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THE weekly sittings of the First and Tenth Division Courts of the County of York authorized by 54 Vict., c. 15 (Ont.), have now been held three times in each court, and the innovation may, we think, be considered a success. Those having cases in these courts are realizing that time, tide, and His Honor, wait for no man. At a recent sitting, owing to the absence of litigants and their counsel, forty cases were called and disposed of within half an hour, and one hundred and twenty cases in one hundred minutes: a fruitful source of new trials, no doubt; but the effect has been salutary. The dates of the sittings of these Courts for next year, fixed for Tuesdays and Thursdays respectively, have already been tabulated by the energetic deputy clerk of the First Division Court, who, we understand, undertakes that the business of the court will be done with neatness and despatch. The dates as fixed will be given in a later issue.

IN answering the question whether a bank can compel a person who presents a cheque payable to bearer or to the payee to indorse it, *The Banking Law Journal* says:

"While the request is occasionally made by bankers to the holders of bearer cheques that they indorse before payment, and in the case of order cheques it is customary to require indorsement of the payee, there is legal authority for the proposition that the bank has no *right* in either case to require indorsement before payment, and a payee, or holder of a bearer cheque, cannot be compelled to indorse as a pre-requisite to receiving the money. As this is a question which frequently arises in banking practice, something more than this brief statement will be warranted. In the first number of this publication the question was asked if a cheque payable to bearer should be indorsed by the holder, and we then said:

"'A cheque payable to bearer does not require indorsement, of course, for the purpose of transfer. It passes by delivery. Nor is an indorsement by the holder necessary before its payment by the bank in order to entitle the latter to charge the payment to the drawer. It is customary, however, for the paying bank to request the party receiving payment to indorse, as his signature answers the purpose of a receipt, and shows to whom payment has been made. Whether a bank could lawfully refuse payment of such a cheque until the holder had indorsed it is a question which, probably, is not definitely settled. It is the law, although perhaps not universally known among the commercial class, that a creditor is under no legal obligation to give a receipt to his debtor for money

paid. The debtor has no right to withhold payment unless a receipt is given, and a refusal by the creditor to give a receipt constitutes no defence to an action for the debt against the debtor who has tendered the amount on condition that he be given a receipt therefor. If this principle were applied to the case of payment of a cheque payable to bearer, the bank would be held to have no right to require indorsement by the holder before payment; but the latter case stands on a little different footing. In some States a bank is directly liable on a cheque to the cheque holder, and would then stand in the relation of debtor. In others it is under no obligation to the holder, but its duty is solely to the drawer to honor his cheques when presented; and its relation then to the holder would be rather that of agent of the debtor to pay the cheque. In either view it could be urged that as indorsement of a cheque before payment was a reasonable requirement, and contemplated in the contract of the bank with the depositor to honor his cheques, the holder, by accepting the cheque in lieu of money, took it subject to this requirement, and was necessarily bound thereby. However this may be, it is certainly customary for cheques payable to bearer to be indorsed by the holder before payment, and is a requirement which should be complied with.'"

Reference is then made to the case of *Osborn* v. *Gheen*, 3 Central Rep. 762, where the Supreme Court of the District of Columbia held:

"'There is no necessity at all for the legal operation of a payment that the payee should indorse the paper. All that he has to do is to receive the money. The party to whom it is directed is ordered to pay so much money to him. All that the drawer has to do, therefore, is to satisfy himself that when the order is presented the true and proper person is there at hand to receive the payment and to receipt for it. It is true it is common for the payee to indorse in blank at the bank, or for the holder of an instrument to indorse in blank when he receives payment, as a voucher for the payment. But a voucher is not necessary, nor is a receipt necessary, to give validity to a payment. The bank makes the payment of course at its peril, if the payee shall afterwards challenge the payment and say the money was not paid to him but to somebody else. Then it is a mere question of identity as between the payee and the bank; but it does not go to the legal integrity of the instrument.

"'The bank upon whom the note or bill of exchange is drawn is authorized and required to pay the money to the payee, knowing him to be the identical man intended, without any indorsement and without any receipt. Beyond that, a prudent man might well hesitate to indorse a paper which was given him to be paid at the bank for this reason, that if he indorsed it in blank and without qualification, if the bank pleased it could, as we know banks sometimes do, put that paper into circulation again; and if it should get into the hands of a *bonâ fide* holder, he might hold the payee responsible upon his blank indorsement. Therefore a prudent man might properly decline to indorse, in the legal sense of the term, a paper when it was paid to him. He should receipt it as a matter of satisfaction between him and the other; but he should qualify his indorsement by some word or sign or indication that he did not mean to throw the paper into circulation again, but meant to make his name upon it only the representa-

tive of the fact that it had been paid to him and that the functions of the paper had ceased and become entirely extinct.'

"The gist of this discourse, we see, is this: That a bank is under obligation to make payment without any receipt or indorsement, but it is common for the payee to indorse as a voucher; and while under no obligation, the payee should, nevertheless, be accommodating and give a receipt as a matter of satisfaction. He should, however, be careful and qualify his indorsement by some word or sign to show that it was not intended as an indorsement, but merely as a receipt. It would not be prudent for a payee to indorse in blank, for the bank might, instead of jabbing the cheque on the cancelling fork, deliver it over to somebody else with the payee's blank indorsement, and possibly subject him to liability to a *bonâ fide* holder, who from the absence of any indorsement by the bank or other indication on the paper might not know that it had ever been in the bank's possession.

"So far as the argument of *prudence* is concerned, if it is imprudent and risky for a payee to indorse before receiving the money, a large majority of the business world are open to that charge. But waiving that objection—for if it, in fact, had any merit, it could be obviated by a qualified indorsement—bankers are met with the truth that while the needs of business, in the case of order cheques at all events, require indorsement by the payee, the law, as so far announced, does not compel indorsement, but, on the contrary, holds it not obligatory and only to be done as a matter of accommodation, if at all. When the vast amounts of payments of cheques are taken into consideration, and the bother and annoyance to the bank which would result if every holder stood on his legal rights and refused to indorse, the reasonableness of the requirement is apparent. It is reasonable enough for a debtor to ask a receipt from his creditor as evidence of his single payment. But where instead of a single payment a multitude of daily payments are made to all sorts and conditions of men, it becomes absolutely necessary to the proper conduct of the banker's business that he have written evidence of the fact from the party to whom payment has been made; and instead of being a matter of accommodation, it should be a legal right. The view as announced in our previous number would seem proper for any court to adopt, namely, that as indorsement of a cheque before payment was a reasonable requirement, it should be held 'contemplated in the contract of the bank with the depositor to honor his cheques, and that the holder by accepting the cheque in lieu of money took it subject to this requirement and was necessarily bound thereby.' It remains to be seen what view other courts may take of the subject."

A QUESTION OF PRIORITY.

Where a point of law has to be determined, not upon the authority of any decided case, but by the application of general principles, it is surprising to see how judges differ and at what diverse conclusions they arrive.

The case of *Maclennan* v. *Gray*, or *Gray* v. *Coughlin* (as it is called in the

Supreme Court), is not an inapt illustration of this. There the question in controversy was not exactly covered by any decided case, and its solution depended on the application to the particular facts of that case of those principles by which equitable rights are established and enforced; and the result of the prolonged litigation has been that four judges, viz., Boyd, C., Ritchie, C.J., Strong and Fournier, JJ., have taken one view, and six other judges, viz., Hagarty, C.J., Burton, Osler, Street, Gwynne, and Patterson, JJ., have taken another, and that the opinion of the four has prevailed over that of the six—a result which may possibly not be altogether satisfactory to the unsuccessful litigant, although it is of course of itself no reason for imagining that the case has not been well decided.

In a former number (vol. 25, p. 581), we ventured to express an opinion on the merits of the controversy; and in view of the remarkable divergence of opinion the case has given rise to among the judges, it may, perhaps, be worth while to recur to it again. In our previous remarks we stated that we thought the conclusion arrived at by the Ontario Court of Appeal was correct, but since the adverse decision of the Supreme Court (*Gray* v. *Coughlin*, 18 S.C.R. 553) it would, of course, be presumptuous to reiterate that opinion here. At the same time, we think it may not be out of place to point out some aspects of the case which do not appear to us to have been noticed by the Supreme Court.

Before doing so, it may be well to briefly recapitulate the facts upon which the case turns. Richard and John Gray were the owners in fee of a parcel of land which was subject to the dower of Rosanna Gray. Richard and John mortgaged their interest to Coughlin for $700. Rosanna was no party to this mortgage, but she knew of its existence. Subsequently Richard and John mortgaged the property to Maclennan for $4,000, and Rosanna joined in this mortgage as surety and mortgaged her own interest in the land also to Maclennan for this mortgage debt. Maclennan had no notice of Coughlin's mortgage, and acquired priority over it under the Registry Act by the prior registration of his mortgage. The whole of the property mortgaged to Maclennan was sold, and after payment of his mortgage a balance of $1,612 was left. Rosanna's interest was valued at $1525, and the question was whether she was entitled to be paid the value of her interest in priority to the claim of Coughlin under his mortgage.

Ritchie, C.J., on this state of facts, observes: "Under such priority thus obtained over the Coughlin mortgage, Maclennan was entitled to be paid out of the fund in court representing the mortgagor's property in priority to Coughlin, leaving the part which represents the property of Rosanna Gray to be appropriated to her and not to Coughlin. . . . The practical operation of the judgment of the Appellate Court (*i.e.*, the Court of Appeal of Ontario) is to remove the Coughlin mortgage from the property of his mortgagors and place it on the property of Rosanna Gray, which was never mortgaged to him." But we think the premises on which the learned Chief Justice bases his conclusion are open to question. Can it be truly said that the fund in court represented the mortgagors' property? It must be remembered that all that Maclennan's mortgagors had to mortgage, and all that they did, in fact, mortgage to him, was their equity of redemption in Coughlin's mortgage; but Maclennan having re-

ceived a mortgage of only his mortgagors' interest is, by virtue of the Registry Act, enabled to plant his mortgage also on Coughlin's interest; but Coughlin's mortgage, though postponed by force of the Registry Act to that of Maclennan, is nevertheless perfectly valid and binding as against the mortgagors. Can the fund in court then be said to represent Maclennan's mortgagors' interest? And if the fund in court did not really represent the interest of Maclennan's mortgagors, but that interest plus the interest previously mortgaged to Coughlin, then may it not be argued that an equity arises in Coughlin's favor to the extent to which his fund has been applied to pay off Maclennan's debt to rank on the surplus, as will more fully appear as we proceed?

