obtained an *ex parte* order directing the Clerk to pay over to the Sheriff, under "The Creditors' Relief Act," the moneys in his hands, which order was complied with, and the Sheriff entered the receipt of such moneys in his books on the 19th January.

Duncan and Parsons then obtained a summons to set aside the order of 13th January, and for an order directing the Sheriff to repay to the Clerk the moneys transmitted, and the summons asked for costs against Madell.

The affidavit upon which the summons was granted charged collusion against Madell, his solicitor and the bailiff of the Division Court.

N. F. Paterson, Q.C., for the applicant, contended that the Judge was deceived or surprised into making the order of 13th January; that the first payment to the Sheriff was a collusion and fraudulent contrivance to bring the case within the provisions of the Act; that the moment the moneys came into the Clerk of the Division Court's hands they became at once the moneys of Duncan and Parsons, and that under ss. 2, of sec. 21, the Sheriff's only remedy was by action and not in a summary way.

DARTNELL, J. J.—I am confirmed in my opinion that "The Creditors' Relief Act" applies in this case. Section 21 seems to provide for cases (which are not uncommon, where the only assets the debtor has are book, or other, debts due to him. It would be impossible in such a case to make an actual, or tangible, seizure or levy. Sub-sec. 4 of that section enacts that "moneys garnished and paid into the Sheriff's hands, shall be deemed to be moneys levied under executions within the meaning of the Act."

I think all the facts show that sec. 21 applies—Mr. Hayes anticipated an attachment of the moneys in his hands by the Sheriff by paying these moneys to the Sheriff. I can see no reason—because they are moneys—why they should not be available for Turner's creditors. If Mr. Hayes, instead of holding money, had become the bailee of a chattel, surely he would be justified in handing it over to the Sheriff.

Then, as to the moneys paid into Court by Smith under sub-sec. 6, even if the Clerk had paid over to Duncan and Parsons, the Sheriff could *recover* from them. If these funds were in Court, they were under the Court's control. If they were not under such control, but were the absolute property of the garnishors, then the Sheriff could recover them from the garnishors. What the latter seem to complain of is that the funds were made available for Turner's creditors, including themselves, not by action but in a summary way. I think the word "recover" is broad enough to include what has been done, and that the Sheriff is not bound to bring an action.

If the Sheriff does not take any proceedings, s.s. 2, of sec. 21 permits "any person entitled to distribution to take the same for the common benefit of himself, and all other persons entitled."

This was done in the case under consideration.

I think the order of the 13th January was made properly, even if the first payment of $9.75 was not equivalent to a levy by the Sheriff, but I think it was.

The policy of the law now definitely recognizes the principle of equal distribution of assets. Where a creditor has received his debt in full from an executor or administrator, and there is a deficiency of assets, the other creditors can recover back from the favoured creditor any excess over and above a rateable dividend among all the creditors. The same principle has recently been extended by the Chancellor, in the case of *Dawson v. Moffat*, to stop orders affecting funds in Court.

I think in this case the spirit if not the letter of the Act has been complied with, and I dismiss the summons. The points being difficult and new, I might have done so without costs; but, as charges of misconduct and collusion have been made against Madell and his solicitor, which have wholly failed, and as costs were asked against Madell, I discharge it with costs, to be paid by the applicants to Madell. If the Sheriff, who was served with the summons, has any costs, these are to be paid by Madell, and added to his own costs.

RE THOMPSON, AND THE CREDITORS' RELIEF ACT.

Levy—Notice by sheriff of entry—Priority of costs—Valuing security.

[Whitby, June 15, 1885.—Dartnell, J.J.]

DARTNELL, J.J.—The sheriff must take the responsibility of determining when he should make the entry in his books, directed by sec. 5, sub-sec. 2, and *semble* the judge has no authority to direct him to amend his entry, even if he considered it wrong.

There is no priority for costs under the Act.

There is no provision for valuing securities, but the dividend o secured creditors was directed to be retained until further order, so as to await either the realization of the securities, or a valuation thereof by the creditors holding, should they be willing or advised so to do.

