# Canada Law Journal.

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## DIARY FOR NOVEMBER.

1. Sat.....All Saints' Day.
2. Sun.....21*st Sunday after Trinity.*
3. Mon .....Draper, C.J., died 1877.
4. Tues.....First Intermediate Examination.
5. Wed .....Sir John Colborne, Lt.-Gov. U. C., 1838.
7. Fri.....Prince of Wales born, 1841,
9. Sun .....22*nd Sunday after Trinity.*
11. Tues..... Court of Appeal Sittings. Solicitors' Examination.
12. Wed .....Barristers' Examination.

*TORONTO, NOVEMBER* 1, 1884.

WE have received, just before going to press, from the publishers, D. Appleton & Company, a collection of the speeches, arguments and miscellaneous papers of David Dudley Field, the eminent American jurist, to whom, we believe, was mainly due that amalgamation of law and equity which was first effectuated in America, and afterwards introduced into the legal systems of England, and later still into our own. We look forward with much interest to a perusal of these volumes. At present we have merely had time to glance at some of the miscellaneous addresses and papers on law reform, which bear such titles as the Study and Practice of the law, Magnitude and importance of legal science, the Law and the legal profession, the Duty of lawyers to the law. In one of these Mr. Field gives as his idea of a true lawyer a picture, the realization of which, in some respects, is almost out of the reach of those who practise in countries where the two professions are united, whatever it may be where barristers are able to give a life-long study to the science of law, undisturbed by the "loss of love and labor" involved in solicitors' practice. "The true lawyer," says Mr. Field, "is he who has mastered the science of jurisprudence in its elements and its details; who has compared the laws of his country with the laws of other countries and with the wants of his own; who is always ready to enlarge and beautify the edifice which generations have raised; who holds his learning and eloquence at the service of the injured; who never prostitutes them to a bad cause; and who everywhere approves himself the friend of order and the adviser of peace."

## *RECENT ENGLISH DECISIONS.*

The October number of the *Law Reports* consist of 13 Q. B. D. pp. 505-651, and 26 Ch. D. pp. 693-823.

LANDLORD AND TENANT—COVENANT FOR QUIET ENJOYMENT

In the former of these the first case requiring notice is *Sanderson* v. *The Mayor, etc., of Berwick-upon-Tweed*, p. 547, and is an instructive one on the subject of the covenant for quiet enjoyment in a lease, and what constitutes a breach of it. The lessee of the plaintiff had previously to the plaintiff's lease, leased the farm next adjoining above the plaintiff's to one C., the general words of demise, including the words, "waters and watercourses." Afterwards the lessee leased to the plaintiff his farm with a covenant for quiet enjoyment. The plaintiff complained of damage done to his farm, partly owing, or in part possibly owing to an excessive user on the part of C. of the drainage system which extended through his, C.'s, and the plaintiff's, farm, and partly arising from a tile drain conduit extending through the plaintiff's farm, a portion of the drainage system being imperfectly constructed. As to the former the Court of Appeal held

that the defendants were not liable, for C., and not they caused or permitted the injury: "They are not liable on the ground that it is a disturbance by a person lawfully claiming under them, because the lease gave C. no lawful claim to do the act complained of. (It would be giving a very strained and violent effect to the words 'waters and watercourses' in the lease to C. if we held they were an authority to the lessee thus to injure at once his neighbour and the soil of the demised farm by an accumulation of water.) They are not liable on the ground that they demised to C. a thing dangerous or injurious to the plaintiff, even assuming such ground to be sufficient, for the drainage system is not found to have been improperly constructed, and it was injurious only when used to carry off more water than it could carry away, and unless on one or other of these three grounds we do not see that the defendants can be liable, whether under their covenant for quiet enjoyment or under the law of trespass or nuisance." But as to the latter injury the Court held the defendants were liable. As to this they say: "The damage here has resulted to the plaintiff from the proper user by C. of the drains passing through the plaintiff's land, which were improperly constructed. In respect of this proper user C. appears to us to claim lawfully under the defendants by virtue of his lease, and to have acted under the authority conferred on him by the defendants. . . . It appears to us to be in every case a question of fact whether the quiet enjoyment of the land has or has not been interrupted; and where the ordinary and lawful enjoyment of the demised land is substantially interfered with by the acts of the lessor, or those lawfully claiming under him, the covenant appears to us to be broken, although neither the title to the land nor the possession of the land may be otherwise affected."

PROSPECTUS—FALSE AND FRAUDULENT STATEMENTS.

Of *Bellairs* v. *Tucker*, p. 562, it seems sufficient to say that it illustrates the length to which a prospectus of a company may go in puffing the company, provided the statements in it are expressions of hope or belief only, and not statements of alleged existing facts.

INTERPLEADER—TAKING INDEMNITY.

At p. 632 is a case entitled, *In the matter of an interpleader issue between Thompson and Wright*, which decides that the objection that a stake-holder (and the same would presumably apply to a sheriff) has, by merely taking an indemnity from one of two rival claimants to property in his hands, disentitled himself to relief under the Interpleader Acts because he has identified himself with and must be taken to "collude" with the claimant who gave the indemnity, cannot be raised by that claimant himself, and the decisions in *Tucker* v. *Morris*, 1 Cr. & M. 73, and *Betcher* v. *Smith*, 9 Bing. 82 do not apply. It may be observed that this is a case where application had been made under the new English rule of 1883 whereby the benefits of interpleader under the Judicature Act is extended to all who are in possession of goods to which claims are made, though they may not have been actually sued.

PATENT—INFRINGEMENT—INJUNCTION.

Passing now to the October number of cases in the Chancery Division, the first which calls for special notice here is *United Telegraph Company* v. *London and Globe, etc., Company*, p. 766. In this case the defendants were in possession of a number of machines which infringed the plaintiff's patent. On the plaintiffs bringing an action to restrain the infringement, the defendants excused themselves on the ground that they did not intend to use the machines. BACON, V. C., granted the injunction but refused to order the destruc-

tion or delivery up of the machines. He says, at p. 775: "If it is not their (the defendant's) intention to use the instruments, then the injunction asked for can do them no harm. That would not be enough to dispose of the case, but it is the right of the plaintiffs to have an injunction against the defendants who have the means, to the extent of 800 machines of injuring their rights. . . . As to the delivery up, I cannot say I see my way to make any order. The consequence might be to do more mischief; it might be merely to destroy. All I have to do in this suit is to entertain the plaintiff's application that they may be protected against a wrong which is imminent unless prevented by injunction, and, therefore, to that extent, I grant the injunction."

EXECUTOR OF MORTGAGOR—DEVASTAVIT—MORTGAGE.

Next has to be noticed *In re Marsden*, p. 783. In this case a testator mortgaged certain parts of his property, and the mortgage deeds each contained the usual covenants for payment of the mortgage debt. He died, and appointed executors, who took possession of his estate, including the leasehold property, which was the subject of the mortgages, and for a long time paid the interest due upon the mortgages, clearly recognizing, therefore, the debt. A judgment had been obtained in an administration action against these executors, and in the accounts which were brought into Chambers the executors charged themselves with the receipt of assets, and in the discharge they attempted to introduce certain payments made more than six years ago by them to some of their legatees. And although the ordinary rule is to disallow such payments, as not being a proper discharge as between executors and the creditors of the estate, they said the payments were made more than six years ago, and, therefore, all remedies in respect of them were now barred by the lapse of time. KAY, J., however, held that the executors, having acknowledged the mortgage debt by payment of interest, and being bound in equity by a trust properly to deal with the assets, could not set up their own wrong by way of devastavit as a defence in order to claim the benefit of the Statute of Limitations. He says, at p. 787: "I never yet heard that executors, by way of discharge in equity, as against a creditor, whose debt they acknowledge, as they have been paying interest upon it for many years, could set up their own wrong by way of devastavit, and say we admit a devastavit, knowing of your debt, because we have been paying interest all the while; but seeing that we did it more than six years ago we can set up a defence by treating the claim as founded on a devastavit committed more than six years ago. . . I certainly dissent from any doctrine of the kind. . . What is the ordinary trust when an executor acknowledges a debt and pays interest upon it? Is it not to preserve the assets for payment of that creditor, and to take care not to dispose of them, either by putting them into his own pocket, or by paying them away to the legatees, or by otherwise committing a devastavit? Most certainly it is; and in equity the executor is bound by a most direct trust to deal properly with the assets and to apply them in due course of administration of the estate for the creditor he has so acknowledged."

CONDITION — REPUGNANCY — RESTRAINT ON ALIENATION — OBITER DICTA.