With the learned and elaborate judgment of Mr. Justice Strong, in which the principles of equity applicable to the case are so clearly and fully stated, it is almost impossible to find fault. There is one aspect of the case, however, which neither he nor the Chief Justice appear to us to have noticed; possibly there is nothing in it, and yet it is one that seems to us to afford some ground for the contention of Coughlin.

One of the crucial tests which the learned judge applies to the case is this: Supposing Rosanna had redeemed Maclennan, on what terms would Coughlin be permitted to redeem her? and he says that he would only have the right to redeem the mortgaged property belonging to the principal mortgagors; in other words, in the technical language of conveyancers, the suretyship securities—namely, the dower—would be "at home" in the hands of Rosanna and would therefore be irredeemable by Coughlin, and unless he redeemed by paying off the full amount of Maclennan's debt and interest he would be liable to be foreclosed.

The point, however, which we should like to present in Coughlin's favor is this: This is a case of conflicting equities; on the one hand, Coughlin as a subsequent incumbrancer is entitled, as against Maclennan, to have the securities held by him marshalled; on the other hand, are the equitable rights of the surety. Maclennan is entitled to two funds: the fund mortgaged by the mortgagors and that mortgaged by the surety, Rosanna. He ought not to be allowed to throw the whole of his debt on the former fund to the prejudice of Coughlin. It is, however, conceded that the right of marshalling cannot be allowed to the prejudice of third parties, and it cannot be allowed, therefore, to the prejudice of a surety. But what are the equitable rights of a surety in such a case? Do they extend beyond the right of having the property of his principal applied first towards the payment of the debt for which he is surety? Has he any equity to have any third person's property applied? May not Coughlin be heard to say: "At the time you entered into the contract of suretyship, you knew that all the beneficial interest your principal had in the property mortgaged was subject to my mortgage. By the operation of the Registry Act, Maclennan, it is true, has acquired priority over me, and by that means has been enabled to apply not only the property of his mortgagors, but my property, in payment of his debt. You have an equity, it is true, to have your principal's property applied in discharge of his debt, but as between you and me you have no equity to

apply my property in payment of it. You must be prepared to do equity, and to the extent to which Maclennan's debt, for which you were liable, has been paid out of my fund you must recoup me."

But Strong, J., though he does not assume to deal with this view of the case directly, does so, nevertheless, indirectly, by affirming that the surety under the circumstances of this case is entitled to the benefit of the priority gained by the creditor to as full an extent as if she were a purchaser from him for value, and that as between the surety and the first mortgagee, Coughlin, the surety's equity to be subrogated to the rights of her mortgagee is superior to the right of Coughlin to redeem. But, admitting the right of the surety to be subrogated to the rights of Maclennan, does not that also involve the liability to hold the position of the mortgagee subject to the same equities as affected him, and among others the liability to marshal his securities, so far as it could be done without prejudice to the surety's rights?

But it may be said that to admit of marshalling on any terms would be a prejudice to the surety: but we may ask how can a surety justly say he is prejudiced merely because he is not permitted to have a fund which was not his principal's applied in the payment of the debt for which he is surety? In one sense, a man is prejudiced by not being allowed to pay his debts out of another man's purse; but that is not, we conceive, the kind of prejudice that a surety would be allowed to set up as an answer to a claim to marshal securities.

While the Supreme Court has given full effect to the surety's right of subrogation, it appears to us to have overlooked the correlative right of Coughlin to have the securities of Maclennan marshalled for his benefit.

The effect of the judgment of the Court of Appeal, as we pointed out before, was to place Rosanna, the surety, in exactly the position she may reasonably be supposed to have contemplated when she entered into her contract; but the effect of the judgment of the Supreme Court is to place her in a superior position, by enabling her to ride on the back of Maclennan over the head of Coughlin. Whether the Registry Act, which purports to confine its benefits to subsequent purchasers and mortgagees for value without notice, was designed to have this effect is certainly a fair subject for discussion.

We would also suggest, in conclusion, that when the decision which has been arrived at is based on a legal equity which appears to conflict with the natural equity of a case, it may not be unreasonable to suggest that the principles on which the legal equity is based may perhaps require reconsideration.

COMMENTS ON CURRENT ENGLISH DECISIONS.

The Law Reports for October comprise (1891) 2 Q.B., pp. 513-545; (1891) P., pp. 321-327; and (1891) 3 Ch., pp. 1-81.

BREACH OF PROMISE OF MARRIAGE—CORROBORATION OF PROMISE—OMISSION TO ANSWER LETTERS, EFFECT OF—32 & 33 VICT., C. 68, S. 2—(R.S.O., C. 61, S. 6).

In *Wiedemann* v. *Walpole* (1891), 2 Q.B. 534, it is not very surprising to find that the somewhat curious decision of Pollock, B., that the defendant's mere

omission to answer a letter of the plaintiff asking whether he intended to marry her as he had promised was corroborative evidence that he had in fact made such a promise, was reversed by the Court of Appeal (Lord Esher, M.R., Bowen, and Kay, L.JJ.), who thought that fact alone was not a corroboration of the plaintiff's evidence within the statute 32 & 33 Vict., c. 68, s. 2 (R.S.O., c. 61, s. 6); neither was the fact that the plaintiff was in possession of the defendant's signet ring. The court was of opinion that the not answering a letter differed from the case of a man being, as in *Bessela* v. *Stern*, 2 C.P.D. 265, taxed orally with the promise and making no denial. Whether an omission to answer a letter amounts to an admission of the truth of the statements claimed in it, according to the Court of Appeal, depends on the circumstances under which the letter was written; and unless there is an irresistible inference that the circumstances are such that the refusal to reply amounts to an admission, it will not do so. In connection with this case it may be well to refer to *Yarwood* v. *Hart*, 16 Ont 23, where the law on this point is also discussed.

LANDLORD AND TENANT—LEASE—BREACH OF COVENANT—FORFEITURE—COMPENSATION—44 & 45 VICT., C. 41, S. 14 (R.S.O., C. 143, S. 11).

Skinner's Co. v. *Knight* (1891), 2 Q.B. 542, was an action of ejectment by landlord against a tenant on an alleged forfeiture of the lease by breach of a covenant to repair. Notice had been given by the plaintiffs to the tenant, under 44 & 45 Vict., c. 41, s. 14 (R.S.O., c. 143, s. 11), and the tenant had, as he claimed, put the premises in repair before the issue of the writ. At the trial before Charles, J., he left two questions: First, whether the premises were out of repair prior to the service of the notice; and second, whether they had been put in repair before the issue of the writ. The jury answered the first question in the affirmative, but disagreed as to the second. On this finding, Charles, J., declined to give the plaintiffs judgment, but gave them leave to re-enter the action for trial. The plaintiffs appealed on the ground that they were entitled to judgment, even though the premises had been repaired before the writ, because the defendant had not paid the plaintiffs the cost of the drawing and serving of the notice under the statute, as part of the compensation required to be made by the statute for the breach of the covenant; but the Court of Appeal (Lord Esher, M.R., and Fry, L.J.) were of opinion that the costs in question were not caused by the breach of covenant, but were occasioned by the fetter which the wisdom of the legislature had imposed on the enforcement of the cause of action arising from that breach.

PROBATE—WILL—CODICILS—REVOCATION—REVIVAL OF FORMER CODICIL BY REFERENCE.

In the goods of Dennis (1891), P. 326, the testator had executed a will in 1867, and two codicils to it in 1869 and 1874. In 1875 he made another will, by which he expressly revoked all previous wills. Subsequently two sisters who were benefited by the codicil of 1874 and the will of 1875 died, and he then made another codicil in 1881, disposing of the property he had left to them, which he described as a codicil to his last will and testament, and which began, "Whereas my two sisters named in my codicil, dated 12th May, 1874, are now dead," etc.,

and the question was whether this had the effect of reviving the codicil of 1874, but Jeune, J., held that it had not that effect.

WILL—FORFEITURE—BANKRUPTCY—ANNULMENT OF BANKRUPTCY, EFFECT OF.

Metcalfe v. *Metcalfe* (1891), 3 Ch. 1, is an appeal from a decision of Kekewich, J., 43 Ch.D. 633 (noted *ante* vol. xxvi., p. 29). The clause in the will in question provided that if by any act or by operation of law any interests given by the testator in trust for his children should be aliened, whereby the same should vest in any other person, then the trustees were to apply the income so aliened to and among the other persons entitled. The bankruptcy in question took place before the death of the testator, and remained unannulled for two years thereafter. Kekewich, J., held that it had the effect of forfeiting the life interest of the legatee, but not the interest of the appellant in remainder, which had not come into possession prior to the annulment of the bankruptcy. The appeal was as to the first point, and the decision of Kekewich, J., was affirmed, although Fry, L.J., expressed the opinion that but for the authorities which were the other way, he would have considered that the act which would create a forfeiture must take place after the testator's death.

COMPANY—WINDING UP—ORDER FOR PAYMENT OF CALLS—MERGER OF RIGHT OF ACTION BY COMPANY FOR CALLS (R.S.C., C. 129, S. 49).

In *Westmoreland Green and Blue Slate Co.* v. *Feilden* (1891), 3 Ch. 15, the short point involved was whether an order made in a winding-up proceeding for the payment of unpaid calls by contributories (see R.S.C., c. 129, s. 49) had the effect of merging the company's right of action for such calls, and the Court of Appeal (Lindley, Bowen, and Fry, L.JJ.), affirming Kekewich, J., held that it had not.

COMPANY—WINDING UP—DIRECTOR—QUALIFICATION SHARES—CONTRIBUTORY.

In re Portuguese Consolidated Copper Mines (1891), 3 Ch. 28, was an application by a former director of a company being wound up to be relieved of liability for calls on certain shares. The applicant was appointed an original director of the company on 22nd October, 1888. The articles of the company provided that each director should hold at least forty shares. At a meeting of some of the directors on 25th October, 1888, forty shares were allotted to the applicant, who never applied for them, nor ever actually accepted them, and never knew, until the company was being wound up, that they had been allotted to him. He, however, acted as a director on 28th November, 1888, and also on the 16th and 18th January, 1889. On the 19th January, 1889, he acquired by transfer forty fully paid-up shares, which were duly registered in his name; and on 28th January, 1889, he retired from the directorate. He had been settled on the list of contributories in respect of the forty shares allotted to him on 25th October, and North, J., held that he was liable, and, on appeal, the Court of Appeal (Lindley, Bowen, and Fry, L.JJ.) affirmed this decision, on the ground that the applicant must be taken to have known that it was his duty to qualify for the office of director by taking forty shares within a reasonable time; and that a

reasonable time had elapsed, if not before the 28th November, 1889, at all events before the 19th January, 1890.