COUNTY COURT OF T COUNTY OF ELGIN.

MUNRO v. ST. THOMAS BISCUIT AND CONFECTIONERY COMPANY.

Joint Stock Companie. Winding-up Act, 41 Vict. ch. 5—Ontario Joint Stock Companies' Letters Patent Act, R. S. O. ch. 150—Contributory—Right of paid-up stockholder to petition for winding-up order.

[St. Thomas, Jan. 12, 1886.

The petitioner was a stockholder in this company which was formed by letters patent under R. S. O. ch. 150. All his stock was fully paid up and he became and continued to be its manager from its inception until, through his mismanagement, as alleged, it became involved in financial difficulties. The directors, of whom he was one, borrowed money to keep its business afloat by discounting their private note at the bank. Then the shareholders displaced the petitioner and appointed another manager, and the new manager's name was substituted for Munro's on the renewal of the bank paper. One Reynolds, who was one of the directors, was subsequently pressed by the bank to pay the note overdue, and he was obliged to retire it out of his own funds. He immediately sued the company, and recovered judgment by default. Execution was placed in the sheriff's hands and all the plant and assets of the company were seized and advertised for sale. The petitioner then, upon allegations of fraud on the part of the directors by allowing that judgment to be recovered, presented a petition under section 5 of the Winding-up Act. The period fixed for the duration of the company had not expired, and no event, other than the insolvency of the company, had transpired by which the company could be wound up compulsorily or otherwise, nor had the directors passed any resolution requiring it to be wound up under section 4.

A summons was taken out, calling upon the company and the execution creditor to show cause why the company should not be wound up so that the property seized might be applied in satisfaction of its liabilities and be distributed amongst the members under the Winding-up Act, and an order was made upon the sheriff staying proceedings upon the execution.

HUGHES, Co.J., *held* (1) That a stockholder who has paid up his stock in full is not "a contributory" within the meaning of sub-sec. 2 of secs. 3 and 5.

(2) That the execution plaintiff, under the facts stated, had a right to recover a judgment for any debt due to him by the Company as for money paid to their use.

(3) That the petition must be dismissed because it would be unjust to the execution creditor, and there being no fraud shown to exist; and because all the creditors could give notice to the sheriff under the Creditors' Relief Act quite as well as to share under a winding-up order.

The following cases were referred to by the learned judge in the course of his judgment: *Re National Savings Bank Association*, L. R. 1 Chy. 547; *Re Anglesea Colliery Case*, L. R. 2 Eq. 37, 1 Chy. 555; *Rica Gold Washing Co.*, L. R. 11 Chy. Div. 42.

SECOND DIVISION COURT OF NORFOLK.

COOMBS v. MICHIGAN CENTRAL RY. CO.

Railway—Accident—46 Vict. ch. 24, sec. 9—Fences—Occupant—Damages not by train or engine—Negligence.

The plaintiff sought to recover $40 damages from the defendants for the loss of his cow which was killed by an employé of defendants under the following circumstances:—It and another cow were grazing in a field adjoining the defendant's railway track which was fenced off therefrom by a fence some 3 feet 8 inches high, which is much less than the height of an ordinary fence, viz., 5 feet, as required by the Railway Act. Plaintiff's cow was simply being pastured there, plaintiff paying the owner of the land so much per month therefor The cows broke down a part of the fence and r

on to the track. Defendants' section-man coming along found the cows there, and seeing where they had got in tried to drive them out where they had got in, the fence being at that point about 2 ft. 8 inches high. The other cow jumped the fence successfully, but plaintiff's cow got one of her hind legs caught between the fence and the top rail which had been knocked down by the cows in getting on to the track, broke her leg and had to be killed.

T. R. Slaght, for plaintiff.

Kingsmill, Cattanach and Symons, for defendants.