Lastly, must be noticed a case of, *In re Rosher, Rosher* v. *Rosher*, p. 801, which in the words of the headnote shows that a condition in absolute restraint of alienation annexed to a devise in fee, even though its operation is limited to a particular time, *e.g.*, to the life of another living person is void in law as being repugnant to the

nature of an estate in fee. The case is an interesting one, amongst other reasons, because the restraint did not on its face appear to be an absolute restraint on alienation at all, being merely that if the testator's son was minded to sell during the life of the testator's widow, the estate must first be offered to the latter at the price of £3,000 for the whole or a proportionate sum for a part. The estate was proved to be worth £15,000. Pearson, J., held this to amount to an absolute restraint against sale during the life of the widow. He says: "To compel him (the son) if he does sell, to sell at one-fifth of the value, and to throw away four-fifths of the value of the estate is, to my mind, equivalent to a restraint upon selling at all." He thus reduces the question to whether it is or is not the law that to a devise in fee simple you may annex a condition that during a limited period the devisee shall not sell at all? He then proceeds in a long and exhaustive judgment to trace the law as to restraints on alienation from the time of Coke, and as to the exceptions which have been made to the general law, *e.g*, in the case of restraint from aliening to a particular person, which is plainly just as repugnant to the gift as any other condition would be. The question of policy, has he says, p. 814, been allowed to intervene, omitting altogether all considerations of repugnancy. Coming to the case immediately before him, he says, p. 821: "It is a very curious thing that although Littleton's book is more than 400 years old, and although Lord Coke died 250 years ago, there is not a single judicial decision to be found in the books showing that a limitation as to time added to such a condition (restraining alienation) makes it a valid condition." He then adds that if he could find that this had been "an accepted *dictum* of law, and that it was likely to have affected divers contracts and dealings between man and man, and that by not following it I should be disturbing anything which had been done in former times over and over again on the faith of the *dictum*, I should feel myself bound by it, and should decline to decide in opposition to it." Not finding such to be the case, he says in conclusion, p. 828: "I will not add other exceptions for which I can find no authority, and the addition of which, to my mind, will only introduce uncertainty and confusion into the law which we have to administer. I must, therefore, as regards the condition which relates to selling, declare that it is void." It may be worth while to mention here that two recent decisions on the subject of restraints in alienation in our courts are to be found in *Dickson* v. *Dickson*, and *Re Carner*.

A. H. F. L.

## LAW SOCIETY.

### *TRINITY TERM, 1884.*

The following is the *resumé* of the proceedings of the Benchers during Trinity Term, published by authority:—

During this term the following gentlemen were called to the Bar, viz.:—Messrs. S. C. Smoke, W. D. Gwynne, S. F. Washington, T. T. Porteous, A. D. MacIntyre, M. M. Brown, W. G. Thurston, T. E. Williams, J. Stewart, N. A. Belcourt, G. W. Field, F. H. Keefer, D. Armour, F. L. Brooke, A. C. Beasley. The names are arranged in the order in which the candidates appeared before Convocation for call.

The following gentlemen received certificates of fitness, viz.:—Messrs. Gwynne, Hutcheson, Smoke, McKinnon, Armour, Urquhart, St. John, Douglas, Thomas, Jackson, Williams, Collier, Brown, Eddis, Yarnold and Brooke.

The following gentlemen passed their First Intermediate Examination, viz.:—Messrs. Reeves, Lyall, Hearst, Duncan, Chambers, Lawson, Johnston, Fraser, McKay, with honours; and Messrs.

Huycke, Reid, Bayley, Weeks, Leggatt, Lee, McGillivray, Helliwell, Willgress, Johnson, Osler, Crease, Tucker, Dalzell, Mills, Taylor, Fraser, Smith, Montgomery, Bankier, Bennett, Young, Mosure, Whittaker, Vance, Considine, Creasor, Dignan, Brydges, Lemieux and Boulton.

Messrs. Reeves, Lyall and Hearst were awarded, respectively, first, second and third scholarships.

The following gentlemen passed their second Intermediate Examination, viz.:—Messrs. Mickle, Godfrey, Latchford, Coleman, Thomas, Code, Esten, Gunther, Douglas, Higgins, MacMurchy, Rutherford, Hill, O'Reilly, Farmer, Smyth, Jell, Creelman, McKechnie, Shibley, Macdonald, Finlay, White, Bell, Campbell, Howard, Roe.

Messrs. Godfrey and Code were awarded first and second scholarships and honours, and Mr. Mickle, who had been prevented from presenting himself for examination in due course, was, under the special circumstances of his case, awarded the third scholarship and honours, although he had obtained sufficient marks to entitle him to the first scholarship if he had been in due course.

The following gentlemen were admitted into the Society as Students-at-Law, viz.:—

*Graduates.*

James Morris Balderson, Alexander Robert Bartlett, Joseph Hetherington Bowes, Samuel William Broad, George Filmore Cane, John Coutts, George Henry Cowan, Robert James Leslie, Archibald Foster May, John Mercer McWhinney, James Albert Page, Horatio Osmond Ernest Pratt, Thomas Cowper Robinette, Robert Karl Sproule, Ernest Solomon Wigle, James McGregor Young, Roderick James Maclennan, George Frederick Henderson, Samuel Walter Perry, Richard S. Box, William Wallace Jones, William Louis Scott, Edmund Kershaw.

*Matriculants of Universities.*

Henry Herbert Johnson, Albert E. Baker, Herbert Holman, Charles D. Macaulay, George Albert Thrasher, John William Seymour Corley.

*Juniors.*

H. E. McKee, E. L. Elwood, W. S. MacBrayne, E. O. Swartz, J. F. Woodward, O. Ritchie, W. A. Skean, R. L. Gosnell, F. E. Chapman, N. Mills, C. J. McCullough, J. McKean.

And the following candidates passed the Articled Clerks' Examination, viz.:—J. A. Webster, A. W. Macdougald.

MONDAY, 1ST SEPTEMBER.

Present—The Treasurer and Messrs. Moss, Morris, Murray, Hoskin, Maclennan, Read, Ferguson, Bethune and S. H. Blake.

A letter from Mr. J. A. Macdonell to the Treasurer was received and read.

Mr. Murray's notice of motion for a rule amending rule 119, section 2, was adjourned to 2nd inst.

The Treasurer retired, and Mr. Maclennan was appointed chairman.

The letter from Mr. J. A. Macdonell to the Treasurer was considered, and on the motion of Mr. Hoskin, seconded by Mr. Morris, the following resolution was unanimously adopted, viz.:—

"Mr. Macdonell's letter to the Treasurer having been read, be it resolved that the letter is of an offensive character, both to the Treasurer and the Society, and that Mr. Macdonell be forthwith notified and required by the Secretary to withdraw the same on or before the 5th day of September instant."

TUESDAY, 2ND SEPTEMBER.

Present—Messrs. Read, Moss, Ferguson, Murray, L. W. Smith, J. F. Smith, J. J. Foy, Æmilius Irving.

In the absence of the Treasurer, Mr. Irving was appointed chairman, *pro tem*, of Convocation.

The report of the Library Committee on the subject of Mr. Grasett's salary was read by the Secretary, as follows, viz.:—

REPORT.

The Library Committee beg leave to report that, in accordance with the resolution of Convocation of 24th June last, they have considered that part of the report of the Finance Committee recommending an increase of two hundred dollars a year to the salary of Mr. Grasett, and now respectfully inform Convocation that they do not concur in the said recommendation.

(Signed) ÆMILIUS IRVING,
*Chairman.*

1st September, 1884, Trinity Term.

Mr. Murray, pursuant to notice, seconded by Dr. Smith, moved as follows:—

"That rule number 119, sub-section 2, be amended by striking out the word 'six' in the second line, and inserting instead the word 'eight;' the motion was carried, and the rule amended in accordance therewith."

Mr. Read moved, seconded by Mr. Murray, that so much of the report of the Finance Committee presented to Convocation on 24th June last, as related to the salary of Mr. Grasett, be adopted. The motion was carried.

SATURDAY, 6TH SEPTEMBER.

Present—Messrs. Moss, J. F. Smith, Hoskin, Foy, Irving, Morris, Kerr, MacKelcan, Maclennan, S. H. Blake, Read and McMichael.

In the absence of the Treasurer, Mr. Maclennan was appointed chairman.

The Finance Committee reported on the subject of the new system of steam heating introduced by the Government in Osgoode Hall, that all the work necessary to enable the Society to avail itself of the new system had been done, that a great saving to the Society would be effected by the Government having assumed the control of the heating and lighting of the courts and offices, and the supply of water to those portions of Osgoode Hall in the occupation of the courts. The report was adopted.

On the motion of Mr. Irving, seconded by Mr. Read,

It was ordered, That the boundaries between the lands of the Ontario Government and the Law Society be accurately defined, bearing in mind the necessity that the west wall of the eastern wing, and the land upon which it stands, and necessary for its support, be vested in the Society, and also that the reason for the title to the land formerly occupied by the boiler house being vested in the Government having now ceased, the same be now conveyed to the Society, and that generally the terms of the deed be reformed in accordance with the original intention in view between the parties at the time of the agreement upon which the said deed was executed.