TRADE MARK—REGISTRATION FOR ENTIRE CLASS OF MERCHANDISE—USER OF TRADE MARK FOR PART OF CLASS—INFRINGEMENT OF TRADE MARK—INTERLOCUTORY INJUNCTION—FRAUD CHARGED BUT NOT ESTABLISHED—COSTS.

Hargreave v. *Freeman* (1891), 3 Ch. 39, was an application to Chitty, J., for an interlocutory injunction to restrain the alleged infringement of the plaintiff's trade mark. The trade mark which *inter alia* consisted of a shield with three crowns, and the word "mixture" underneath, was registered for "tobacco, whether manufactured or unmanufactured." Since registration it had only been used by the plaintiff on packages containing cut tobacco; but he had also used the device of the shield and three crowns on boxes of cigars. The defendants, who were cigar manufacturers, used a label on which was also a shield and three crowns, and which the plaintiff claimed to be an infringement of his trade mark; but Chitty, J., held that the registration of the trade mark for an entire class of goods, followed by a user on one description of goods only, did not give an exclusive right to the use of the trade mark for all descriptions of goods in that class, and he therefore refused the injunction. He refused to give the defendants costs because they had set up a charge of fraud against the plaintiff which had failed.

WILL—LEGACY TO WIFE—INSUFFICIENT ESTATE—ABATEMENT OF LEGACIES.

In re Schweder, Oppenheim v. *Schweder* (1891), 3 Ch. 44, the question was raised whether where a testator has bequeathed a legacy to his wife for her present requirements, and directed it to be paid within three months of his decease, such a legacy, in the event of a deficiency of assets, is liable to abate with other legacies. Malins, V.C., *In re Hardy*, 17 Ch.D. 798, had decided the question in the negative, in opposition to the view expressed by Lord Hardwicke in *Blower* v. *Morrett*, 2 Ves. Sr. 420, which, however, Chitty, J., considered he was bound to follow.

WILL—CONSTRUCTION—GIFT TO CHILDREN AND ISSUE OF DECEASED CHILDREN—"SHARE AND SHARE ALIKE"—JOINT TENANCY OR TENANCY IN COMMON.

In re Yates, Bostock v. *D'Eyncourt* (1891), 5 Ch. 53, is a decision of North, J., upon the construction of a will, whereby a testator devised real estate to trustees in fee upon certain trusts for his sons and daughters and the survivor of them; and from and after the death of the survivor, or during the lives of all or any, with their concurrence upon trust to sell the property, and to stand possessed of the proceeds "upon trust for all and every of my said sons and daughters who shall be then living, and the issue of any then dead (such issue standing *in loco parentis)*, share and share alike." The question was, what was the nature of the estate which was thus conferred? North, J., decided that the sons and daughters and the issue of any deceased son or daughter took as tenants in common, but that for wants of words of severance the issue of any deceased son or daughter took their share *inter se* as joint tenants.

JOINT TENANCY—SEVERANCE.

In re Wilks, Child v. *Bulmer* (1891), 3 Ch. 59, it became necessary to consider what acts on the part of a joint tenant are sufficient to create a severance of the joint tenancy. In this case a fund in court stood to the credit of three infant plaintiffs, "as joint tenants." On 19th March, 1890, the eldest of the three obtained his majority, and became entitled to have one-third of the fund paid out to him. On 20th March solicitors were instructed to apply to get his share out of court, and they obtained a summons for payment out returnable on 28th March. On that day the parties attended, and the evidence was complete, but owing to pressure of business the summons was not reached, and was therefore adjourned to 22nd April. In the meantime, on 2nd April, the applicant died; and Stirling, J., held that the proceedings not having been effectual before the death of the applicant, there was no severance of the joint tenancy. According to the learned judge, an act to amount to a severance of a joint tenancy must be of such a character as to preclude the joint tenant from claiming by survivorship any interest in the subject matter of the joint tenancy. The taking out of a summons on which no order was made could not have that effect.

CONTRACT—SALE OF LAND—VENDOR DESCRIBED AS "LANDLORD"—SUBSEQUENT LETTER REFERRING TO CONTRACT AND VENDOR—STATUTE OF FRAUDS, S. 4.

Coombs v. *Wilkes* (1891), 3 Ch. 77, is a decision on that perennial source of profit to the legal profession, the Statute of Frauds; and the point involved was whether or not the vendor was sufficiently described in the contract. The defendant signed a contract agreeing to purchase a parcel of land, and in it stated that he had paid a deposit to "Messrs. R., as agents for the vendor." The document continued: "I hereby agree to pay in the usual way for the tenant right (the landlord to be considered an outgoing tenant, according to the custom of the country)." The vendor's name was not mentioned in the contract and he did not sign it, but it was signed by a clerk of Messrs. R. In a subsequent letter to the vendor's solicitor, the defendant asked that the balance of the purchase money might remain on mortgage, and concluded: "Let me know, and then Mr. Coombs could sign off the deeds . . . I should like a copy of our agreement." It was contended by the plaintiff (the vendor) that the term "landlord" in the original contract sufficiently identified the vendor, and even if it did not the subsequent letter of the defendant cured the defect. Romer, J., however, was of opinion that the term "landlord" was not necessarily referrible to the vendor, and was therefore not a sufficient description of the vendor to satisfy the requirements of the statute; and the letter was not sufficiently connected with the contract by reference to enable it to be used to supplement it. There can, however, be very little doubt that this is only one more case in which the statute has practically been used to effectuate the very purpose it was intended to prevent.

Notes on Exchanges and Legal Scrap Book.

FIRST OFFENCE.—In the report of *Reynold* v. *Phillips*, 13 Ill. Ap. 557, it is stated that when a dog assails a man the man is not bound "to stop and investigate as to the antecedent habits of the dog."

SEWING MACHINE—"HOUSEHOLD FURNITURE."—A sewing machine is included in a general assignment for the benefit of creditors covering all "household furniture."—*Allen* v. *Wallace*, 21 U.S. 49.

INSURABLE INTEREST—FIRE.—A person engaged in moving houses has an insurable interest in the houses which he is moving to the extent of the compensation which he is to receive.—*Planters & Merchants' Ins. Co.* v. *Thurston*, 9 So. Rep. 268 (Ala.).

ACCIDENT INSURANCE—SUNSTROKE.—"Sunstroke or heat prostration" contracted by the decedent in the course of his ordinary duty as a supervising architect is a disease, and does not come within the terms of a policy of insurance against bodily injuries sustained through "external, violent, and accidental means," but expressly excepting "any disease or bodily infirmity."—*Dozier* v. *Fidelity Co.*, 46 Fed. Rep. 446 (Mo.).

TELEGRAPH COMPANIES—MENTAL ANGUISH.—Damages cannot be recovered for mental anguish caused by the negligence of defendant telegraph company's agent in failing to deliver to plaintiff a message informing him of the death of his brother, and the time and place of burial, until after the last train had left by which the plaintiff could have travelled to attend the funeral.—*Western Union Tel. Co.* v. *Rogers*, Miss., 9 South Rep. 823.

BENEFIT OF THE DOUBT.—"I confess I never could understand what the phrase means. There is no benefit of the doubt. Every person is presumed to be innocent until he or she is proved to be guilty. If there is a doubt in the minds of the jury it follows that guilt has not been established, and consequently that the person is, in the eyes of the law, innocent."—*Mr. Montagu Williams* in "*Later Leaves*."

VALUABLE LEGAL DECISION.—The conclusion we arrive at on discovering the head-note to the case of *Sergeant* v. *Emlin*, 21 Atl. Rep. 662, is that either the bar of Pennsylvania contains some very embryo lawyers, or else that some judge of that State is very anxious to give a judicial opinion about something or

other. In that case the court gravely held that "where two different agents are employed to collect moneys, one of them is not responsible for the defalcation of the other." Such a valuable judicial decision should not be lost sight of.

CARRIERS OF PASSENGERS—SLEEPING CAR COMPANY.—In an action against a sleeping car company for money stolen from a person while asleep, it appeared that the only man kept on the car while it ran from New York to Boston, making eight stops on the way, was a man who acted as conductor, porter, and boot-black. Held that defendant had not exercised due care in protecting its passenger while asleep.—*Carpenter* v. *N.Y., &c., R. Co., N.Y.*, 26 N.E. Rep. 277.

"DEFECTIVE PLANT" INCLUDES A VICIOUS HORSE.—In a recent English case in the Manchester County Court *(Dearn* v. *The Corporation of Manchester)*, the plaintiff sought to recover compensation, under s-s. 1 of the Employers Liability Act (R.S.O. (1887), c. 141, s. 3, s-s. 1), for injuries caused by a vicious horse used by the defendants. It has previously been held in the superior courts that a horse is "plant" within the meaning of the section, and in this case the judge held that a vicious horse was "defective plant," and thereupon gave judgment for the plaintiff. The decision seems consonant with reason, and will no doubt be allowed to stand.

BENEFIT INSURANCE—SIMULTANEOUS DEATH OF INSURED AND BENEFICIARY.—A member of a mutual benefit society named his wife as beneficiary. One of the society's by-laws read: "Should all the beneficiaries named die before the decease of a member and no other or further disposition be made thereof, the benefit shall be paid to the heirs of the deceased member dependent on him or her; and if no person or persons are entitled to receive such benefit, then it shall revert to the relief fund of the said K. & L. of H." The husband and wife perished in the same calamity, being burned to death in a hotel, no one witnessing their death. It was held that the heirs of the member were entitled to the insurance to the exclusion of the administrators of the wife. There being no presumption of survivorship, the court found that the beneficiary named at the time the policy was earned by the death of the husband did not survive him, and was incapable of taking the proceeds of the policy.