LIVINGSTONE, Co. J.—I think plaintiff must fail. In the first place, if the damages sued for are such as are contemplated by the statute, I do not think he is an occupant within the meaning of the Railway Act, 46 Vict. ch. 24, sec. 9 (see the remarks of WILSON, C.J., and ARMOUR, J., in *Conway* v. *C. P. Ry. Co.*, 7 Ont. Rep. 673), and so cannot recover. Although the case is not expressly in point and is now in appeal before the Supreme Court, still the reasoning is applicable. I think the occupancy must be of some distinct part of a lot either in severalty or jointly with some one else, and that a mere right to put a cow into a certain field for the purpose of pasturing it does not constitute an occupancy within the statute.

In the second place, I do not think the action will lie under the statute, because the damage was not done by the defendant's trains or engines.

In the third place, admitting that there is no statutory liability, I do not think there is any common law liability, inasmuch as I do not think that the section-man was guilty of such negligence as to entail any legal liability upon the defendants, as I do not think he acted unreasonably in the premises.

ASSESSMENT CASE.

COUNTY OF ONTARIO.

RE THE CANADIAN PACIFIC RAILWAY AND THE TOWNSHIP OF PICKERING.

Assessment of land used—Road-bed for railway—Station grounds—Gravel pits.

[Whitby, June 16.—Dartnell, J.J.]

The Canadian Pacific Railway passed through the Township of Pickering, occupying as road-beds and one station-ground about 146 acres of land. They also had acquired about 14 acres which they used as gravel pits.

MacMurchy, for the company.

J. E. Farewell, for the township.

DARTNELL, J.J.—The 146 acres should be assessed according to the average value of the holdings through which the railway passes, irrespective of the fact that many of the farms are of less size than 200 acres—the whole township lot.

The station building should only be assessed for any excess in value over and above the average value of farm buildings upon the farms in the neighbourhood, approximate in size to the quantity of land used by the railway.

The gravel pits should be assessed according to their value to the company as such, and not as farming lands.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

QUEEN'S BENCH DIVISION.

IN BANCO.

CHRISTIE V. BURNETT.

Memorandum in writing—Statute of Frauds—Parol evidence.

Held, that the letters of the defendant set out in the case constituted a sufficient note or memorandum in writing within section 17 of the Statute of Frauds, and that parol evidence was admissible to show what the words "work" and "rig" used therein referred to.

Creasor, Q.C., for motion.

Masson, Q.C., contra.

SHERIDAN V. PIDGEON.

Negligence—Surgeon—Addition to verdict.

In action against a surgeon for negligence the jury, in finding for plaintiff, added this to verdict: "We are of opinion that defendant made a mistake in not calling in skilful assistance, but not wilfully or through inattention."

Held, a mere expression of opinion, and that it did not nullify or affect the verdict.

Nesbitt, for motion.

Masson, Q.C., and *Stone*, contra.

REYNOLDS V. ROXBURGH.

Hiring chattel for reward—Implied warranty.

Held, that the hirer out of a chattel for reward impliedly warrants its fitness for purpose hired.

Nesbitt, for motion.

Dumble, contra.

LEGACY V. PITCHER.

Venue—Abolition of, by O. J. Act.

Held, that local venue is abolished by the Ontario Judicature Act.

V. McKenzie, Q.C., for motion.

G. T. Blackstock, contra.

REGINA V. FEARMAN.

Larceny—43 *Vict. c.* 28, *s.* 66—*Conviction.*

The prisoner was indicted for larceny under the Indian Act, 1880, section 66, and was convicted.

Held, WILSON, C.J., dissenting, that he ought not to have been convicted, because, *per* ARMOUR, J., the wood, the subject of the alleged larceny, was not "seized and detained as subject to forfeiture"; and because, *per* O'CONNOR, J., the affidavit required by section 64 had not been made, and was a condition precedent to a seizure.

Per WILSON, C.J., that he was properly convicted.

Johnson, for the Crown.

McKenzie, Q.C., contra.

CHANCERY DIVISION.

Ferguson, J.] [February 15.

RE FLEMING.

Executor—Compensation—Commission—R. S. O. c. 107, *s.* 36-40.