*Ordered*, That the Finance Committee be instructed to carry out the directions contained in the above order.

On the motion of Mr. Read, the Finance Committee was directed to make certain enquiries respecting the property immediately north of Osgoode Hall, and to report the result to Convocation.

A letter dated 4th September, from Mr. J. A. Macdonell, withdrawing his late offensive letter to the Treasurer, in accordance with the directions of Convocation, was read.

*Ordered*, That Mr. Macdonell's letter be received, and Mr. Macdonell having withdrawn the offensive letter, ordered, that it be returned to him with a copy of this resolution.

On the motion of Mr. Mackelcan, seconded by Mr. Hoskin, it was

*Ordered*, That the Treasurer be requested to represent to the Attorney-General for Ontario that in the opinion of Convocation it is desirable that the Act respecting the Law Society should be so amended as to give to the Benchers in Convocation, or to any committee appointed for the investigation of any matters coming under the jurisdiction of the Benchers of the Law Society, power to take evidence upon oath, and to compel witnesses to attend, submit to examination and to produce books, papers and documents in the same manner and subject to the same conditions as to payment of conduct money, and otherwise, as in the case of witnesses examined at a trial in the High Court of Justice, and to impose such penalty or punishment for refusal to attend to be examined as could be imposed by such court.

On the motion of Mr. Irving, seconded by Mr. Read, it was

*Ordered*, That as it is desirable to settle a rule upon the subject of adorning the walls of Osgoode Hall with the portraits of those judges who have been appointed Chief Justices, the custom shall be restricted to the portraits of such judges as shall hereafter be appointed Chief Justices of Ontario.

Mr. Martin gave notice that he would, on the 12th instant, move a rule to rescind the rule passed on 2nd instant, increasing the salary of one of the assistants.

FRIDAY, 12TH SEPTEMBER.

Present—The Treasurer and Messrs. Murray, S. H. Blake, L. W. Smith, Read, Maclennan, Crickmore, Morris, Bethune,

Moss, J. F. Smith, Cameron, Hoskin, Foy, Martin, Irving, Ferguson.

Mr. Murray, from the Reporting Committee, presented the following report, viz.:—

TRINITY TERM, 1884.

The Committee on Reporting beg leave to report as follows:—

1. The work done by the reporters since last term is satisfactory, but there is still considerable arrear in Chancery which the reporters of that Division are doing their utmost to bring out.

2. The Committee regret that the digest is not yet published, but they are assured that it will be ready in another fortnight.

3. The Committee have communicated with Mr. O'Brien and Mr. Armour, and these gentlemen will both be willing to publish early notes of cases on the terms expressed in the resolution, adopted by Convocation in the event of that resolution being adhered to, but Mr. O'Brien considers that the existing resolution of Convocation is very unjust to him.

All which is respectfully submitted.

(Signed) JAMES MACLENNAN,
*Chairman.*

12th September, 1884.

The report was adopted.

Mr. Murray moved, pursuant to leave, that the rule amending rule 119 (2), which was read a first time on the 2nd instant, be now read a second and third time. Carried.

The rule was read a second and third time.

Mr. Hoskin, seconded by Dr. Smith, moved, and it was

*Ordered*, That Mr. C. R. Irvine be called upon for an immediate explanation touching the advertisement inserted by him in a local newspaper in the following words:

"C. R. Irvine, M.A., Barrister-at-Law, successor to L. U. C. Titus, Esq. Special attention to all business. Notes and mortgages bought. Collections promptly attended to. Wills, deeds, mortgages and contracts drawn at moderate rates. Money to loan—terms to suit. In all matters charges fair. Mr. L. U. C. Titus will complete the business of his former clients and remain in the office;"

Mr. Titus therein named having been struck off the rolls.

## REPORTS.

## *ONTARIO.*

(Reported for the CANADA LAW JOURNAL.)

### MASTER'S OFFICE.

### TRINITY COLLEGE V. HILL.

*Opening foreclosure—Subsequent interest—Interest on costs—Mortgagee's costs of writs of fieri-facias.*

Where a foreclosure is opened and the time extended for the payment of the mortgage money, subsequent interest is computed on the aggregate amount of principal, interest and costs found due by a decree or by a Master's Report.

Taxed costs carry interest from the date of taxation; and in taking accounts under an order for redemption in a mortgage case, the mortgagee is entitled to interest on such costs, and also to the costs of writs of *fi.-fa.* issued to enforce payment.

[Mr. Hodgins, Q.C.—October 14.

This was a reference to take account in a mortgage case where the foreclosure was re-opened. The case is reported in 2 O.R., 348 and *ante* p. 262.

*Vankoughnet*, Q.C., for plaintiffs.

*Bain*, Q.C., for defendants.

THE MASTER-IN-ORDINARY — In this case the Court of Appeal, reversing the judgment of Boyd, C., 2 O. R., 348, has allowed the defendants to redeem the mortgaged premises "on payment into Court of principal money, interest and costs, and subsequent interest and subsequent costs." The question discussed before me was whether this subsequent interest is to be computed on the aggregate amount of principal, interest and costs found due by the decree of the 14th of November, 1877, or only on the principal sum secured by the mortgage.

The judgment of the Court of Appeal leaves this decree untouched, but re-opens the foreclosure and gives the defendants further time to redeem on the terms above stated.

The cases on the question show what is the rule where the amount is ascertained by the Master's Report, and they appear to be consistent. In *Butler* v. *Duncomb*, 1 P. Wms., 453, Lord Chancellor Parker stated that a mortgagee "by getting reports of the money due might make his interest principal, as it must be after the report is confirmed." And in *Brown* v. *Barkham*, 1 P. Wms., 652, he said: "It is true a Master's Report computing interest makes that interest principal, and to carry interest; for a report is a judgment of the Court."

The observations of Lord Loughborough in *Crenze* v. *Hunter*, 2 Ves. jr. 157, are to the same

effect: "In the case of a mortgage the ground is plain. The estate belongs to the mortgagee, it is forfeited; the owner comes here to redeem; the Court orders payment on such a day, and that he shall then redeem. He lets that time elapse; of course he shall pay interest."

The House of Lords in *Kelly* v. *Lord Bellew*, 4 Bro. P.C., 495, varied a decree of the Irish Court of Chancery where there had been delay in carrying it out, by directing a computation of interest in a mortgage case on the whole sum found due by the Master's Report, on which the decree had been made, instead of on the principal money secured by the mortgage. In a note to the case it is stated that, "a stated account ought to carry interest, especially in case of a mortgage, and more strongly when settled by a Master of the Court pursuant to order."

In *Bruere* v. *Wharton*, 7 Sim., 483, the following note of the practice in Exchequer was cited to Sir L. Shadwell, V.C., who made an order in similar terms: "After the report of principal, interest and costs on mortgage, and time enlarged, with order to compute subsequent interest; this subsequent interest shall be computed on the aggregate reported sum of principal, interest and costs, and not on the principal only; and agreed the practice in Chancery to be the same."

The subsequent cases, up to the late case of *Elton* v. *Curteis*, 19 Ch. D. 49, show a slight variation in the practice, but not an alteration of the rule. In *Whatton* v. *Cradock*, 1 Keen, 267, Lord Langdale, M. R., after reviewing some of the cases, states the variation in the practice thus: "The time for paying what is found due on the mortgage is enlarged upon payment of the interest and costs found due; and the subsequent interest on the principal only, and subsequent costs, are directed to be computed and taxed."

The same learned judge is more explanatory in *Brewin* v. *Austin*, 2 Keen, 212: "The practice formerly was not to order any immediate payment but to order subsequent interest to be computed on principal, interest and costs already ordered. For many years past, however, the practice has been to enlarge the time only on terms of first paying the interest and costs already reported; and these being paid, subsequent interest is to be computed on the principal only—that remaining unpaid. If for any special reason the Court should think fit to enlarge the time without ordering any immediate payment, I conceive it would now be proper to order the subsequent interest to be computed on the aggregate amount of principal, interest and costs before computed."

In *Holford* v. *Yate*, 1 K. & J. 677, the form of order in that case shows the terms on which the foreclosure was opened—one of which was that the interest should be calculated on "the aggregate amount found due to the plaintiff."

*Whitfield* v. *Roberts*, 7 Jur. N. S. 1268, does not seem to be consistent with these decisions, nor with the subsequent case of *Elton* v. *Curteis*, 19 Ch. D. 49.