MARRIAGE—WHEN COMPLETE.—The clergyman who recently completed the marriage of a drunken man has been found fault with for so doing, but he pleads justification on the ground that "when the outrage occurred the ceremony, so far as regards the actual marriage itself, had already been legally completed by the declaration which pronounces M. & N. to be 'man and wife together.'" We cannot think that the reverend gentleman is technically correct as to the point of the marriage service at which the knot is legally tied. From the judgments

in *Beamish* v. *Beamish*, 9 H.L.C. 274, it would seem that the part of the service at which the marriage becomes knit is "after affiance and troth plighted" between the parties, so that if the ministerial pronouncement should not happen to be given, the marriage would be complete and binding on the parties all the same. In Blunt's "Church Law," however (2nd edit., revised by Sir W. Phillimore, at p. 154), the view is taken that the marriage itself is legally completed by declaration of the priest.—*Law Journal.*

INSURABLE INTEREST—LIFE POLICY.—Two cases at Bolton have drawn attention to the peculiarities of insurance law. The landlord of an hotel in Bolton upon taking it over undertook also to take over and keep a man who was a general hanger-on about the premises. Subsequently an agent of an insurance company called upon the landlord and hinted that the hanger-on's life might be insured in his company. The landlord assented, the policy was granted, and all premiums regularly paid. Two years after the hanger-on died. The landlord now desired to obtain the value of the policy. The company offered £5 in settlement, but this was refused, and thereupon the landlord instituted proceedings against the company. The magistrates held, however, that he had no insurable interest in the deceased, and, though the company had profited by the premiums paid, they could not be made to pay the amount of the policy. The company claimed that they endeavored to conform to the law; but, looking at the fact that it had received these premiums, this seems hardly creditable. In another insurance case tried in the same place, where a man had insured his brother without his knowledge, and the executors sued for the amount of the policy, they were more successful, and the insurance society had to pay.—*Law Journal.*

WILL—"CHILDREN."—The case of *In re Baynham*, deceased, of which a report will be found in another column (*Ind. Jur.*, vol. xv., p. 413), should serve as a warning to testators, if, indeed, any warning will ever keep some testators from going wrong. The particular moral in this case is not to use lithographed forms of will, and, when you intend to benefit children who are not in the strictest sense your own, to make clear who are the real objects of your bounty. It does not follow that the court will always be able to carry out a testator's wishes although it is quite clear what he really meant. In this case a man of thirty-four married a woman of forty-three, who had children. She bore him no children, and some two or three years after the marriage he made a will on a lithographed form in which were the words "my children." He crossed out the "my" and put "our." It was clear he meant to intimate that he looked upon his wife's children as being as much his as hers. But the court, acting on well-established principles, was obliged to deprive these children of the benefits intended for them by their step-father. It is a pity that in so important a matter as making a will testators will not act on the principle of a cool and self-possessed undergraduate who was in for the Law and History School at Oxford,

and not knowing much law, when asked by the examiner what he should do in such and such complicated circumstances, replied: "I should take a cab, sir, and consult an experienced solicitor."—*Indian Jurist.*

COUNSEL'S IDENTITY.—Sometimes amusing incongruities arise from the closeness with which a counsel in pleading identifies himself with his client. It is a convenient form of speech to refer to yourself as your client. Even judges do not scorn to avail themselves of it in addressing the bar. "Mr. X.," his lordship would say, "are you the engine-driver?" "Are you the lady who was expelled from the public-house for being riotous and disorderly, Mr. Q.?" will be asked by the bench of a peculiarly staid and respectable counsel. And such questions are not resented, the strict distinction seldom being drawn. It takes a little time for an advocate to merge his own identity in that of his client in this way. During a long multiple poinding, in which the claimants were legion, Lord Fraser suddenly turned to O., one of the counsel, and asked brusquely, "Who are you?" The gentleman was sadly taken aback at the directness of the question. He flushed a little, and stammered, "I'm Mr. O., my lord." But this counsel has, through a large practice, learned the way of the courts since those days. He took part in the following colloquy before one of the divisions of the Court of Session last month. He and *Z.* were opposing counsel in a case. "Who are you, Mr. O.?" asked the presiding judge. "I'm Mr. Z.'s sister, my lord," was the unblushing statement. "And why are you interested in pressing this?" "I am anxious to get married, my lord," said O., who has really lost all sense of shame and modesty. To the question of an Outer House judge, too, this gentleman of many *aliases* not long since made the startling disclosure, "My lord, I am Charles Macready's bastard son!"—*Journal of Jurisprudence.*

RELIGIOUS EDUCATION OF INFANT.—It is well-settled law that the father who is clothed by law with the right of directing the religious education of his children cannot, even by ante-nuptial contract, bind himself to exercise in a particular way that power which the law gives him for the benefit of his children and not of himself (*Andrews* v. *Salt*, L.R. 8 Chanc. App. 622). In *In re Nevin*, 60 Law J. Rep. Chanc. 542, in addition to an ante-nuptial promise to educate the children of the marriage in the Roman Catholic religion, the father had also allowed the child to be baptized in that faith. The father died in 1886 intestate, the child being then three years old, and on his deathbed he commended his wife and child to a charitable lady of the Protestant faith, who maintained the mother and child in her house, and after the death of the mother, who died intestate in 1889, continued to maintain and educate the child in the Protestant faith. Then followed a story of forcible abduction and rival claims to the guardianship of the infant, involving a dispute whether she should be educated in the Roman Catholic or Protestant faith, which was heard before Mr. Justice Chitty in January and before the Court of Appeal in April last. The court had no

hesitation in deciding against the claim to the guardianship set up by the forcible abductor. Her religious education was a matter of great difficulty; but, acting on the rule laid down in *Titus* v. *Salt*, the court thought the father was at liberty to change his mind and that there had been a sufficient change of mind on the father's part in committing his child to the care of her benefactress, and decided that, in the true interests of the child, she should remain under the care of her Protestant friends and be educated in the Protestant faith.—*Law Journal.*

SI NON E VERO, E BENE TROVATO.—The murder case of *State* v. *Avery*, recently tried in Henry county, Tennessee, is one of the most remarkable in the annals of criminal jurisprudence, and proved the phenomenal genius of the attorney for the accused, a prominent criminal lawyer from Cincinnati, named Wallis. In June, 1887, Charles Ensley, a cousin of Avery, was killed in his room while lying on a lounge, about three o'clock in the afternoon. The weapon used was a small rifle, sending a thirty-two calibre ball through Ensley's brain. No one was in the house at the time but Ensley. An empty rifle was found lying in its rack on the side of the wall, and the bullet fitted the tube. Avery was arrested for the crime, as he was the only living close relation to Ensley, and would have profited by his death to an extent of nearly $100,000. Avery was tried, pleaded not guilty, but was convicted of murder in the first degree and sentenced to be hung. He appealed to the Supreme Court, and engaged Mr. Wallis to defend him. The Supreme Court remanded it back to the Circuit Court on account of technical errors. Two mistrials have been brought about. Now comes the strangest part of the story. The brilliant Wallis struck the keynote to the mystery. In August last he had the rifle loaded and hung on the wall, a white sheet with the form of a man marked on it, and a heavy cut-glass pitcher of water placed on the shelf above. The temperature was ninety-nine degrees in the shade, one of the hottest days in the year. The pitcher of water acted as a sun-glass, and the hot rays of the sun shining through the water were refracted directly on the cartridge-chamber of the rifle. Eight witnesses were in the room, and a few minutes after three o'clock a puff and a report, and the ball struck the outlined form back of the ear, and the theory of circumstantial evidence was exploded. This incident, being seen and sworn to, readily explained itself to the jury. As the sleeping man was lying on the lounge, the direct rays of the sun-glass heated the cartridge, causing it to explode.—*Albany Law Journal.*

DONATIO MORTIS CAUSA.—An interesting and novel point in the law of gifts *causa mortis* was recently decided by the Court of Appeals of New York in the case of *Redden* v. *Thrall*. The donor, who was suffering from hernia, was about to undergo an operation for its cure. The evening before going to the hospital, where the operation was to be performed, he delivered to the donee a tin box, with the declaration that, if he did not return, the box and its contents were to belong to the donee. While undergoing the operation the donor died of heart disease, the

shock from the operation being the immediate cause of the fatal result. On these facts it was contended that, inasmuch as the donor died of a different disease from that from which he apprehended death at the time when the gift was made, the gift could not take effect. But Mr. Justice Earle, delivering the opinion of the court, said: "I am quite sure that no case can be found in which it was decided that death must ensue from the same disease, and not from some other disease existing at the same time, but not known. There is no reason for this additional prerequisite. The rule is that the donor must not recover from the disease from which he then apprehended death. If he recovers, the gift is void; if he does not recover and the gift is not revoked, it becomes effectual. In this case the condition was that if he did not recover from the consequences of the operation and return from the hospital, the gift should take effect. That was a perfectly lawful condition for him as the owner of the property to impose, and no reason can be perceived for refusing to uphold a gift made under such circumstances. A donor may have several diseases, and may, in making a gift, apprehend death from one and not from the others, and shall the gift be invalid if, before he recovers from the disease feared, he die from one of the other diseases? In such a case it might be and generally would be difficult, if not impossible, to tell what share any of the diseases had in causing the death. No medical skill could ordinarily tell that the donor would have succumbed to the disease feared, if the other diseases had not been present. Here the immediate cause of death appeared to be heart disease, and the autopsy did not disclose that there was any connection between the hernia or the operation and the heart disease. But who could tell that the death would have ensued from the heart disease at that particular time but for the operation? No medical skill can tell that the shock from the operation, and the debility and the disturbance caused thereby, did not hasten death; and the death, therefore, in a proper sense may have ensued, and probably did ensue, from both causes. Sound policy requires that the laws regulating gifts *causa mortis* should not be extended, and that the range of such gifts should not be enlarged. We therefore confine our decision to the precise facts of the case, and we go no further than to hold that when a gift is made in the apprehension of death from some disease from which the donor did not recover, and the apparent immediate cause of death was some other disease with which he was afflicted at the same time, the gift becomes effectual."—*Washington Law Reporter.*

ATTORNEY ACQUIRING INTEREST ADVERSE TO CLIENT.—In the case of *Yerkes* v. *Crum* in the Supreme Court of North Dakota, it appeared that while defendant Crum was acting as attorney in a litigation to quiet title to property his client allowed said property to be sold for taxes. It was purchased by a third person, who subsequently assigned the tax certificate to the attorney. The opinions contain much interesting discussion as to whether an attorney can purchase property from his client and acquire title adverse to him under any circumstances. The court divided on the question whether an attorney's title so

acquired is absolutely void and can be assailed by any person, or whether the irregularity so arising can be taken advantage of only by the client. Bartholomew, J., citing *Cunningham* v. *Jones* (37 Kansas, 477), expresses his views as follows: "If the purchase by an attorney of a title to the subject matter of the litigation antagonistic to the title of his client can be assailed only by the client, then the strongest temptation is held out to the attorney to abuse the confidence of the client, to exercise his power and influence over the client to prevent any objection on his part, and it need not be stated that the attorney's efforts in that direction would be successful in a large percentage of cases. To so hold, it seems to me, would be to invite the very results that the law abhors. I think the courts should forever remove this temptation by declaring all such purchases void, by whomsoever attacked."