This was a petition by an executor of the will of Charles Magrath, deceased, asking the Court to fix a fair and reasonable allowance for his care, pains and trouble and time expended as executor in and about the estate of the said Charles Magrath. A reference was accordingly made to the Master in Ordinary to fix the amount of compensation, under R. S. O. chap. 107, sec. 36-40. Evidence was taken in his office, from which it appeared that Charles Magrath died in the month of May, 1884, leaving a will by which he made William Magrath sole legatee and devisee of the whole of his property, with the exception of an annuity of $400, payable to his widow. He added, however, the following words after the general bequest to William Magrath, "I commend to his care my said dear wife, and that, notwithstanding the above bequest, that in as far as in him lies he shall see that she does not want for all reasonable maintenance and comforts becoming her station in life." And he appointed the present petitioner and W. Magrath executors of his will. The evidence further shewed that the estate of which Charles Magrath died possessed amounted to between $115,000 and $120,000, of personalty consisting of some $32,000 on deposit in a bank, and of a number of debentures and stock of various descriptions, a great many of which were payable to bearer. The evidence further shewed that the actual labour involved in connection with the estate, which, under any circumstances, did not seem to have been very great, was done by the solicitor of Mr. William Magrath, acting also for the present petitioner in the matter, and that the present petitioner did such acts as were required by way of conformity, such as signing checks when required and doing formal acts required, first, to put the estate in his name and in the name of his co-executor, and then transfer it to Mr. William Magrath solely; but the petitioner appeared to have relied implicitly on the advice of the said solicitor in what he did. Mr. William Magrath himself lived away from Toronto where the work was done, and where the deceased died, and consequently what there was for the executor to do was mainly done by the petitioner, who also exerted himself to procure an additional sum for the widow in furtherance of the wishes of the testator expressed in the words quoted above. The Master in Ordinary allowed as commission two and one half per cent. upon the $32,000 on deposit in the bank, which, it appeared, had been paid out on the cheque of the executors to various persons to whom the said solicitor had loaned it upon mortgage of real estate, and he allowed a commission of one per cent. upon the amount

of the debentures and stock. Upon appeal from the report on the grounds that the commission was inadequate, and not in accordance with the principles heretofore acted upon by the Court in these cases, the commission for the petitioner was increased to three and one half per cent. upon the whole of the estate. After a review of the authorities the learned judge said: "I think I may without more express the opinion of which I had scarcely any doubt at the beginning or at the argument that our Courts have adopted a commission or percentage as a means of ascertaining or measuring the amount of the allowance to be awarded to executors, trustees and administrators under the provisions of the statute, and that it is the mode adopted generally when the circumstances of the case are such as to admit of its ready adoption, and that the cases in which a different mode or method has been adopted are to be considered as exceptions to this rule, which should be considered the general rule, the exception in each instance being for some good reason appearing in the case, and I think it sufficiently appears from the cases that the usual percentage or commission allowed is five per cent. upon the amount of the estate got in and paid or over properly applied, and that this in the ordinary case is allowed upon the determination of the trust, although there are exceptions to this last. This rate of five per cent. in the ordinary case seems to be so generally alluded to in the authorities that I think it may be safely said to have been adopted as the general rule in measuring the allowance under the provisions of the statute." He then proceeded to say that looking at the relative amount of work done and services rendered by the petitioner as compared with the co-executor, William Magrath, he considered that of the commission of five per cent. the petitioner was entitled to at least one per cent. more than the half.

S. H. Blake, and *A. H. F. Lefroy*, for the petitioner.

Boswell, for the respondent, William Magrath.

PRACTICE.

Rose, J.] [February 16.

BROWN v. PORTER.

Postponing trial — Costs.

Where a party has made diligent efforts to secure the attendance at the trial of a witness within the jurisdiction of the Court, and has failed to secure it from a cause which he could not control, the costs of an application by such party to postpone the trial should be costs in the cause, unless it was possible to take the evidence before a special examiner, or the knowledge of the fact that the attendance could not be secured came to the applicant in time to enable him to advise the other side, so that the witnesses might be notified not to attend.