In this latter case the reason for the alteration in the practice was referred to during the argument; and in giving judgment Fry, J., quoted the words of Lord Hardwicke, in *Bickham* v. *Cross*, 2 Ves. Sr. 471, that: "Where a mortgagor came to redeem, and a mortgagee to foreclose, and afterwards there is a report computing what is due for principal, interest and costs, all that is considered as one accumulated sum;" and that as to mortgagees "the compound sum carries interest." And then, after referring to the distinction between the modes of computing subsequent interest in foreclosure and other actions, the learned judge states that subsequent interest in mortgage cases should be computed on the whole amount found due for principal, interest, and costs, and that such was the ordinary practice and was a "well established and old practice of the Court."

These cases show that a Master's Report when confirmed becomes a judgment of the Court. But in this case the amount of principal, interest and costs was ascertained by a decree which is unquestionably a judgment of the Court; and, therefore, in computing the "subsequent interest" allowed to the plaintiffs by the Court of Appeal in this case, I must hold that the direction in *Bruere* v. *Wharton*, 7 Sim. 483, and similar cases applies: that such subsequent interest is to be computed on the aggregate amount of principal, interest and costs found due by the decree of the 14th of November, 1877, and not on the amount of the principal secured by the mortgage.

As the Court of Appeal has given the plaintiffs their taxed costs of the hearing before the Chancellor, they are entitled to interest on these costs from the date of taxation and also the costs of any *fi.-fas.* issued to enforce payment *Schroeder* v. *Cleugh*, 46 L. J. Q. B. 365.

## COUNTY COURT OF YORK.

(Reported for the CANADA LAW JOURNAL.)

## JENNINGS v. NAPANEE BRUSH CO.

*Promissory note—Instalments of interest—Protest.*

When a note payable in eighteen months contained a condition for the payment of interest half-yearly, *held* that notice of dishonor was necessary in order to charge endorser, where maker made default in payment of an instalment of interest.

*Semble*,—That interest is not a mere incident of the debt when payable by a term of the contract.

[McDOUGALL, Co. J.—October 13.

The plaintiff was the holder of a promissory note, and brought his action against the makers of the note and John Stevenson, an endorser, to recover two instalments of interest alleged to be due in respect of the note. The note was in the following words:—

$4,290. NAPANEE, 19th April, 1882.

Eighteen months after date the Napanee Brush Co. promise to pay to the order of G. M. Elliott the sum of $4,290, at the Dominion Bank here, with interest at the rate of seven per cent. per annum, payable half-yearly, value received.

Signed, NAPANEE BRUSH CO.,
*per* D. T. Preston, President.

and endorsed by defendant Stevenson, and others.

The action was commenced by the plaintiff in July, 1883, against the parties to recover $310.82, that being the amount of the two first half-yearly instalments of interest, then overdue by the terms of the same. While this action was pending, the note matured and was duly protested and proper notice of dishonor given to all the endorsers, and a second action was brought to recover the principal sum of $4,290 and the last half-yearly instalment of interest. Judgment was duly recovered against all parties, including the defendant Stevenson, for these two latter-named sums. Execution was issued upon that judgment, and the amount realized from Stevenson, who defends this action.

McDOUGALL, Co. J.—The defences on the record—set up by Stevenson—are: (1) *Non-fecit*; (2) That note was not duly presented for payment of the instalments of interest sued for in this action; (3) That he, the defendant, received no notice of dishonour, nor of non-payment of the instalments of interest sued for.

The defences relied upon are the neglect of presentment, and the failure to give notice of dishonour. The case is somewhat unique, for after the most diligent search I have been unable to find any English or Canadian authorities upon the precise point, and the learned counsel engaged assure me that the result of their examination of the books has been equally fruitless.

Is a note dishonoured by the non-payment of interest, where, by the contract, interest is made payable at certain fixed periods, which periods are to occur before the time fixed for the payment of the principal sum?

*Orridge* v. *Sherborn*, 11 M. & W. 374, is an authority deciding that a note, the principal of which is payable in instalments, is within 3 & 4 Anne, cap. 9, so as to be assignable, and that the same should be protested on the maturity of each instalment, and that days of grace should be allowed with each instalment. *Corlow* v. *Kenealy*, 12 M. & W. 139, decides that a note payable by instalments is within the statute of Anne, although it contains a provision that upon failure of payment of one instalment, the whole debt is to become due and payable.

*Brooks* v. *Mitchell*, 9 M. & W. 15, is to the effect that a promissory note payable on demand, *with interest*, cannot be treated as overdue so as to affect an endorsee with any equities against the endorser merely because it is endorsed a number of years after its date, and no interest has been paid on it for several years before such endorsement.

The plaintiff contends that interest is a mere incident of the debt, and the failure to pay or demand the same at the stated periods in no wise dishonors the bill or note.

I have been able to find some American cases which would appear to sustain this view.

In Daniels on negotiable instruments (3 Ed.), the learned text-writer at page 737 (vol. 1), states: "The weight of authority is to the effect that the *bona-fide* purchaser for value of negotiable paper is within the protection of the law merchant, although interest is overdue and unpaid at the time of purchase, interest being a mere incident of the debt, and the holder losing no right as against the parties, whether makers or endorsers, by failing to demand it. This," he says, "seems to be the correct rule, though the contrary view is not without some weighty consideration."

I will refer now to some of the cases cited in support of this statement.

*Kelley* v. *Whitney*, 45 Wis. 110 (1878). In this case the Court approved of and followed the earlier case of *Boss* v. *Hewitt*, 15 Wis. 260. In the latter case Mr. Justice Paine, delivering the opinion of the Court, said: "Neither do we think that the fact that the interest had not been paid makes the case equivalent to a purchase after maturity so as to let in defences that might have been made against the original parties. The interest is a mere inci-

dent of the debt, and although it is frequently provided that it shall be paid at stated periods before the principal falls due, we know of no authorities holding that a failure to pay it dishonors the note so as to let in all defences against subsequent purchasers for value without any other notice of defects except the mere fact that such interest has not been paid; and we do not think it should have that effect. The maturity of the note within the meaning of the commercial rule on the question is the time when the principal becomes due."

*Boss* v. *Hewitt* is also approved in *National Bank of North America* v. *Kirby*, 108 Mass. 497 (1871), and the latter case is cited with approval, and its general doctrines affirmed in *Cromwell* v. *County of Sac*, 96 U. S. 51 (1871).

In the *National Bank* v. *Kirby* the following language occurs in the judgment of COLT, J.:— "Interest is an incident of the debt and differs from it in many respects. It is not subject to protest and notice to endorsers, or days of grace, according to the law merchant. Interest is not recovered on overdue interest, and the Statute of Limitations does not run against it until the principal is due. The holder of the note, with interest payable annually, loses no rights against the parties to it, whether makers or endorsers, by neglecting to demand it, and he has the election to do so or wait and collect it all with the principal." The learned judge adds further in another part of his judgment: "There is a large class of negotiable securities, the principal of which is payable only at the end of many years, but with interest payable either annually or semi-annually, and many of the notes given in the purchase of real estate and secured by mortgage, especially in the country, are of this class, as are most of the obligations for debts contracted by public, and many of those incurred by private corporations; and it is important that the value due to their negotiable character should not be impaired by new rules tending to lessen their currency and credit."

See also Bigelow on Bills and Notes (2 Ed.) 445.

I find in the case of *Newell* v. *Gregg*, 51 Barbour 263, an authority for the opposite view, and in that case it was expressly held that the payment of the interest at the fixed period was as much a part of the agreement as the promise to pay the principal, and that the effect of non-payment of the interest was to dishonor the note. This case is cited in the case of *Cromwell* v. *County of Sac*, 96 U. S., but is not commented on.

From the foregoing cases it may be concluded that the rule in the United States, as affirmed by high authority, is that the non-payment of an instalment of interest, payable by the tenor of the contract, and expressed on the face of the note, before the date fixed for the payment of the principal will not amount to a dishonor of the note, and that as between subsequent holders for value without notice, and the endorsers, such non-payment cannot be relied upon even where there has been no presentment or notice of dishonor. That presentment and notice of dishonor is wholly unnecessary, and that, notwithstanding the default, the original liability of the parties is preserved.

It was argued before me that under the case of *Orridge* v. *Sherborn*, 11 M. & W. 374 which is the authority for protesting and giving notice of dishonor at the maturity of each instalment of a note, the principal money secured by which is payable in instalments, the payment of an instalment of interest was equally within the authority of that case. That an instalment of interest payable at a fixed date was to all intents and purposes equivalent to an instalment of principal. There certainly does appear to be a close analogy, but if the American cases decide rightly, that interest is a mere incident of the debt, "the natural growth" of the money, even when payable by an express term of the contract, then doubtless the defence set up here should fail.