Corliss, C.J., on the other hand, used this language: "The true reason for the rule inhibiting dealings by the attorney adversely to the interests of his client is the protection of the client. As fraud in such cases might be difficult of proof, and as men may be influenced unconsciously by their personal interests pulling them in the opposite direction, while striving to be loyal to their trusts and while honest in their belief that they are loyal, the law has placed in the hands of the client the power arbitrarily in all cases to thrust aside the ordinary legal effect of the attorney's acts so far as they clash with the client's interests, however fair the transaction may have been. There is no justification for pushing the rule further, thus enabling a stranger to reap profit from an act of the attorney where the same act performed by the client would have barred the stranger's right. Under such a stringent rule, the purchase being a nullity, the client could not, by succeeding to the attorney's interest, secure that paramount right which he could have obtained had he originally made the purchase himself; and thus a rule ordained for the protection of the client is turned against him for the benefit of a stranger."

The decision went off on another ground, but the arguments on this point are forcibly put from the standpoints of the respective writers. See the report of the case in full in 49 Northwestern Reporter 422.—*N.Y. Law Journal.*

JUDGES' CHAMBERS IN ENGLAND.—In Ontario the business of judges' chambers is conducted with the same order and formality as the business in court. A judge holding chambers does not sit in his private room, but in one of the court-rooms: the counsel, solicitors, and students in attendance are called upon in the order in which they sit, and the applications are heard and disposed of with the same regularity as motions in court; the only difference in the mode of holding chambers and court being that in the former case neither the judge nor counsel don any professional costume, and that in chambers both solicitors and clerks are heard; whereas in court both judge and counsel assume their professional costume, and only counsel or suitors in person can be heard to argue cases.

Very different was the mode of holding judges' chambers in England some

thirty years ago. Whether a more civilized method has been adopted of late, we do not know. Of the English method at the time we refer to we do not speak from any lengthened or profound experience, for it is all summed up in one brief visit made at the somewhat juvenile age of fourteen, which, however, has left a vivid and indelible impression behind.

If our recollection serves us right, judges' chambers at that time were held in a dingy building in or near Chancery Lane, that well-known region where the London lawyers were, and probably still are, wont to congregate. Arrived at this building, you ascended a flight of stairs, where you found a comparatively small room, crowded with lawyers and lawyers' clerks. No chairs or sitting accommodation, if we remember aright, were provided. This room, we understood, was the ante-chamber of the judges' room, in which chambers were being held. The motley crowd of lawyers and lawyers' clerks was engaged in what to any spectator unfamiliar with the scene appeared very like an exhibition of lunacy on a large scale; for at intervals they howled out at the top of their voices the names of the cases they were interested in, and, as they were all engaged in the same interesting occupation, the sound which was produced was very much like what one would expect to hear from a pack of loquacious lunatics. "*Brown* v. *Jones*, *Smith* v. *Tompkins*," etc., etc., resounded on all sides. This was the way which attorneys and clerks who had business in chambers had for attracting the attention of those engaged on the opposite side with whom they wished to arrange any preliminaries before being called before the judge; or, on the other hand, the way in which the janitor who guarded the judge's door announced that the next case was ready to be heard. On one side of this room in which this boisterous crowd was assembled, we have a strong impression, stood a man behind a counter, to which a copy of the Bible was chained; not for devout and reverent perusal, we fear, but to be used as a sort of swearing machine, and upon which the custodian behind the counter administered oaths in a perfunctory manner to all and sundry who wished to swear to affidavits of service or what not before him, the form of the oath being somewhat as follows, viz.: "You swear this affidavit is true—s—help you God—a shilling—if you haven't got change, go out and get it."

No doubt when the lawyers and the lawyers' clerks entered the precincts of the judges' room to argue their summonses, etc., due decorum was preserved; but as far as the preliminary stages of approach to the judge are concerned, our English cousins of that day might well have taken a lesson from our mode of doing business. It would be interesting to know whether they still continue to conduct their chamber business in this archaic fashion.

COURT OF SESSION IN SCOTLAND.—*The Law Gazette* extracts the following interesting particulars of this court from the *St. James' Gazette*: "In Scottish judicature the Court of Session fulfils the same functions as the High Court and the Court of Appeal do in England. The building where the judges sit is known as the Parliament House, being the place devoted formerly to the making and

not the interpreting of the laws of the kingdom. The visitor there passes first into the Parliament Hall. The scene is greatly changed from the times when the Morays and the Scotts, the Douglasses and the Homes, with many a noble of lesser degree, met there in hot debate and family feud. The atmosphere is now entirely legal. Round the walls are oil-paintings of men honored in legal legend and lore, and famous in Scottish anecdote. Bust and statue appear at intervals in age-stained marble. Here and there deep chimney-places, and recesses fitted with seats, which are generally occupied by gossiping juniors, while their busier brethren are pacing in conference with their clients up and down the well-worn boards. The wig and gown of the Scots advocate are all but the same as those of the barrister; but his professional garb otherwise is in striking contrast. An evening swallow-tail coat and a high-cut waistcoat, with trousers of some colored tweed, constitute his visible habiliments; and in that costume the advocate is content to parade the streets of his capital. The Scotch advocate has no 'chambers.' He lives and moves and has his professional being in the purlieus of the Parliament House. The client, actual or would-be, is not debarred from finding him at his private abode, and can approach him without the medium of a clerk. It is only the busier counsel at the Scottish bar who finds it necessary to employ such a functionary. He is generally some law-office-trained clerk who can systematize his master's work, 'devil' for him, to a certain extent, and take down in shorthand a dictated opinion or draft. But it is not against professional etiquette for the solicitor to go direct with work or with fees to his counsellor. Up in one of the corridors of the Parliament House are ranged on shelves a series of brief boxes, keyless, bearing on brass plates the names of their owners; and in these any papers for counsel are generally left, unless some urgency demands their delivery at the private address of the advocate. The Court of Session is divided into two 'houses'—the outer and inner. At the end of the Parliament Hall is a lobby out of which on one side open five narrow doors. The five narrow doors lead into as many narrow boxes. In each narrow box is to be found a judge of first instance, one of the Lords Ordinary of the Outer House; the Senior Lord Ordinary occupying the box nearest the Inner House, and the Junior that furthest from it. These lords survey and administer every province of law—Common, Equity, Probate, Divorce, and Admiralty. The pay of a Lord Ordinary is £3,600, and it profiteth him nothing to be promoted to the dignity of a Judge of Appeal in the Inner House, unless he is president of his division. The Inner House consists of two divisions—first and second—of co-ordinate jurisdiction and authority. Each division consists of the apparently awkward number of four judges; but the president's opinion is doubled in the event of any conflict of numbers; he has a casting vote. The Lord President of the Court of Session sits in the first division, and his annual pay is £5,000. The president of the second division is styled the Lord Justice Clerk, and his services are rewarded with £4,800. An appellant may bring his cause before either of these two divisions, as he pleases: being liable, of course, to have it removed from the one list to the other, according to the pressure of business. From either division the appeal lies to the House of Lords."

NOTES PAYABLE AFTER DEATH.—"Like money by the Druids borrow'd, in th' other world to be restor'd." Men usually, in the creation of promissory notes or other commercial obligations, provide a time for their settlement, which, in ordinary expectation, will be reached ere they leave the confines of this earth and journey toward unknown shores. Yet occasionally we find an individual who, be it pleasure to pass life under the shadow of paper obligation, or be it grim humor in postponing his creditor to a time when he may have a journey to the realms of the devil to collect, or be it desire to make a testamentary gift to a friend, using this form instead of a will, sits down and writes his promise to pay an amount of money, payable when he dies or at a certain time after that melancholy event. Of course, such a promise is personally impossible of performance. Death, the intervenor, renders powerless the hand that wrote, to personally keep his promise good. The lifeless clay cannot pay, nor can the spirit which actuated the writing. The promise, if it be enforcible, must be fulfilled by the living representative.

An instrument of this weird class has recently been the subject of consideration by the New York Court of Appeals, and a glimpse of how it has passed muster in the courts may appropriately accompany the abstract elsewhere published.

It will be found, upon looking at the cases which will presently be cited, that the judicial sentiment is unanimous (with the exception of a Scottish case decided a century ago) that the fixing of the time of payment at a period posterior to the life of the promisor, or of another, not only has no effect upon the validity of the instrument as a contract obligation, but none either upon its negotiability. The importance of this latter element lies in its effect upon the right of the holder of such an instrument to recover without proof of consideration—a negotiable instrument importing consideration—and also in its bearing upon the right of an indorsee to recover as upon a negotiable instrument.

In an early case decided in the English Common Pleas in 1743 (*Colehan* v. *Cooke*, Willes 393; Ames, p. 82), a note was given promising to pay an amount to D. or order six weeks after the death of the maker's father. After his death, D. indorsed the note to the plaintiff, who sued upon it. The point made by the defence did not relate to validity of the note as a contract obligation, but to its negotiability. It was insisted against payment that the note was not within the statute of Anne and not indorsable or assignable. Hence the indorsee could not recover. The court overruled this objection, and its judgment was afterwards affirmed in the Court of King's Bench (2 Strange, 1217), where the instrument was said to be negotiable, "for there is no contingency whereby it may never become payable, but it is only uncertain as to the time, which is the case of all bills payable so many days after sight."

In another English case decided a century later (*Roffey* v. *Stapylton*, 10 A. & E. 222; year, 1839) the writing was in this form:

"I promise for myself and executors to pay F. H. or her executors, one year after my death, £300 with legal interest."

This was the subject of dispute simply on the question whether interest should run from date (1808) or from maturity after death (1836). Ordinarily an instru-

ment so drawn carries interest from its date, but it was argued for the executor that in all cases where it had been so held the notes or bills were given for value received. Here, though a consideration must perhaps be presumed, it need not be a pecuniary consideration, or one on which interest may be supposed to run, as a loan. No transactions or dealings between the parties were shown to give probability to a claim of interest during the lifetime of the maker, who certainly could never have himself been called upon to pay any. And it was argued that the instrument looked like a voluntary gift in the nature of a legacy.

Lord Denman, however, said it appeared improbable, if it was the maker's intention that interest should be computed only after his death, he should not have expressed it with more distinctness. In the absence of all particular proof, the note must be presumed to have been given for value, so that interest would be due from the date. If that be doubtful, the instrument ought to be construed most strongly against the maker; and the holder was therefore declared entitled to the larger sum.

Crossing the Atlantic, the American cases have concurred in upholding promissory notes payable after death valid, and not wanting in negotiability for that reason. In an Alabama case (*Conn* v. *Thornton*, Admx., 46 Ala. 587), the instrument in the suit was as follows:

> One day after date I promise to pay, or at my death, W. G. Conn or bearer, the sum of five hundred dollars, for labor done by W. G. Conn for value received this 11th day of December, 1860.
>
> W. R. THORNTON.