Watson, for the plaintiffs.

Lount, Q.C., for defendants.

C. P. Div.] [February 16.

RE BUSHELL v. MOSS.

Prohibition—Division Court—Title to land—Question of fact.

The plaintiff sued in a Division Court for the conversion of a mirror, which, the defendant contended, was annexed to the freehold and passed therewith. The judge of the Division Court found that the mirror was a chattel and gave judgment for the plaintiff.

Held, that the Court could not interfere by way of prohibition.

W. H. P. Clements, for the plaintiff.

Aylesworth, for the defendant.

Chan. Div. Ct.] [February 20.

CANADIAN PACIFIC RY. CO. v. MANION.

Changing place of trial—Ejectment—Rule 254 O. J. A.—R. S. O. ch. 51, sec. 23.

The decision of PROUDFOOT, J., *ante*, p. 70, was affirmed on appeal.

W. H. P. Clements, for the appeal.

Arnoldi, contra.

CORRESPONDENCE.

ULTRA VIRES.—III.

LICENSES AND PROHIBITION.

To the Editor of the LAW JOURNAL:

Having now obtained the latest decision of the Privy Council that the McCarthy Act, as it has been called, is unconstitutional, it may be useful to discuss briefly the net result of the various decisions of the Court of last resort on questions arising out of the provisions of the B. N. A. Act respecting the Liquor Traffic and Licenses. I will first set out the wording of the B. N. A. Act on these points respectively:—

"Sec. 91: Parliament may make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to

"2. The regulation of trade and commerce.

"3. The raising of money by any mode or system of taxation."

Then in each Province, by sec. 92:

"The Legislature may exclusively make laws in relation to

"2. Direct taxation within the Province, in order to the raising of a revenue for Provincial purposes.

"8. Municipal institutions in the Province.

"9. Shop, saloon, tavern, auctioneer and other licenses, in order to the raising of a revenue for Provincial, local or municipal purposes.

"13. Property and civil rights in the Province.

"15. The imposition of punishment by fine, penalty or imprisonment for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section.

"16. Generally all matters of a merely local or private nature in the Province."

I.—THE CANADA TEMPERANCE ACT OF 1878.

The object of this Act being evidently to diminish the evils caused by intoxicating drinks, it is clearly a law for the peace, order and good government of Canada, in relation to a matter not assigned exclusively to the Local Legislatures. It is also an Act which affects the trade in intoxicating liquors wherever enforced, and so comes within the subject "regulation of trade." It is difficult, therefore, to understand how it could have been gravely contended that the Act was unconstitutional.

II.—THE PROVINCIAL LICENSE ACT.

When the Imperial Parliament assigned "licenses in order to the raising of a revenue" to the Local Legislatures, they created a sub-class out of the more general subject of "the regulation of trade" or "the raising of money by any mode or system of taxation," which were given to Parliament; therefore, according to the canons laid down in the first letter of this series, Parliament cannot in any manner legislate on this subject.

There are several objects which a license law may be supposed to have in view, as (*a*) in order to the raising of a revenue for Provincial, local or municipal purposes; (*b*) by limiting the number allowed, to diminish the amount of drinking, and so to lessen the evils arising from the excessive use of intoxicating liquors; (*c*) by making regulations to be observed by the license holders to secure, as far as possible, orderly behaviour in taverns and saloons, for the furtherance of peace, order and good government.

Apart from decided cases one would suppose that the Local Legislatures could only legislate upon licenses to raise revenue (*a*); the objects, (*b*) and (*c*) appearing plainly to come within the duties and powers of the Federal Parliament. If this be so, then the Legislatures are really confined to the taxation of all persons engaged in any of the businesses referred to, and such taxation must be *bona fide* for revenue merely, and must not be imposed with a view of prohibiting or diminishing the volume of the liquor traffic. Nor can it be coupled with any measure to regulate the traffic, or to provide for peace, order and good government. Any measure to secure these objects ought to come from Parliament.