But is interest a mere incident of the debt within our own or the English authorities? With a certain propriety, interest may be said always to be an incident to the principal; not only when it is part of the contract, but also when it is allowed as damages. In the former case it is however not strictly an incident or rather it is more than an incident. There must be a principal sum; but after interest has accrued it is no longer dependant on the principal; it does not necessarily follow it. (*Crouse* v. *Park*, 3 U. C. R. 458, *Hudson* v. *Fawcett*, 2 D. & L. 81, *Watkins* v. *Morgan*, 6 C. & P. 661.) Conventional interest is of itself a debt, and payment of the principal alone will not affect the right to recover the interest, and yet it is so allied to the principal, that if the latter is recovered without the recovery of the interest when not secured by a separate instrument, it is barred; not because the interest cannot exist as a valid demand distinct from the principal; but because demands arising upon one agreement for principal and interest due to the same party at the same time cannot be divided, and each made the subject of a separate action. In that respect there is no difference between principal and interest. An action brought for one would bar both, whether included in the claim or recovery or not. But such interest made payable before the principal is due may be sued for in an action for that alone if brought before the principal is due; and if sued for before the

maturity of the whole debt, it is really sued for as a part of the debt accrued due.

Can there, then, be said to be any difference between an instalment of interest payable by a term of the contract, and an instalment of the principal itself payable in the same manner?

It seems to me that it is highly inconsistent to say that an action may be maintained for an instalment of interest each six months, and that the endorser shall be charged with it, without demand on the maker, and notice of his failure to pay; and to say that as to the payment of the principal, in say eighteen months, the endorser shall be discharged, unless duly demanded and he is given proper notice of dishonor. Surely the contract of the endorser is the same with reference to each instalment, whether principal or interest. Is not his contract the following?—The maker of this note has promised to pay you, the holder, at particular times and occasions, certain sums of money (call them principal or interest as you will), and I undertake that if he fails to pay you, and you promptly notify me of the fact, I will pay you.

If the stamp act were in force the interest accruing during the eighteen months which this note had to run would have to be computed, and duty paid upon the whole sum or debt represented by the one contract. The interest here is not a penalty, or damages, it is debt, and, in my opinion, just as much so as the principal sum secured by the note.

The American cases referred to by me in support of the opposite view, are, I think, not to be followed. They are due to a line of decisions upon the question of interest, which are admittedly at variance with the principles maintained in a number of English authorities. Mr. Sedgewick, in his work on damages, very clearly points out the distinction between the American and English authorities. "There is," says the author, "considerable conflict and contradiction between the English and American cases on this subject. But as a general thing it may be said, that while the tribunals of the former country restrict themselves generally to those cases where an agreement to pay interest can be proved or inferred, the courts of the United States on the other hand have shown themselves more liberally disposed, making the allowance of interest more nearly to depend on the equity of the case, and not requiring either an express or implied promise to sustain the claim. The leading difference seems to grow out of a different consideration of the nature of money. The American cases look upon the interest as the necessary incident, the natural growth of the money, and therefore incline to give it with the principal, while the English treat it as something distinct and independent, and only to be had by virtue of some positive agreement." (Sedg. (6 ed.) 473.)

In Van Rensselaer (2 Barb. S. C. R. 643), Mr. Justice Willard, at. pp. 666, says: "Whatever may be the rule in England, interest in this country is not considered as a demand distinct from, and independent of, the original debt, and resting solely upon contract, express or implied. It is treated rather as an incident to the debt, always payable when there is a promise, express or implied, to pay it, and in numerous instances when no such promise can be inferred."

Referring again to the cases cited by me in support of the plaintiffs' contention, *The National Bank* v. *Kirby* was an action against a maker only, who claimed that the non-payment of the interest dishonored the bill, and that the plaintiff in that action, taking the bill with interest unpaid, took it subject to all the equities. *Kelly* v. *Whitney* was an action also against joint makers only, who set up the same defence as in last case.

*Boss* v. *Hewett* was also against a maker who claimed the benefit of the same defence as in last two cases, alleging the notes had been obtained from him by fraud.

Suppose the whole debt in this case, principal and interest, had been secured by several notes endorsed by the defendant, one promising to pay the amount of six months' interest, naming the dollars and cents in six months from the date of the note; in another note the same amount in one year; in another note the same amount in eighteen months; and in another note the principal sum in eighteen months. Could recovery be had against the defendant endorser upon these notes without demand and notice of dishonor? As against the endorser, I do not think the plaintiff is to have any greater benefit by reason of the whole contract being on one piece of paper promising to pay the interest half-yearly.

I think therefore the plaintiff's action should be dismissed with costs.

## RECENT ENGLISH PRACTICE CASES.

### Macdonald v. The Tacquale Gold Mines Company.

*Ont. r.* 370—*Imp. O.* 45, *r.* 2, (1875).

*Garnishee order—Debt due to judgment debtor and another jointly.*

The debt, legal or equitable, owing by a garnishee to a judgment debtor, which can be attached to answer the judgment debt, must be a debt due to such judgment debtor alone, and where it is only due to him jointly with another person it cannot be so attached.

[L. R. 13 Q. B. D. 535.

Bowen, L.J., was there any debt (including by that word "debt" both a legal and equitable one) owing or accruing from the defendant company to the judgment debtor which was capable of being attached by a garnishee order? Can it be said that a debt due to two persons jointly is a debt due to one of them? Before the Judicature Act such a question would, as it seems to me, have been unarguable. Where money is due on a covenant made with two persons jointly by which it is to be paid to such two jointly, no one of those two has any right to that money without the other of them. What difference in this respect can the Judicature Acts have made, for they do not give any right which did not previously exist but only another mode of procedure. It is clear that there was no debt due to the judgment debtor . . . when this order to attach was sought for, but only a sum due to him jointly with another, and therefore not a sum capable of being attached.

### The London Land Company v. Harris.

*Ont. r.* 392—*Imp. O.* 49, *r.* 1, (1883).

*Transfer of action—Counterclaim for specific performance.*

In an action by purchaser of land against vendor for return of deposit, the defendant counter-claimed specific performance.

*Held*, that the action ought to be transferred to the Chancery Division.

[L. R. 13 Q. B. D. 540.

Pollock, B.—It is admitted by the councel for the plaintiffs, that by the practice of the Court of Chancery the judgment of the Court in favour of a party claiming specific performance can only amount to this, viz.: that all conditions have been fulfilled, and all things have been done and happened necessary to entitle him to specific performance, subject however to an inquiry into the title. That inquiry this Division has no machinery for making. This renders applicable the cases cited, in which it was held that where the Division in which the proceedings arose has no sufficient machinery for administering the necessary relief, there is good ground for making the transfer.

[Note.—*Quære*, whether section 63, Ontario Judicature Act, 1881, which makes all masters in Chancery official referees, read in connection with section 47 does not render this decision inapplicable to our practice.]

### Cropper v. Smith.

*Ont. r.* 474—*Imp. r.* 320, (1883).

*Amendment—Patent action—Defendant's particulars of objection.*

[L. R. 26 Ch. D. 700.

This was an action brought against S. and H. to restrain alleged infringements of a certain patent. In their particulars of objection as delivered, S. and H. denied infringement, and S. objected to the validity of the patent on the ground of want of novelty. The Court of Appeal held, reversing the Court below, that the patent was invalid for want of novelty, and S. having succeeded on this objection was entitled to judgment. But they held that as H. had not delivered objections to the validity of the patent, but only denied infringement, evidence that it was invalid for want of novelty could not be read on his behalf; and, moreover, that as H. had never asked for leave to amend his particulars of objection, but had to the last argued the case on the ground that no such amendment was necessary since the denial of infringement included an objection by implication that the patent was invalid (which was over-ruled), leave to amend ought not to be now given, but his appeal must be dismissed.

[Note.—It may perhaps be a question whether the clause at the end of our Rule 474, which is not found in the English rule, would not prevent this decision being followed under similar circumstances in our Courts.]

### Roberts v. Oppenheim.

*Ont. r.* 221, 229—*Imp. r.* 356, 357, (1883).

*Production of documents—Documents referred to in pleadings—Privilege.*

Where a party claims privilege against the production of documents on the ground that they support his own title and do not relate to that of his opponent, his affidavit must be taken as conclusive, unless the Court can see from the nature of the case or of the documents that the party has misunderstood the effect of the documents.

*Attorney General* v. *Emerson*, L. R. 10 Q. B. D. 191, distinguished.

The privilege claimed for documents is not lost merely by their being referred to in the pleadings. The penalty for non-production is that they cannot afterwards be used in evidence.

[L. R. 26 Ch. D. 724.

In this case the defendant obtained the usual order for production. In their affidavits made therein, similar affidavits being made by each plaintiff, they objected to produce certain documents on the ground that "they relate exclusively to my title and that of some of my co-plaintiffs, and do not prove or tend to prove that of the defendant." Some of these documents, production of which was refused, had been referred to in the plaintiffs' claim.

The defendants took out a summons to consider the sufficiency of the plaintiffs' objections to discovery.