The man that wrote this died. His administrator was sued. Objection was made that it was not a promissory note, because not a promise to pay a certain sum of money at a certain time unconditionally; and that it was void for uncertainty. If anything, it was a codicil to Thornton's will; but as such it was void for want of proper execution. The court held the instrument a valid promissory note. The rule was applied that "that which can be made certain is certain," and a promise to pay at, or a limited time after, death of a party was declared valid because the note must inevitably become due at some future time, since all men must die although the exact period is uncertain.

In Connecticut (*Bristol* v. *Warner*, 19 Conn. 7, year 1848) a promise was signed by A. as follows:

> On demand after my decease, I promise to pay to B. or order 850 dollars without interest.

This was held not an instrument of a testamentary character, to be proceeded with in the probate court, but a promissory note, negotiable and irrevocable.

And in Indiana (*Price* v. *Jones*, 105 Ind. 543, year 1885) the instrument was as follows:

> One day after my death, I promise to pay to the order of Nancy M. Jones two thousand dollars, to be paid out of my estate, for value received, without any relief from valuation or appraisement laws, with six per cent. interest from date until paid, and attorney's fees.
>
> BENJAMIN PRICE.

Price's administrator insisted the instrument was an attempt to make a testamentary disposition of property, and was destitute of all legal efficacy. The court

non-concurred in this view, saying: "It is a promise to pay money absolutely and at all events to a person named, and it has, therefore, all the essential features of a promissory note."

In the New York case, which is published elsewhere, the instrument reads:

Thirty days after death I promise to pay to C. fifteen hundred dollars, with interest.

The fact that it is payable after death is held not to affect its character; but the principal discussion relates to the question of enforcibility without proof of consideration by reason of lack of words of negotiability in the instrument. No consideration was proved, and it was contended it could not be presumed unless the instrument was negotiable. This point is decided favorably to the holder under the New York statute, as will be seen by the report of the case.

It remains, before closing, to look at the old Scottish case, where the *post mortem* terms of payment did operate to defeat the instrument. The case, *Stewart* v. *Fullerton*, was decided in the Court of Sessions, Scotland, in January, 1792, and is reported in Morson's Dictionary of Decisions, 1408 (see report also in 1 Ames 92). It was one of an acceptance payable after death. In 1742 the following bill was drawn by Mrs. Mary Stewart, on her brother, John Stewart Murray, of Blackbarony:

Brother.—Pay to me at the first term of Whitsunday or Martinmas after your decease £140 sterling money, value received from your sister, Mary Stewart. To John Murray, of Blackbarony, Esquire.

It was accepted thus:

"Accepts. J. W. Murray."

Mr. Murray survived the date of this bill thirty-seven years. It was contended by his heir in opposition to payment: A bill payable at a term posterior to the death of the grantor is truly a novelty; and in the present case that event did not happen for thirty-seven years after its date. As a document of debt, the bill in question must appear in a light equally extraordinary and dangerous. Should it be sustained to that effect, many new opportunities would arise of committing forgery with impunity. But perhaps it ought rather to be considered as constituting a legacy in a manner not authorized by law.

The answering argument was: As this bill bears value received, there is no evidence of its having been intended to constitute a legacy. It is therefore to be understood as a voucher of debt; to which it is no sufficient objection that the reason of postponing payment till the death of the grantor cannot be clearly shown, especially as the transaction occurred between persons so nearly related.

The court did not view the bill as constituting a legacy. They thought, however that the right which it contained was so anomalous a kind as not to be the proper subject of a bill, and therefore adhered to the Lord Ordinary's interlocutor, "sustaining the objections to the bill."

In this ancient case we see an acceptance equivalent to a promissory note thrown out as a promissory obligation because of the anomalous time of payment expressed. But the modern authorities, it has been shown, are all the other way;

and while this recital of cases cannot, probably, be excused on the ground of practical utility to the banker, whose practice of short time loans will not permit the tying up of his capital on *post mortem* paper, it neverthelesss has an interesting side, which, it is hoped, will justify its insertion and perusal.—*Banking Law Journal.*

Correspondence.

DOWER IN MORTGAGED ESTATES.

To the Editor of THE CANADA LAW JOURNAL:

SIR,—*Re Pratt* v. *Bunnell*, 21 Ont. 1—The proposition that the measure of a widow's interest in the surplus moneys derived from a sale of mortgaged lands, as to which, for the purposes of the mortgage, she had barred her dower, is one-third of such surplus, irrespective of whether or not the mortgage was given to secure purchase money, receives some countenance from R.S.O., c. 169, s. 50, which provides that in case of a sale by a building society of mortgaged lands, and of there being a surplus of not more than $200, such surplus shall be deemed personal property; *except that* in all such cases the widow of the mortgagor shall be entitled to *a third of such surplus* absolutely in satisfaction of her dower. Assuming the legislature to have a consistent continuous understanding as to what the law is, the section referred to supports the judgment in the above case as a general rule, and not merely in the restricted sense suggested in your article in your issue of 1st October.

Yours, etc.,

Hamilton, Oct. 26, 1891. PETER D. CRERAR.

[We are inclined to think that the statute to which our learned correspondent refers, and which was obviously passed to meet a particular class of cases, does not necessarily afford any ground for concluding that there was any intention to alter or declare the law as to another class of cases to which it does not in terms apply. If we make the assumption which is suggested, then it seems to us that we must conclude that the section was intended to be an exception to the general law, otherwise it would have been unnecessary.—ED. C.L.J.]

DIARY FOR NOVEMBER.

1. Sun.....*23rd Sunday after Trinity.* All Saints' Day
2. Mon.....O'Connor, J., Q.B., died 1857.
3. Tues.....1st Intermediate Examination.
5. Thur.....2nd Intermediate Examination. Sir John Colborne, Lieut.-Governor U.C., 1838.
7. Sat.....Battle of Tippecanoe, 1811.
8. Sun.....*24th Sunday after Trinity.*
9. Mon.....Prince of Wales born, 1841.
10. Tues.....Court of Appeal sits. Solicitors' Exam.
11. Wed.....Barristers' Examination. Annual Fees to Law Society due. Battle of Chrysler's Farm. 1813.
12. Thur.....J. H. Hagarty, 4th C.J. of C.P., 1868. W. B. Richards, 10th C.J. of Q.B., 1868.
13. Fri.....A. Wilson, 5th C.J. of C.P., 1878. J. H. Hagarty, 12th C.J. of Q.B., 1878.
14. Sat.....Falconbridge, J., Q.B.D., 1887.
15. Sun.....*25th Sunday after Trinity.* M. C. Cameron, J., Q.B., 1876.
16. Mon.....Michaelmas Term begins. H.C.J., Q.B.D., and C.P.D. Sittings begin.
19. Thur.....J. D. Armour, 14th C.J. of Q.B., 1887. Thos. Galt, C.J., C.P.D., 1887
21. Sat.....J. Elmsley, 2nd C.J. of Q.B., 1796. Princess Royal born, 1840.
22. Sun.....*26th Sunday after Trinity.*
24. Tues.....Battle of Fort Duquesne, 1754.
25. Wed.....Marquis of Lorne, Governor-General, 1878.
27. Fri.....Frontenac died at Quebec, 1698.
29. Sun.....*1st Sunday in Advent.*
30. Mon.....St. Andrew's Day. Thos. Moss, C.J. of Appeal, 1877. Street, J., Q.B.D., and MacMahon, J., C.P.D., 1887.

Early Notes of Canadian Cases.

EXCHEQUER COURT OF CANADA.

BURBIDGE, J.] [Sept. 17.

THE QUEEN *v.* MALCOLM.

Injurious affection of property by construction of public work — Obstruction of access — Right to compensation — Waiver.

The defendant was the owner of a dwelling-house and property fronting on a public highway. In the construction of a Government railway, the Crown erected a bridge or overhead crossing on a portion of the highway in such a manner as to obstruct access from such highway to defendant's property, which he had theretofore freely enjoyed.

Held, that the defendant was entitled to compensation under the Government Railways Act and the Expropriation Acts.

Beckett v. *The Midland Railway Company*, L.R. 3 C.P. 82, referred to.

The defendant, and a number of other persons interested in the manner in which the crossing was to be made, met the Chief Engineer of Government Railways and talked the matter over with him. The defendant, who does not appear to have taken any active part in the discussion, and the other persons mentioned, wished to have a crossing at rail level, with gates; but the Chief Engineer declining to authorize such gates, it was decided that there should be an overhead crossing with a grade of one in twenty. Subsequently the defendant signed a petition to have the grades increased to one in twelve, as the interference with access to his property would in that way be lessened. The prayer of the petition was not granted.

Held, that by his presence at such meeting the defendant did not waive his right to compensation.

W. F. Parker for plaintiff.

J. J. Ritchie for defendant.

THE QUEEN *v.* BARRY ET AL.

Injurious affection of land — Construction of a railway siding on a sidewalk contiguous thereto — Measure of damages.

Where lands are injuriously affected, no part thereof being taken, the owners are not entitled to compensation under the Government Railways Act, 1881, unless the injury (1) is occasioned by an Act made lawful by the statutory powers exercised; (2) is such an injury as would have sustained an action but for such statutory powers; and (3) is an injury to lands or some right or interest therein, and not a personal injury or an injury to trade.

The construction of a railway siding along the sidewalk contiguous to lands, whereby access to such lands is interfered with and the frontage of the property destroyed for the uses for which it is held (in this case, for sale in building lots), is such an injury thereto as will entitle the owner to compensation.

Quære: Whether the rule that compensation in cases of injurious affection only must be confined to such damages as arise from the construction of the authorized works, and must not be extended to those resulting from the user of such works, is applicable to cases arising under *The Government Railway Act* 1881.

W. E. Parker for suppliant.

Ross, Sedgewick & McKay for respondents.

[Sept. 21.

ARCHIBALD *v.* THE QUEEN.

Contract — Construction — Implied promise — Breach thereof.

The suppliant had a contract to carry Her Majesty's mails along a certain route. In the

construction of a Government railway, the Crown obstructed a highway used by the suppliant in the carriage of such mails and rendered it more difficult and expensive for him to execute his contract. After the contract had been fully performed by both parties, the suppliant sought to maintain an action by petition of right for breach thereof on the ground that there was an implied undertaking on the part of the Crown in making such contract that the Minister of Railways would not so exercise the powers vested in him by statute as to render the execution of the contract by the suppliant more onerous than it would otherwise have been.

Held, that such an undertaking could not be read into the contract by implication.

Ross, Sedgewick & McKay for suppliant.

W. F. Parker for respondent.

THE QUEEN *v.* FISHER.