The power to impose a tax of this kind may carry with it the power to punish any person who attempts to carry on any of these callings without paying the tax required (ss. 15 of s. 92). But it does not necessarily carry with it the power to limit the number of licenses to be issued in any place. That seems to me to be a restriction of trade not *bona fide* required "in order to the raising of a revenue." So that (apart from judicial decisions) it appears to me that the Local Legislatures have no right to limit the number of licenses; and that they must allow all who pay the tax demanded to exercise the calling. Nor,

again, would it be *bona fide* within the powers given to the Legislatures to place the license fees so high as to be practically prohibitory, for that again would be for quite a different object than the raising of a revenue. It would seem thus far to be the prerogative of Parliament alone to pass all laws intended to prohibit wholly or in part the trade in intoxicating liquors, or to discourage it, or to diminish the evils arising from it.

Some writers in the press, since the decision in the McCarthy Act case has been cabled from England, have hastily rushed to the conclusion that if the McCarthy Act is *ultra vires* so must the Canada Temperance Act, and they quote the argument of Chief Justice Ritchie that the power to prohibit must of necessity go hand-in-hand with the power to permit. One writer asks: "Of what use is the privilege of issuing licenses for the purpose of raising a revenue to the Provinces while the Dominion Parliament has the power to say that only so many licenses, or even none whatever, shall be issued?" But I see no difficulty. It is not exact language to say that the Provinces have the power to permit the liquor traffic; they really only have the power to impose a tax on every person who carries on that traffic, and reading the two provisions together they amount to no more than this: Wherever the Dominion Parliament allows the trade in intoxicating liquors to be carried on, then the Legislatures may compel every person carrying on such traffic to pay a tax for local revenue purposes.

Carrying out the same reasoning it would seem that all provisions regulating the hours of business, the closing on Sunday, and every particular intended to instigate or prevent the evils arising from the traffic, should be within the jurisdiction of the Dominion only. I am aware that the Privy Council has decided otherwise in the Hodge case on the ground that such regulations come fairly within the subject of municipal institution, and matters of a merely local or private nature in the Province; but it may be permitted to me, following the example of the great judge at Calgary who has criticized so fully the very highest courts, to give reasons for thinking that the Privy Council did not correctly decide the Hodge case in that aspect of it.

For if the regulations in question, considering their object and purpose, come fairly within the regulation of trade, and not expressly within any subject assigned exclusively to the Legislatures of the Provinces, then they can only be validly passed or authorized by Parliament. Do they, of necessity, come within the subject of "municipal institutions in the Province?" I think not. There might be no municipal institutions in the Province at all. These institutions are organized to assume and exercise a portion of the functions of government in the particular localities, and a municipal corporation or government cannot be authorized to do what the legislative body creating it could not do itself.

Then do the regulations there in question come within the "matters of a merely local or private nature in the Province," referred to in sub-section 16? Still less, in my opinion, considering always the object and purpose in view, and especially considering the final part of section 91, which provides that "any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration in the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces." If, then, the regulations in question come fairly within the subject of the regulation of trade, or are laws for the peace, order and good government of Canada in relation to matters not (expressly) assigned exclusively to the Legislatures, they do not come within sub-section 16. I have, I think, given good reasons for thinking they do not necessarily come within sub-section 8—"municipal institutions"—and, if not, they are not within the authority of the Legislatures at all.

It is to be regretted that the Judicial Committee of the Privy Council so early laid down for itself the rule that it would not go beyond the particular facts in each case coming before it, but would confine its decisions to the particular points arising in each case. On this account several cases have been finally decided without taking a comprehensive view of, and carefully examining the scope of the whole Act. Consequently there have been apparently conflicting decisions upon it, and we are still left in great uncertainty as to the proper limits of Federal and Provincial jurisdictions as to many subjects, and especially as regards the subject of this letter.

Winnipeg. GEORGE PATERSON.

THE BAR DINNER.