KAY, J., refusing to make any order on the summons, the defendants appealed.

COTTON, L.J.,—It is said that the plaintiffs cannot avail themselves of a claim to protection, because they have referred to the deed in their pleadings, and Rule 357 (Ont. R. 229) is relied on. But that rule only says that if a party will not produce a document to which he has referred in his pleadings, he shall not afterwards be at liberty to put such document in evidence. That is the penalty. He may prefer to lose part of his claim rather than produce the document. In my opinion, that rule does not take away the privilege of the documents, but only prevents them from being put in evidence unless produced.

FRY, L.J.,—I am of the same opinion.

[NOTE.—In his judgment, KAY, J., comments at length on the extraordinary nature of the provision in Rule 357 (Ont. R. 229), which draws a distinction between the position of the plaintiff and defendant in refusing to produce documents referred to in his pleadings. He confesses he is not "at present fully able to understand" this part of the rule, but avoids passing an opinion upon its effect and meaning as unnecessary to the application before him.]

## WHEELER V. THE UNITED TELEPHONE COMPANY.

*Imp. O.* 30, *r.* 1. (1875)—*Ont. r.* 215.

*Payment into court without admitting liability.*

In an action for trespass in breaking and entering the plaintiff's land, the defendants paid money into court under the above rule, and in their defence denied the plaintiffs' possession of the land, and also stated that, without admitting any kind of liability, the sum paid into court was sufficient to satisfy any damage which the plaintiff might have sustained in consequence of any acts of theirs. The plaintiff joined issue upon these defences but failed at the trial to establish any damages exceeding the sum paid into court, though he succeeded on the other issue. The Court of Appeal treated such defence of payment into court as an alternative defence, and as it went to the whole cause of action,

*Held*, that the defendants were entitled to judgment.

[L. R. 13 Q. B. D., 597.

BRETT, M.R.—Payment into court is allowed to be pleaded as an alternative defence; it is a defence to the action, in the sense that if it succeeds, the action is defeated. Whatever the exact form of the defence may be in words, the substance of it is that the money is paid into court, and the defence is pleaded as an alternative defence, which means, that if the defendant fails in the other defences which he has set up, this is his defence to the action. If it succeeds, the result is the same as if under the old system of pleading—the jury had found in favour of one plea which went to the whole cause of action. In that case there would be verdict and judgment for the defendant, but the plaintiff would be entitled to the costs of the issues raised by the other alternative defences which had failed, I am of opinion, therefore, that there ought to be judgment for the defendants.

# NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

## COMMON PLEAS DIVISION.

Osler, J. A.] [October 17.

## DOUGLAS V. HUTCHINSON.

*Married woman—Dower—Separate estate.*

A married woman, married to her present husband in 1871, was entitled to dower in land of which her former husband died seized, and was living thereon with her husband and children working it, but her dower had never been actually set apart or assigned.

*Held*, that this was separate estate, with reference to which she could contract debts, or which she could contract to sell or dispose of, and that it could therefore be sold under a *fi. fa.* on a judgment recovered on a promissory note made by her.

*Shepley*, for the plaintiff.

*W. H. P. Clement*, for the defendant.

## CHANCERY DIVISION.

Ferguson, J.] [Sept. 16.

### TOWNSHIP OF ELDERSLIE v. VILLAGE OF PAISLEY.

*Municipal law—New municipality—Liability to share of debts created by old municipality—36 Vic. c. 48, s. 56 O.—R.S.O. c. 174, s. 55.*

36 Vic. c. 48, s. 56 O. (R.S.O. c. 174, s. 55), provides, that upon an incorporated village being created out of a portion of an existing municipality, "all special rates for the payment of debts theretofore imposed upon the locality by any by-law of the former corporation, shall continue to be levied by the new corporation, and the treasurer of the new corporation shall continue to pay over the amount as received to the treasurer of the senior or remaining municipality, and the latter shall apply the money so received in the same manner as the money received under the same by-law (*i.e.*, the by-law of the senior municipality which created the debt in question) in the senior or remaining municipality."

In this case the township of Elderslie in 1873 passed a by-law for issuing debentures to raise $6,000 for purposes of a school section, in part comprised in it, and providing for payment of interest, and creation of a sinking fund, and levying of the necessary special rate in the property of the school section.

In 1874 the village of Paisley was incorporated out of a portion of the township of Elderslie, being a portion of the said school section. During the currency of the debentures, and after the incorporation thereof, the corporation of Paisley collected their share of the money required to pay the interest and raise the sinking fund, but they paid over the same to the secretary and treasurer of the school board instead of to the treasurer of the township of Paisley. In 1883 the said secretary and treasurer died, and it was found he had converted the said sinking fund money to his own use, but had left no assets to make good the theft.

In the same year the debentures fell due, and the township of Elderslie paid them, and now sued the village of Paisley for its *pro ratâ* portion thereof.

*Held*, that the plaintiffs were entitled to judgment, except as to sums levied and received by the defendants more than six years before action brought, for the defendants should have paid the moneys over to the treasurer of the plaintiffs' corporation, and even if there had been a positive agreement by and with the township of Elderslie that the money should be paid to the secretary-treasurer of the school section, this would have made no difference; for such an agreement would have been *ultra vires* the township of Elderslie, and void as contrary to the statute law, while the sections of the Municipal Act of 1873 relating to arbitrations in cases of separations of incorporated villages from townships, did not apply in this case, so as to prevent the action lying.

*Held*, also, that even if it was impossible to make the judgment productive, on the ground that the defendants could not now levy and collect the money, this was no reason why the plaintiffs should not obtain judgment: *Frontenac* v. *Kingston*, 30 U.C.R. 594 distinguished.

*Cassels*, Q.C., and *O'Connor*, for the plaintiffs.

*C. Moss*, Q.C., and *Shaw*, Q.C., for the defendants.

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Ferguson, J.] [October 18.

### ROSS v. MALONE.

*Execution—Fi. fa. lands—Sale by sheriff before return nulla bona—R. S. O. c. 66, s. 14, 15.*

*Held*, under the circumstances of this case that a sale under a *fi. fa.* against lands conferred a good title on the purchaser, although the *fi. fa.* against goods had not been returned *nulla bona* under R. S. O. c. 66, s. 15. The want of a return *nulla bona* before the sale of the lands were only an irregularity, and not fatal to the validity of the sale. It appeared the sheriff would have returned the writ *nulla bona* if called upon to do so; that the judgment debtor had no goods in the county during the currency of the writ against goods, and that the plaintiff endeavouring to set aside the sale, being a mortgagee, would, if he had made the proper searches, have found the writ against lands in the sheriff's hands.

*Lount*, Q.C., for the plaintiff.

*Pepler*, for defendant W. Boys.

*Lennox*, for defendant Giffin.

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Boyd, C.] [October 22.

DONALD v. DONALD.

*Will—Construction—Maintenance of infants—Reference—Practice.*

A testator willed as follows: "I give, devise and bequeath to my executors and executrix" (of whom one was the plaintiff, the testator's widow), "all my real and personal property of every kind whatsoever for the benefit of my children, share and share alike, and to my wife while she continues my widow, and I give to my said executor and executrix power to sell any part or the whole of my real property for the support and maintenance of my children and my wife while she remains my widow."

*Held*, on action brought by the widow, that under the above will, she and the children took the real and personal property jointly, she during widowhood, and they share and share alike absolutely. She did not take an immediate estate in the whole with reversion to her children, as contended.

*Held*, also, a reference might be directed, similar to that in *Maberley* v. *Morton*, 14 Ves. 499 to ascertain whether it would have been reasonable and proper in the trustees to apply any or what part of the land, having regard to the situation and circumstances of the children, to their support and maintenance, and declaring the sum which the Master should find to have been properly expended by the mother in part maintenance to be a charge upon the inheritance of the children respectively in the land.

*Walkem*, for the plaintiff, Jane Donald.

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## PRACTICE.

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Mr. Hodgins, Q.C.] [June 7.

HUGHES v. REES.

*Estoppel—Pleading—Jurisdiction of Master—Indemnity to trustee under a void trust deed—Husband and wife—Agency—Maintenance of Children.*

Where a party does not plead a prior judgment in bar by way of estoppel before the entry of a judgment directing a reference to the Master-in-Ordinary, he waives it, and leaves the whole matter at large to be enquired into on the evidence.

The Master has no jurisdiction to make amendments to the pleadings after judgment, nor could he give leave to file a statement in his office raising a defence which ought to appear in the pleadings.

It is incident to the office of a trustee that the trust property shall reimburse him for his expenses in administering the trust, and a clause so indemnifying a trustee is infused into every trust deed; and the statute R. S. O. ch. 107, sec. 3, does little more than what Courts of Equity have been accustomed to do without any statutory direction.