Interference with public right of navigation—Injunction to restrain—Jurisdiction of Exchequer Court—Right to authorize such interference since the union of the provinces—Position of provincial legislatures with respect thereto—Right of federal authorities to exercise powers created prior to the Union.

(1) An information at the suit of the Attorney-General to obtain an injunction to restrain defendant from doing acts that interfere with and tend to destroy the navigation of a public harbor is a civil and not a criminal proceeding, and the Exchequer Court has concurrent original jurisdiction over the same under 50-51 Vict., c. 16, s. 17 (D.).

(2) A grant from the Crown which derogates from a public right of navigation is to that extent void unless the interference with such navigation is authorized by Act of Parliament.

(3) The provincial legislatures, since the union of the provinces, cannot authorize such an interference.

(4) Wherever by Act of the provincial legislature, passed before the union, authority is given to the Crown to permit an interference with the public right of navigation, and authority is exercisible by the Governor-General and not by the Lieutenant-Governor of the province.

W. F. Parker for plaintiff.

J. A. Jennison for defendant.

[Oct. 14.

DUBÉ *v.* THE QUEEN.

Injury received on Government railway—Negligence—Order for particulars—Practice.

Where in his petition the suppliant alleged in general terms that the injuries he received in an accident on a Government railway in the Province of Quebec resulted from the negligence of the servants of the Crown in charge of the train, and from defects in the construction of the railway, an order was made for the delivery to the respondent of particulars of such negligence and defects.

P. A. Choquette for suppliant.

W. D. Hogg for defendant.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE.

Chancery Division.

STREET, J.] [Aug. 25.

BROOKE ET AL. *v.* THE TORONTO BELT LINE RAILWAY CO.

Railway and railway companies—Expropriation of land—Offer of privileges as compensation—Surveyor's certificate—County judge's jurisdiction—Injunction.

On a motion for an injunction to restrain a railway company from taking possession, under a warrant obtained from a county judge, of certain land different from what was shown on the company's plan deposited under s. 10, s-s. 2, of R.S.O., c. 170,

Held, following *Murphy* v. *The Kingston & Pembroke Railway Co.*, 17 S.C.R. 582, that the land could not be taken, as it was not shown on any plan so deposited.

Held, also, that as the notice given under s-s. 1, s. 20, R.S.O., c. 170, offered certain privileges in addition to cash, and as the land owner was entitled to have her compensation all in cash, there was no proper notice and no proper surveyor's certificate; and as these are at the very foundation of the county judge's authority, he had acted without jurisdiction.

Held, also, that in the case of a limited jurisdiction, such as that of the judge in this case, the facts which give jurisdiction, and without

which the powers given by the Act never arise, must not be absolutely presumed to exist because the judge has acted as if they did; and, if disputable, then the warrant based upon them must stand or fall with them.

Shepley, Q.C., and *W. D. McPherson*, for the motion.

Moss, Q.C., and *Walter Macdonald*, *contra*.

FERGUSON, J.] [Sept. 30.

RE BOWEY, BOWEY *v.* ARDILL.

Will—Executory devise—Death of parties entitled—Whose heirs should take.

A testator died, leaving his farm to his wife until his daughter should attain the age of twenty-one, when it was to go to her and her heirs; but if she died before attaining twenty-one, it was to go to his wife and her heirs. The widow died before the daughter, and then the daughter died, both deaths taking place before the daughter attained twenty-one.

Held, that the widow took an executory devise which, on her death, descended to her daughter as her heiress-at-law, and that the heirs of the daughter were untolled.

Meredith, Q.C., for the plaintiff.

W. H. Blake for the defendant.

Practice.

BOYD, C.] [Oct. 14.

IN RE SARNIA OIL COMPANY.

Security for costs—Proceeding under Winding-up Act—Powers of referee—R.S.C., c. 129—52 Vict., c. 32, s. 20—Intervening shareholder out of the jurisdiction—Delay in applying for security—Appeal.

An order was made by the court delegating the powers exercisible by the court for the purpose of winding up the company to a referee, pursuant to R.S.C., c. 129, s. 77, as amended by 52 Vict., c. 32, s. 20.

Held, that power was delegated to the referee to order security for costs and to stay proceedings till security should be given by a shareholder resident out of the jurisdiction, who intervened.

Held, also, that the liquidator and others opposing the applications made by the intervening shareholder were not barred of their right to security by not applying till after the original application of the shareholder had been dismissed and appeals taken; but that the security should be limited to the costs on the appeals.

G. W. Marsh for James A. Moore.

Duncan MacMillan for the liquidator.

E. R. Cameron for mortgagees.

BOYD, C.] [October 16.

GENGE *v.* FREEMAN.

Attachment of debts—Judgment debt—Attaching order—No order for payment by garnishee—Sheriff—Return to fi. fa.—Effect of fi. fa. on goods of judgment debtor—Withdrawal of sheriff—Settlement between garnishor and garnishee—Solicitor's lien—Assignment of judgment.

A sheriff's return to a writ of *fi. fa.* goods set forth that he was notified that the amount of the judgment to be executed had been attached by a judgment creditor of the execution creditor, and that the execution debtor (the garnishee) had thereupon satisfied the claim of the garnishor. In fact, there was only an order to attach and a summons to pay over, but no order absolute.

Held, that the return was insufficient in substance, because it showed that the writ remained unexecuted without legal excuse; a garnishee order absolute would have operated as a stay of execution, but not so the attaching order and summons; the duty of the garnishee was to pay the sheriff, advising him at the same time of the existence of the attaching order, and this would have been equivalent to a payment into court.

Where purchasers are not in question, the issue of a writ of execution gives a specific claim to the goods of a judgment debtor, which remains till satisfaction of the debt; and, therefore, the withdrawal of the sheriff did not preclude further action upon the writ.

It appeared that the solicitor for the execution creditor had a lien for his costs upon the judgment obtained by his client, and also an assignment of the judgment, whereof the garnishor and garnishee both had notice.

Held, that the garnishor and garnishee should not have settled the amount garnished between themselves; and that the solicitor should have intervened and had the attaching order set aside by disclosing the assignment to himself of the debt attached.

E. Taylour English for the execution creditor.

Langton, Q.C., for the garnishor.

Middleton for the sheriff.

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ARTICLES OF INTEREST IN CONTEMPORARY JOURNALS.

Deposits in Savings Banks "In Trust." By Van Buren Denslow. *Banking Law Journal*, Oct. 15.
Natural Law and the Behring Sea Question. By S. B. Browning. *Law Quarterly Review*, Oct.
Terminology in Contract. By Sir W. R. Anson. *Ib.*
The American and British Systems of Patent Law. *Ib.*
The Power of the Sovereignty to regulate the conduct of citizens toward each other. *Criminal Law Magazine*, Sept.
A Brief Summary of Equity Jurisdiction. Part vii. *Harvard Law Review*, Oct. 15.
The Nature and Effect of the Certification of a Check. By Robert Thorne. *Columbia Law Times*, Oct.
The Prevention of Unfair Competition in Business. By Rowland Cox. *Harvard Law Review*, Oct.
The Rights of an Unborn Child. By T. F. Utley. *The Cape Law Journal*, Aug. 15.
The Custody of Lunatics. By W. S. Webber. *Ib.*
Comparative Characteristics of Bills, Notes, and Cheques. By N. Newmark. *Central Law Journal*, Sept. 15.
Barbed Wire. *Law Gazette*, Oct. 22.
The State of the Law Courts. *Strand Magazine.*

Flotsam and Jetsam.

A judge, in pronouncing the death sentence, tenderly observed: "If guilty, you deserve the fate that awaits you; if innocent, it will be a gratification for you to feel that you were hanged without such a crime on your conscience; in either case you will be delivered from a world of care."—*Ex.*

AN Advocate, seeing that there was no longer any use in denying certain charges against his client, suddenly changed his plan of battle in order to arrive at success in another way.

"Well, be it so," he said, "my client is a scoundrel, and the worst liar in the world."

Here he was interrupted by the judge, who remarked, "Brother B——, you are forgetting yourself."—*Ex.*

IN Malta the English let the municipality administer their own laws, and frequently that means that the affair is referred to the clergy. There is a fine church in process of building just without the wall of Valetta, but it progresses very slowly. It is all the work of a single man's hands. He was a stonemason, and he assassinated a brother workman in cold blood. The clergy condemned him to build this church alone and with his own money, or suffer the penalty of the criminal courts. One may see the murderer working out his expiation early and late.—*Green Bag.*

RESTRAINT OF MARRIAGE.—The Hamburg law courts have a nice question to decide. An old gentleman left 20,000 crowns each to his manservant and cook on condition that, if either married, the whole sum should go to the one who remained single. The servants married each other and secured the whole 40,000 crowns. A relative, who disapproves of this cuteness, now seeks to overthrow the will and obtain the return of the money on the ground that by the servants marrying they have defeated the intention of the will. One would imagine that the servants ought to be allowed to keep the money for their ingenuity.—*Law Journal.*

QUEER BEQUESTS.—An eccentric old female of eighty-three years, who was very wealthy, has died in Lyons, leaving behind her a peculiar "last will and testament," which appears to be intended as a posthumous joke at the expense of the members of the medical profession. "In grateful recognition of the intelligent and devoted care of Dr. X.," so runs a clause in the document, "who has enabled me to attain a ripe old age, I bequeath to him everything contained in my *bonheur du jour*." After the death of the estimable testatrix the executors unlocked the article of furniture in question, and found in it, still unopened, unsealed, and uncorked, all the pills and potions prescribed for the deceased by Dr. X. during the past ten years!—*Law Gazette.*

IN a right of way case which recently came before Mr. Justice Kekewich, a local surveyor entertained the court with a brilliant resistance to the sallies of a well-known Chancery barrister, who sometimes attempts to confuse witnesses by filling them with awe at their solemn surroundings. "Remember that you are upon your oath," he was told. "I am not likely to forget it, I think, while I see you in front of me," was the surveyor's very unexpected reply. The learned gentleman tried another question: "Would you continue to state what you have told us if another witness possessing the same opportunities as yourself said the opposite?" Without the least hesitation came the answer: "If another witness possessing the same opportunities as myself were to make a statement contrary to my own, I should know that one of us was wrong." And the local surveyor proudly surveyed the court as his cross-examiner, somewhat crestfallen, set his wig right, and resumed his seat.—*Ex.*

Law Students' Department.

EXAMINATION BEFORE TRINITY TERM: 1891.

CERTIFICATE OF FITNESS.

Taylor on Equity.

Examiner: A. W. AYTOUN-FINLAY.