To the Editor of the LAW JOURNAL:

SIR,—I disclaim at the outset an intention to comment on your notes on the dinner given under the auspices of the County of York Bar Association and the Osgoode Legal and Literary Society. I simply enter a protest against the action taken in this matter by the Osgoode Legal and Literary Society at its meeting on the 20th inst.

At the meeting referred to, Mr. Nesbitt, the president of the Society, read from a manuscript what he assured the members was a fair summing-up of your comments on the dinner above mentioned. This "summing-up" very naturally caused much indignation among those present, the outcome of which was a very strongly-worded resolution expressive of the Society's dissent and condemnation of your remarks, in so far as they reflected upon it and its American guest. I have since read your remarks, and I must say that Mr. Nesbitt's "summing-up" was altogether too highly coloured, although, doubtless, so done under the influence of an unconscious bias. Had I previously read your comments I should certainly have opposed the adoption of the resolution condemning them.

But, in my opinion, the most objectionable part in the Society's action was the causing its fiery resolution to be published in the lay press. This I did oppose, but I had the honour of doing so as a minority of one. I pointed out that the dinner which gave rise to your comments was an exclusively professional one, that the criticisms complained of had been published in a professional journal, that it would be unprofessional to appeal to an *extra*-professional constituency, and, after the manner of the clerical profession, to wash our dirty linen before the "*profanum vulgus*."

As a member of the Osgoode Legal and Literary Society I regret exceedingly that it should have forgotten what is due to the dignity of the honourable profession to whose robes (as it were) it is pinned.

M. J. FLETCHER.

Toronto, Feb. 22nd, 1886.

BAILING PERSONS CONVICTED OF FELONY.

To the Editor of the LAW JOURNAL:

SIR,—At the last Assizes in Toronto a merchant of some prominence was found guilty of uttering forged paper. His criminal operations were carried on to a large extent and under circumstances which indicated both ingenuity and premeditation. The jury recommended him to mercy; why, it is very difficult to see. Some points of law were raised and sentence was deferred until they should be determined. In the meantime the prisoner was set at liberty to appear when called upon; his own recognizance being taken in $3,000, which is, presumably, of no great value, and two sureties in half the amount each. I do not feel called upon to criticise the discretion of the learned and common-sense judge who tried the case, except to remark that it may hereafter be used as a dangerous precedent. The offence is a very serious one, striking at the root of commercial confidence, and the judge himself very properly remarked that offences of the kind should be, and would thereafter, by him at least, be visited with heavy penalties. Though there were points of law which may have been well taken they cannot be said to be at first sight very strong, and there was no doubt in any one's mind of the prisoner's guilt. But, however this may be, he *was* found guilty, and it does not seem to me to be in the interests of commercial morality that the prisoner should be allowed for the present to be going about his business as though he had done nothing very much amiss after all.

Yours, etc.,

BARRISTER.

[In the case referred to, although the jury found a verdict of guilty, their recommendation to mercy was (as it often is) probably made in order to get all the jurors to agree to a unanimous verdict, and was consequently of no value. There were strong doubts whether the facts justified the accusation on legal grounds. It is not usual for a judge, in such circumstances, to exact bail by sureties and penalties in case of the non-appearance of the accused to receive sentence at a subsequent assize; or where there is every or any probability that the Court on a case reserved will hold that the necessary ingredients to constitute a criminal offence have not been made out. The jury, no doubt, were influenced by the moral wrong exhibited by the acts of the prisoner in the case referred to; but the Court administering criminal law can only treat that as an offence which is not only *contra bonos mores*, but amounts to either felony or misdemeanour.—ED.]

FLOTSAM AND JETSAM.

AN odd decision comes from Cockermouth County Court. It seems that one Scraggs bet a hat with a friend named Kirkwood, and lost. Scraggs told Kirkwood to buy his hat at Waite's, at Workington, but he preferred to buy it at Boyle's, the plaintiff's. When, therefore, the plaintiff asked Scraggs to pay, he declined. We suppose that if a man authorizes another to buy a hat at a shop he must pay for it, although the hat was lost in a wager, but not if he is told to buy it at Waite's and he buys it at Boyle's. The County Court judge, however, thought that, as the defendant's only reason for preferring Waite's was that she was a widow, and sold cheap hats, he might just as well have authorized the purchase at Boyle's. The only difficulty about this is that he did not.