Therefore a trustee, who had been induced by a settlor to accept a trust under an instrument void by the law of the settlor's domicile is entitled to be reimbursed by such settlor for all his expenses incurred in the execution of the trust.

The defendant's wife, who had been supported by the plaintiff with the defendant's consent, returned to her husband's home, but was turned out of the house by him, whereupon the plaintiff again took charge of and supported her.

*Held*, that the defendant by turning his wife out of his house sent her forth as his delegated agent to pledge his credit for the necessaries of life suitable to her position, and that the plaintiff was therefore entitled to assert a claim against the defendant for his expenses in so supporting the defendant's wife; and that such claim could be maintained up to the date of a judgment allowing alimony to the defendant's wife.

Where a father whose children are maintained by another, and who could have obtained possession of their persons by *habeas corpus*, allows them to be so maintained, he is liable for their support and maintenance to the person in whose care such children are.

*S. H. Blake*, Q.C., and *G. Morphy*, for plaintiff.

*Maclennan*, Q.C., and *Kingsford*, for defendant.

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Mr. Dalton, Q.C.] [June 20.
Rose, J.] [July 2.

OGDEN v. CRAIG.

*Interpleader—Intended seizure.*

Upon an interpleader application by the Sheriff of Bruce, it was sworn that the sheriff

intended to seize certain chattels in the possession of the execution debtor, but was unable to do so because they had before the writ of execution was placed in the sheriff's hands passed into the possession of the claimant, a chattel mortgagee of the judgment debtor, and that the claimant refused to produce them, and claimed them in his own right.

The interpleader application was refused with costs.

*Alan Cassels*, for the sheriff.

*H. J. Scott*, Q.C., for the execution creditor.

*Clement*, for the claimant.

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Osler, J. A.] [Sept. 23.

IN RE MERCHANTS' BANK v. VAN ALLEN.

*Prohibition—Division Court—Jurisdiction.*

In an action on a promissory note brought in a Division Court, M., the endorser, was made a defendant by the order of the judge of the Court, and was served by the original defendant, the maker of the note, with a notice claiming relief over and indemnity, but was not served with the summons or a copy of the plaintiffs' demand. M. filed a notice disputing the defendant's claim against him, and the jurisdiction of the Court to try it, and also appeared at the trial, and gave evidence and objected to the jurisdiction. Judgment was given for the plaintiffs against both the original defendant and M.

Upon motion by M. for prohibition, *held* that judgment could not have been given against M. in his absence, because the writ of summons and statement of claim had not been served upon him; but *held*, that by appearing in the suit and taking proceedings both before and at the trial, M. had waived service of the summons and demand.

Prohibition refused.

*E. Douglas Armour*, for the motion.

*D. M. Christie*, contra.

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Mr. Dalton, Q.C.] [Oct. 11.

WRIGHT v. LEYS.

*Notice of appeal—Time for service.*

A notice served on Monday, the 6th of October, of an appeal to the Court of Appeal from a judgment given on the 4th of September, was set aside as irregular.

*J. Ruttan*, for motion.

*Walter Read*, contra.

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Osler, J. A.] [Oct. 13.

QUEEN v. DILLON.

*Stakeholder—Conviction—40 Vict. (Can.) ch. 31.*

The Act 40 Vict. (Can.) c. 31, intituled "An Act for the Repression of Betting and Pool Selling," does not apply to stakeholders in any of the three cases mentioned in section 2 of the Act.

*Fenton*, for the Crown.

*T. C. L. Armstrong*, for the prisoner.

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M. O.] [October 14.

TRINITY COLLEGE v. HILL.

*Opening foreclosure—Subsequent interest—Interest on costs—Mortgagee's costs of writs of fieri facias.*

A Master's Report when confirmed becomes a judgment of the Court.

Where a foreclosure is opened and the time extended for the payment of the mortgage money, subsequent interest is computed on the whole amount of principal, interest and costs found due by a decree or by a Master's Report. Taxed costs carry interest from the date of taxation, and in taking accounts under an order for redemption in a mortgage case the mortgagee is entitled to interest on such costs and also to the costs of writs of *fi. fa.* issued to enforce payment.

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Mr. Dalton, Q.C.] [Oct. 15.

WILSON v. RODGER, MACLAY & CO.

*Service of writ—Partnership.*

Motion to set aside service of the writ of summons.

*Held*, that the defendants were properly sued in their firm name, the cause of action having arisen before, but the writ of summons having issued after the dissolution of the firm.

Motion refused.

*George Bell*, for the motion.

*Urquhart*, contra.

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Osler, J. A.] [October 21.

WILSON v. RODGER, MACLAY & Co.

OSLER, J.A., affirmed the order of the Master-in-Chambers *supra*.

*George Bell*, for the appeal.

*Urquhart*, contra.

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Hodgins, Q.C.] [Oct. 18.

O'BRIEN v. WELLS.

*Notice of trial—No place mentioned—Irregularity.*

*H. J. Scott*, Q.C., moved on notice to set aside notice of trial as irregular upon the ground that the notice of trial did not state the place where the trial was to take place. The notice of trial read in this way: "Take notice of trial of this action at the sittings of this court for the 20th day of October next." It was admitted that the statement of claim showed the place of trial to be at the town of Stratford.

*Holman*, contra.

THE MASTER refused to set aside the notice of trial unless it was shown by affidavit that the plaintiff, upon whom notice of trial was served, had been misled, and as this was not shown, motion was dismissed as to this ground.

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Osler, J. A.] [Oct. 20.

LAY v. ALEXANDER.

*Final interpleader order—Sheriff's costs.*

On appeal by a sheriff from the order of the Master-in-Chambers striking out so much of a former order as awarded the sheriff his costs of appearing on a motion made by the claimant. In a final interpleader order barring the execution creditor for default in giving security for costs.

*Held*, that the sheriff was properly served with notice of such motion and was entitled to his costs thereof.

Appeal allowed and the later order of the Master rescinded.

*Clement*, for the sheriff.

*George Kerr*, for the claimant.

*Shepley*, for the execution creditor.

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Osler, J. A.] [October 21.

REGAN v. WATERS.

*Appeal from Surrogate Court—Costs.*

*Held*, upon an appeal from one of the taxing officers, that the costs of an appeal from a Surrogate Court to the Court of Appeal should be taxed on the scale of the Court appealed from as provided by Rule 28 of the Court of Appeal, and not on the scale of County Court appeals.

*Holman*, for the appeal.

*Davidson*, contra.

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Boyd, C.] [Oct. 22.

MARTENS v. BIRNEY.

*Motion for judgment—Length of notice—Chy G. O. 418—Rule 407 O. J. A.*

A motion for judgment was made to the Court by the plaintiff upon two clear days' notice of motion, the defendant having appeared, but having filed no defence.

It was objected by the defendant that seven days' notice of motion should have been given under Chy. G. O. 418.

*Held*, that Chy. G. O. 418 is controlled by the conflicting provision of Rule 407, O. J. A., and that the two days' notice of motion was regular.

*Cavell*, for the plaintiff.

*Masten*, for the defendant.

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Boyd, C.] [October 22.

DAWSON v. MOFFATT.

*Solicitor's lien for costs.*

An action for an account in the nature of a partnership account.

By the terms of the judgment pronounced at the trial costs up to the hearing were to be paid to the plaintiff out of the fund in Court, a reference was directed to take the accounts, and further directions and subsequent costs were reserved.

By the report of the officer to whom the reference was directed, the plaintiff was found indebted to the estate in a considerable amount.

A motion was made by the defendant Moffatt (pending an appeal from the Report),

to stay payment out of Court of the costs of the plaintiff up to the trial, until after the hearing, on further directions in order that the amount found due to the estate by the plaintiff might be set off *pro tanto* against the costs awarded to the plaintiff.

*Held*, that the judgment pronounced at the trial gave the plaintiff and his solicitor a vested right to be paid out of the fund in Court prior to the defendant's equity to ask a set off, and no set-off should be allowed to the prejudice of the solicitor's lien thus arising. A solicitor's lien having been asserted at the bar during the argument, an affidavit proving it was allowed to be put in subsequently, following the suggestion of STRONG, V. C., in *Webb* v. *McArthur*, 4 Ch. Ch. R.

*Wallace Nesbitt*, for defendant Moffat.

*Ruttan*, for the other defendants.

*Arnoldi*, for the plaintiff.

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Boyd, C.] [Oct. 22.

HOLDEN v. SMITH.

*Settling minutes — Judgment clerk — Rule* 416, *O. J. A.*

On the 30th June the Chancellor, on the application of the defendant, gave an *ex parte* direction under Rule 416, O. J. A., to have the minutes of a judgment pronounced by him at Chatham settled by one of the judgment clerks at Toronto. The local registrar at Chatham had on the 25th June previously settled the minutes. Subject to the objection of the defendant who then gave notice that he required the minutes to be settled at Toronto, and judgment for the plaintiff, and execution was afterwards issued by him, but these facts were unintentionally, not disclosed to the Chancellor when he gave the direction.