1. A. has placed a considerable sum of money in the hands of B., with the object of furthering an illegal purpose.

The purpose is accomplished, but B. refuses to account to A. for the proceeds.

What relief, if any, is A. entitled to in equity, and what maxim applies?

2. Under what circumstances and upon what terms will profert of a bond, upon which action is brought, be dispensed with?

3. A compromise of rival claims, of apparently doubtful validity, by A. and B., is entered into by the parties, by which it happens that A. eventually obtains much more than he was entitled to. How far has B. a remedy against A.?

4. What has to be shown to entitle a party to a contract, reduced to writing, to have the contract reformed?

5. A. enters into negotiations with B. for the purchase of a large farm, which B. represents to be "well watered, well wooded, and fertile." A. says that he will not close the negotiations until he has visited the farm, which he does.

He does not go over all of it, but rides to various rising grounds, and expresses himself as well satisfied with the appearance of the farm.

As a matter of fact, much of the farm is a swamp, and the trees, though plentiful, are of a very worthless nature, while a considerable part of the soil is stony and barren.

How far is A. entitled to relief? State reasons of your answer.

6. In the case of a marriage settlement where there is very gross inadequacy in the arrangement, what relief, if any, will be given in equity?

7. How far may gifts from a client to a solicitor, during the existence of the relation or after its cessation, be supported?

8. An instrument not required by statute to be registered is registered by one of the parties. How far does this registration create notice by which third parties are affected?

9. A firm endorses a negotiable security in the partnership name. What is the liability of the partners, joint or several, or both?

10. Where a parol contract is entered into in consideration of marriage, how far is the subsequent marriage a sufficient part performance to take the case out of the Statute of Frauds?

Benjamin on Sales.

Examiner: A. W. AYTOUN-FINLAY.

1. A. is induced by B. to sell goods to C., who is at the time, and to the knowledge of B., in insolvent circumstances; B. then obtains the goods from C. for his own benefit. Has A. any remedy against B.? Give reasons for your answer.

2. A. orders goods from B., an agent, to be paid for on delivery; on receiving notice of the arrival of the goods at B.'s warehouse, he goes there and directs C., whom he finds in charge, to put a certain mark on the goods; afterwards, a dispute having arisen as to the stipulated price, A. refuses to take the goods, and action is brought against him by B.'s principal; after action brought, A., at B.'s request, writes in B.'s ledger, at the bottom of a page containing a list of the goods in question, the acknowledgment "Received the above," and signs it. How far is there (*a*) delivery of the goods to, and acceptance of them by, A.; (*b*) a sufficient memorandum to satisfy the Statute of Frauds?

3. A. agrees to sell B. goods to the amount of $300, B. being allowed to deduct therefrom the sum of $78, a debt due by A. to B. How far is the sum of $78 a part payment, sufficient to take the case out of the Statute of Frauds?

4. Plaintiff brings action against A. on a contract in writing, which satisfies the Statute of Frauds; A. sets up as a defence a rescission of the contract by parol agreement. How far is this a sufficient defence to an action for specific performance?

5. A. sells to B. an annuity dependent on the life of C., who had, prior to the transaction, died, without the knowledge of either A. or B.; both have equal means of ascertaining the fact, but B. pays the purchase money to A. Has B. any remedy? Explain.

Hawkins on Wills.

Examiner: M. G. CAMERON.

1. A. by his will makes the following bequest: "I direct that the net proceeds of my estate be equally divided between my children, share and share alike, and at the time of their respectively arriving at the age of twenty-one years." All of the children die under twenty-one. Who take? Explain.

2. The will of A. contains the following clause: "I bequeath to B. when he attains twenty-one the sum of $1000 with interest." B. dies before attaining his majority. Who take? Explain.

3. A testator makes a bequest to the children of A., viz., B., C., and D., when the youngest child, D., attains twenty-one, that is to say, to

B. one-third, to C. one-third, and to D. one-third. B. dies under age and before D. attains her majority. To whom does his share go? Explain.

4. A. by his will makes a gift to B. for life, and after his decease to the next of kin of A. What rule is to be followed in ascertaining who are entitled?

5. A testator by will bequeathes $500 "to my servant John." By codicil to that will he bequeathes another $500 "to my servant John." Is John entitled to both sums? Explain. Would parol evidence be admitted in this case to show what the testator intended?

Armour on Titles, Statute Law, and Pleading and Practice.

Examiner: M. G. CAMERON.

1. A., the owner of a parcel of land, enters into an agreement to sell it to B., who agrees to purchase; but there are no conditions, and no covenant that A. will make a good title. Can B. compel him to do so, although nothing is said in the agreement about it? Explain.

2. A. agreed to sell five acres of land to B.; the abstract, when produced, showed a title to three acres only; it appeared that the remaining two acres had been enclosed by A., and occupied by him for a number of years; the agreement for sale contained a condition that if the purchaser should insist on any objection to the title which the vendor should be unable or unwilling to remove, he should be at liberty to rescind the contract and return the deposit, without interest, costs, or any other compensation. Could A., in this case, take advantage of the condition? If so, why?

3. What must appear in order to induce the court to hold that the taking of possession by a vendee is a waiver of objections to title?

4. From what time should an abstract of title commence, and what should it show?

5. If a defendant, in his memorandum of appearance, gives an illusory or fictitious address, what remedy has the plaintiff?

6. If a defendant does not require the delivery of a statement of claim, what course should he take?

7. Can a person be added as a party defendant to an action under all circumstances, and whether he is or is not interested as to all the relief prayed for in the action?

8. When, if at all, will a defendant in an action be refused permission to avail himself of any set-off or counter-claim that he may have against the plaintiff?

9. What is the rule at present in existence governing the form of pleading?

10. When must the writ of summons in an action brought against an infant be served upon him personally?

Contracts, Mercantile Law.

Examiner: F. J. JOSEPH.

1. In the construction of a written contract, what are the functions of a judge and jury?

2. A. writes to B., "I shall not pay you; the debt is barred by the Statute of Limitations." Will this revive the remedy of B. against A. to recover a debt barred by the statute?

3. A. falsely represents to B. that certain grain which B. has in his (A.'s) elevator has been injured, and that its value is greatly depreciated. On the faith of this representation B. sells the grain to A. at a price much below its value. Is this contract between B. and A. void? What would be the effect had A., after concluding his bargain with B., sold the grain to C.?

4. A seller shows the buyer a list of prices; the buyer agrees to purchase on the condition of a reduction of 10 per cent. from such prices for cash. The buyer writes an order for certain of the articles, not specifying anything as to price. Is this a binding contract?

5. Can a contract entered into by a person under arrest, part of the condition being that he shall be released, be enforced against him?

6. Is an undisclosed principal liable to a vendor for contracts made by his agent? Is there any exception to the rule?

7. Is a carrier bound to charge all his customers equally?

8. A. purchases a house from B., which is insured. The policy is not assigned to A. In the event of the destruction of the house, what are A.'s rights against the Insurance Company?

9. Is the right to participate in profits conclusive of the existence of a partnership? Explain.

10. A. sells goods to B. which are not fully paid for. A. holds the goods as a lien. B. has an overdue note of A.'s for an amount equal to the price of the goods sold by A. to B. Can B. compel A. to hand over the goods?

EXAMINATION QUESTIONS.

(Selected from those set for admission to the Illinois Bar.)

Statutory and Constitutional Law.

1. What is the meaning of the term habeas corpus? What do you know about it?
2. What is the difference between an *ex post facto* law and a retroactive law? Is either valid?
3. What is the leading rule of construction of penal statutes? Of remedial statutes? Of statutes in general changing the common law rule on the subject to which they relate?
4. Distinguish between the legislative powers of Congress and the various States, on the one hand, and the Dominion and Provincial Parliaments on the other.

Criminal Law.

1. What is crime? What is the difference between a crime and a tort?
2. Define felony, misdemeanor, larceny, burglary.
3. What is the difference between murder and manslaughter?
4. How many persons constitute a grand jury? How many a petit jury?
5. What is the rule in relation to evidence necessary to convict?

Torts.

1. What are private wrongs as distinguished from public wrongs?
2. In respect to right of contribution between parties liable, how are torts distinguished from contracts?
3. What class of words are actionable without proving any particular damage to have happened?
4. When will no action lie for words, even though damages be averred and proven?
5. What remedies are given by the law for the wrongful taking of goods?
6. What is trespass as applied to real property?
7. Does an action lie for a purely accidental occurrence causing damage without the fault of the person to whom it is attributable?
8. Where several persons unite in an act which constitutes a wrong to another, under circumstances which fairly charge them with intending the consequences which follow, is each person liable for all of the damage, or will it be apportioned among them according to the extent each may have contributed to it?
9. Must they be proceeded against jointly, or may the remedy be enforced against any one or more of them?
10. Where two or more persons are engaged in an unlawful undertaking, in the prosecution of which one unintentionally injures another, can an action for the jury be sustained?
11. What three circumstances must concur in order to maintain an action for malicious prosecution?
12. Does an injury to a wife give a husband a cause of action independent of the cause of action she may have, and, if so, for what?

Contracts.

1. Into what two general classes are contracts divided with reference to whether they have or have not been performed?
2. What contracts are generally sufficient without a consideration in fact?
3. Is there any difference in the consequence between a mistake in law and a mistake in fact in the performance of a contract?
4. If one, mistaking the law of the circumstances, makes a payment he is not compelled to make, can he recover the money? In your answer state your reason.
5. If he make such payment under a mistake of fact, can he recover the money? In your answer state your reason.
6. What is the distinction between a void and voidable contract? Give an instance of each.
7. What is required on the part of a person having the right and desiring to rescind a contract?
8. Under what circumstances may an agent act for both parties and under what may he not?
9. What is the effect of the death of a principal where the agency is not coupled with an interest?
10. How does it affect an agent if he contracts without disclosing his agency?
11. In such event, what other right has the other contracting party if the agency is afterward disclosed?
12. What is the power of a single partner in the conduct of the firm business as to third persons?
13. What is required from a partner upon retiring from the business in order to avoid subsequent liabilities?
14. When is a contract against public policy and what is the effect of it?
15. State generally the nature of the Statute of Frauds and its purpose.
16. Does it apply to both executed and executory contracts?
17. What is the rule for construing the language of a contract?
18. What is the effect of an unauthorized alteration of a written contract by one of the parties to it?
19. What contracts can not be altered by an oral agreement?
20. Where a note is payable in specific articles and after maturity payment is demanded, can an action be maintained to recover the amount in money?
21. What constitutes a fiduciary relation, and, when the relation exists, how does it affect the right of the party standing in such relation to another to contract with him?
22. In order to avoid a contract for fraud, what effect must it have produced?