SHELLEY'S CASE.

["I shall not say much about the rule in Shelley's case. I have heard some judges say that, in their opinion, it was the most unjust decision ever come to."—Lord Esher, M.R., Law Reports, Q. B. D., vol. 11, p. 104.]

The SHADE OF FEARNE *(on Contingent Remainders) loquitur.*

"A most unjust decision." Good heavens! is all precision,
All subtle fine acumen, to be swept at once away?
Are the doctrines which delighted Bruce and Kenyon to be slighted,
And the flowers of learning blighted which have bloomed for many a day.

Shall each innocent Remainder now suffer an attainder,
Each patient calm Reversion wait no more its destined hour?
E'en the lovely springing Uses be considered but abuses?
Oh, ye sacred legal Muses! have ye lost your ancient power?

In the new age that is dawning shall be heard a voice of mourning
From many a dying beauty, for which men of old have fought;
Each weeping Term attendant, once so radiant and resplendent,
Like a beaten pale defendant, shall shudder out of court.

Men whose god is in their belly may despise the rule in Shelley
Laugh to scorn the ancient learning which a Coke did once adore,
But their furious innovation will hurry to damnation
The glorious British nation with a law no longer lore.

Yet, tho' Parliament may say, "An estate for life to A,
With the same to B to follow, then to A his lawful heirs
Shall be naught but an estate for life," the truth is great,
Or is not, at any rate, what a Parliament declares.

In higher worlds than this A shall have his lawful bliss
To dispose of what is his where no earthly courts restrain,
While in lowest pits of hell disappointed heirs shall yell
And confess that the rule in Shelley must for evermore obtain.

B. H. H.

—From Pump Court.

PRINTERS' errors sometimes make queer havoc of a sentence, for instance, the transposition of a line leads to the following curious result in the report of the case of *Bailey* v. *Lloyd*, 5 Russ. at p. 332:—"In 1815, Mr. Vokins and his wife had been long dead, Mr. and Mrs. Lloyd had had nine children *of whom, seven being about to intermarry with the plaintiff Arthur Bailey*, etc "!

Law Society of Upper Canada.

SUBJECTS FOR EXAMINATIONS.

Articled Clerks.

1884 and 1885.
- 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.

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

Students-at-Law.

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

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

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

Translation from English into Latin Prose.

MATHEMATICS.

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

ENGLISH.

A Paper on English Grammar.
Composition.
Critical Analysis of a Selected Poem:—
1884—Elegy in a Country Churchyard. The Traveller.
1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

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.
1884—Souvestre, Un Philosophe sous le toits.
1885—Emile de Bonnechose, Lazare Hoche.

of Natural Philosophy.

Books—Arnott's elements of Physics, and Somerville's Physical Geography.

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.

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.

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 Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

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 Socity 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, six 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 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.

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

PRIMARY EXAMINATION CURRICULUM

FOR 1886, 1887, 1888, 1889 AND 1890.

Students-at-law.

CLASSICS.

1886.
- Cicero, Cato Major.
- Virgil, Æneid, B. I., vv. 1-304.
- Cæsar, Bellum Britannicum.
- Xenophon, Anabasis, B. V.
- Homer, Iliad, B. VI.

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. (vv. 133.)
- 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. (vv. 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 special 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:—

1886—Coleridge, Ancient Mariner and Christabel.

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; *or* Peck's Ganot's Popular Physics, and Somerville's Physical Geography.

ARTICLED CLERKS.

Cicero, Cato Major; *or*, Virgil, Æneid, B. I., vv. 1-304, in the year 1886: and 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.

Copies of Rules can be obtained from Messrs. Rowsell & Hutcheson.