Upon a motion by the plaintiff to set aside the Chancellor's *ex parte* direction and a cross motion by the defendant to have the judgment settled by the Registrar at Toronto.

*Held*, that the entry of judgment did not preclude the party who stated his desire to have the minutes settled at Toronto from afterwards obtaining that reference.

The Court will rather encourage (at all events, for some time), the settling of judgments, such as are not included in the forms, at the head office, because of the well-understood phraseology in use by the two officers whose official function it is to settle the frame and terms of such judgments.

*E. D. Armour*, for the plaintiff.

*Langton*, for the defendant.

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Osler, J. A.] [October 28.

DARLING v. SMITH.

*Absconding Debtors' Act—Priorities.*

On the 25th January, 1884, seven warrants of attachment at the instance of different plaintiffs, were issued out of a Division Court against the goods of the defendant, an absconding debtor, and under these warrants the bailiff seized certain goods. Subsequently; and on the same day, a writ of attachment was issued by the plaintiff in this suit against the defendant as an absconding debtor, and the goods seized by the bailiff were delivered up by him to the sheriff, pursuant to section 16 of the Absconding Debtors' Act. Five other Division Court attachments, and one County Court attachment, were afterwards issued. Judgments were recovered by all the attaching creditors, executions were issued in the suits in the Superior and County Courts, and the clerk of the Division Court furnished the sheriff with a certified memorandum of the judgments in that Court by virtue of which each creditor mentioned in it was entitled for the purpose of sharing in the proceeds, to be treated as a plaintiff who had obtained judgment and sued out execution. Pending this suit an order was made for the sale of the goods attached under the writ, and the goods were sold and the proceeds of the sale paid into Court.

Upon a motion for distribution of the moneys in Court, the plaintiffs claimed payment of their costs of suit in priority to all other claims.

It was ordered that the costs of issuing the plaintiffs' writ, and the fees and charges paid to the sheriff for executing it should be paid first out of the fund, because these costs and charges were necessarily incurred in seizing, recovering and preserving the property, and that any fees which had been incurred in the Division Court in issuing the warrants of attachment on the 25th January, and seizing the property and holding it till it was delivered to

the sheriff should also be paid out of the fund, and also the costs of the order directing the sheriff to sell, and the costs of this application, and that after payment of these charges the fund should be distributed rateably among the creditors.

*Aylesworth*, for the plaintiffs.

*Holman*, contra.

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Osler, J. A.] [Oct. 28.

IN RE GUY V. GRAND TRUNK RY.

*Acquiescence in jurisdiction—Prohibition—Division Court—Foreign corporation.*

The defendants, a foreign corporation, having their head office in Montreal, and not residing or carrying on business in this Province (as held in *Re Ahrens* v. *McGilligat*, 23 C. P. 171, and *Re Westover* v. *Turner*, 26 C.P.), were sued by the plaintiff in the first Division Court of the united counties of Northumberland and Durham, within the jurisdiction of which the cause of action arose. The summons was served upon the local station agent of the defendants at Bowmanville. No notice disputing the jurisdiction was given by the defendants until the trial of the cause, when counsel appeared on their behalf and objected to the jurisdiction of the Division Court because the defendants resided out of the Province. The judge of the Division Court overruled the objection, and proceeded to try the case, the defendants' counsel cross-examining the plaintiff's witnesses and addressing the jury. The amount of the claim was admitted and judgment was given for the plaintiff.

The defendants then moved for prohibition.

*Held*, that the service on the defendants was a nullity. *Held*, also, that these defendants cannot be compelled to appear to a summons issued against them in an ordinary Division Court action, because no means have been provided for effecting service upon them in such an action.

But *held*, that the defendants had precluded themselves by their appearance and conduct at the trial from objecting to the jurisdiction on account of the absence of power to compel their appearance, and the Court having jurisdiction over the cause of action as to its locality, nature and amount, prohibition ought to be refused.

*Aylesworth*, for the defendants.

*Holman*, for the plaintiff.

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Boyd, C.] [October 29.

ANGLO-AMERICAN V. ROWLIN.

*Security for costs—Meritorious defence.*

The local Master at Hamilton, on the application of the plaintiff, set aside a *præcipe* order for security of costs, the plaintiff swearing, and the defendant not denying, on affidavit that the defendant had no good defence to the action. In a letter written by the defendant to the plaintiff, the former said, "My note for $750 (the note sued on) in your favour is due on the 24th. You will kindly give me another month . . . when it will be paid in full."

Upon appeal to a judge in Chambers, *Held* that the defendant had no right to compel the plaintiff to give security for costs unless he had a defence on the merits, and that the failure to answer the affidavit of the plaintiff, and to explain the admissions in his letter, warranted the conclusion that he had no defence.

*Bank of Nova Scotia* v. *La Roche*, 9 P. R. 903, dissented from and *Winterfield* v. *Bradman*, 3 Q. B. D. 325, and *Du St. Marten* v. *Davis*, 28 Sol. J. 392, W. N. 1884, p. 86, followed.

*Watson*, for the appeal.

*William Bell*, contra.

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## LAW STUDENTS' DEPARTMENT.

### LAW SOCIETY.

EXAMINATION QUESTIONS.

TRINITY TERM:

FIRST INTERMEDIATE.

*Equity.*

1. Distinguish between the effects of constructive notice on the one hand, and mere want of caution on the other, and illustrate each by an example.

2. Illustrate by an example the maxim that Equity looks upon that as done which ought to have been done.

3. Illustrate by two examples the change wrought by the Statute of Frauds as to the creation of trusts of real estate. Let one example show the mode in which such trusts might have been created before the statute, and the other show the mode which must be adopted since the statute.

4. State the only modes in which, apart from legislative enactment, a trustee may be relieved of the burden of his trust.

5. Discuss the right of a *cestui que trust* to follow the trust estate, which by virtue of a breach of trust has come to the hands of a third person.

6. Explain what is meant by the maxim "once a mortgage always a mortgage," and show how this conflicts with the common law maxim *modus et conventio vincunt legem.*

7. Explain the principle upon which the marshalling of assets is founded.

*Honors.*

1. "While recognizing the rule of law, and even founding upon it and maintaining it, a Court of Equity will, in a proper case, get round about, avoid, or obviate it." Illustrate this passage by an example.

2. *Qui prior est tempore, potior est jure.* Explain the meaning of this maxim, and illustrate its application by an example.

3. Give a state of facts in which there will arise a resulting trust of an unexhausted residue.

4. State shortly the rights which, under the old common law, a husband acquired in the property of his wife, and the obligations under which he acquired the same; and state the extent to which (apart from statutory enactment) the Courts of Equity refused to recognize such common law rights.

5. Discuss the right of executors to carry on the trade of their testator: (1) where there is no reference thereto made in the will; (2) Where the will directs them so to do. And discuss the right of creditors arising from such trading to recover their claims: (1) as against the executors; (2) as against the estate,

6. Distinguish between a mortgage and a sale with right of repurchase: (1) as to the form of the transaction; (2) as to the different consequences resulting therefrom. State the circumstances which will generally guide one in deciding under which of these classes a given transaction will fall.

7. State the modes in which (apart from legislative enactment) a married woman may acquire equitable separate estate; and state shortly her power of disposing thereof, (*a*) by conveyance, (*b*) by incurring debts; (1) as to her separate personalty, (2) as to her separate realty.

*Broom's Common Law, and O'Sullivan's Government in Canada—Honors.*

1. In what cases, and under what circumstances, may an executor be sued for a tort committed by the testator?

2. If one maker of a joint and several promissory notes give to the holder a mortgage to secure the amount, and therein covenants to pay it, is the other maker discharged on the ground of merger of the simple contract debt in the specialty? Give reasons.

3. A man purchases a lamp for the use of his wife from the manufacturer, who warrants it to be properly constructed: by reason of its improper construction, it explodes and injures the wife. Can *she* maintain an action against the manufacturer? If not, state what additional facts would require to be proved to support her action, and give reasons.

4. Explain briefly, and in general terms, what amount of personal inconvenience inflicted by one person on another is sufficient to constitute a nuisance which the Court will restrain.

5. What difference does it make, as to the presumption of the wife's agency for the husband in purchasing goods, whether they are living together or apart?

6. The driver of an omnibus drives into another omnibus while both are on their ordinary route. Is the proprietor of the first omnibus liable for the damage done to the other, (*a*) if it was done purposely, from some spite which one driver had against the other, (*b*) if it was done through careless driving on the part of the driver of the first omnibus. Reasons.

7. What Courts in Ontario (if any) have the right to refuse to give effect to a Dominion Act on the ground that it is *ultra vires?*