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DIARY FOR SEPTEMBER.

1. Sat.... Beauharnois, Governor of Canada, 1726.
2. Sun.... *Fifteenth Sunday after Trinity.*
4. Tue. .. Court of Appeal Sittings begin.
8. Sat.... Trinity term ends.
9. Sun.... *Sixteenth Sunday after Trinity.*
10. Mon.. Sebastopol taken, 1855.
11. Tue. .. County Court Sittings for York begin.
12. Wed.. Peter Russell, President, 1796.
13. Thurs.. Frontenac, Governor of Canada, 1672. Quebec taken by British under Wolf, 1759.

TORONTO, SEPT. 1, 1883.

WE publish in another column a paper over the signature of "R. W. Wilson," criticising some interesting articles by Mr. Frederick Harrison, on the English School of Jurisprudence, which appeared some years ago in the *Fortnightly Review*. We are glad at all times to encourage discussions on questions of abstract Jurisprudence, the tendency with us being, perhaps, to sacrifice a little too much the theoretical, or we might say, the less obviously practical, to the more obviously practical. While, therefore, we do not concede that Mr. Wilson has succeeded altogether in meeting Mr. Harrison's objections to Austin's definition of law, we welcome his article and hope it will provoke discussion. Mr. Wilson does not appear to us to have comprehended what Mr. Harrison meant by the sovereign power in a community. We take it that the ultimate sovereignty throughout the empire resides in the Crown and Parliament of Great Britain, and that it is entirely correct to say that within the range of *municipal law* there are no limits to the absolute powers of the sovereign, in the sense of the jurisprudist.

WE regret to state that at the last moment Lord Coleridge has written to the secretaries of the Committee of arrangements to say that he cannot come to Canada as he had hoped and intended, his engagements being such as to render his visit impossible. He adds, however, that Sir James Hannen and probably Lord Justice Bowen would be able to go to Toronto in October and would be glad to accept at the hands of our Bar the complimentary dinner which he was compelled to decline. He expressed great sorrow at having to forego a visit which he had looked forward to with so much pleasure. The Committee having been called together passed a resolution echoing the regret; but directing the secretaries to say to his Lordship that as the circuits would be in full swing in October, they did not see their way to tendering a dinner to Sir James Hannen and Lord Justice Bowen. We join our regrets at the course things have taken, as it deprives our Bar of the opportunity of showing our respect in the way intended to one who occupies so eminent a position as that of Lord Chief Justice of England. The thanks of the profession are due to the Committees who took so much trouble to perfect the necessary arrangements for the visit which His Lordship fixed for the 12th instant. We trust that when next a Chief Justice of England comes to this Continent he will not allow anything to stand in the way of his visiting one of the most important and not the least loyal portions of Her Majesty's Dominions.

IN *Monaghan* v. *Dobbins*, 18 C. L. J. 180, the learned Master in Chambers held that "the provisions of Rule 185 virtually superseded the practice prescribed by Chancery Order 266, and that in every case where it was required to obtain oral evidence in support of a motion in Chambers, an order for

the examination of the witness must be first obtained." In Holmested's Manual, p. 206, it was suggested that the proper construction of this Rule was, that it should be deemed to afford an additional remedy rather than as being a substitution for the former procedure under Order 256.

The point we see has been recently before the Court of Appeal in England in the case of *Raymond* v. *Tapson*, 48 L. T. 403. In that case oral evidence was sought to be given after judgment in reference to the accounts directed to be taken. The plaintiff, without order, issued a *subpœna*, which the witness, under advice of counsel, refused to obey, the contention being that the former practice under the Imp. statute 15-16 Vict. c. 86, ss. 40-41, from which our Chancery Order 266 is taken, had been superseded by the Order 37, r. 4, from which our Rule 285 is taken, but the Court of Appeal decided that the former procedure in Chancery was still in force, and that there was no irregularity. The correctness of *Monaghan* v. *Dobbins*, therefore, seems now open to considerable doubt.

IN the case of *Meyers* v. *Kendrick*, 9 P. R. 363, Mr. Justice Osler appears to have adhered stedfastly to the decisions of the Common Law Courts, and following those decisions has determined that where a plaintiff's action is dismissed with costs, the defendant has no right to examine the plaintiff as a judgment debtor, either under the rule of the Supreme Court or the statutes. There seems to be no good reason in principle why a plaintiff who has become liable to pay costs in this way should not be subject to examination, and we are moreover morally certain that the Legislature never intended to make any such exception in his favour; and it seems to us that it is only by a very strict construction of the rules and statutes that the exception is made out to exist. Rule 366 provides that a judgment debtor may be examined touching his estate and effects, and as to the property and means he had "when the debt or liability which was the subject of the action in which judgment has been obtained against him was incurred," and it is said that these words exclude the possibility of the rule being intended to apply to cases where a plaintiff is defeated in his action and ordered to pay the defendant's costs. On the other hand it appears to us it might not unreasonably be said that as soon as a plaintiff issues a writ he submits himself to the jurisdiction of the Court, and incurs "a liability" to pay the defendant's costs in the action if so ordered by the Court, and that this liability for costs, therefore, is one of "the subjects of the action," so far as the defendant is concerned. It may not be the sole subject of the action, and it is not necessary that it should be, otherwise if a plaintiff sued on two promissory notes and recovered judgment on one and failed on the other, he could not examine the defendant because the note for which he recovered judgment would not be "the sole object of the action"—a conclusion which would be absurd. All that the rules or statutes require is that the judgment should be in respect of a liability which was the subject, or one of the subjects of the action in which the judgment is recovered, and it appears to us that a judgment for the defendant against the plaintiff for costs fulfils this condition. It is absurd to say as a matter of theory that the costs are no part of the subject of the action; when as a matter of fact it is well known that in many cases the costs in the end form the most material part of the subject matter in controversy, not only to the solicitors, but to the litigants themselves. Take for instance the celebrated case of *McLaren* v. *Caldwell*. In that case it is not too much to say the costs will in the end probably form one of the, if not the most substantial parts of the subject of that protracted litigation.

The question of costs appears to us to be a substantial part of the subject of every action; and the case of a defendant recovering judgment against a plaintiff for costs is, to our

mind, within both the letter and the spirit of the statute and rules. The statute and rules are remedial in their nature and designed to promote the recovery of just debts, and should receive a liberal, and not a narrow, interpretation. We therefore think it is to be regretted that the decision of Spragge, C., in *Lowell* v. *Gibson*, 6 P. R. 132, was not followed in preference to the common law cases of *Kerr* v. *Douglass*, 4 P. R. 124; *Walker* v. *Fairbairn*, 6 P. R. 251; *Ghent* v. *McColl*, 8 P. R. 428; *Hawkins* v. *Patterson*, 23 U. C. R. 197.

THE decision of the Queen's Bench Divisional Court in *Johnson* v. *Oliver* (or *Heirs*,) noted *ante* p. 246, appears to us, to some extent, to conflict with the decision of the Supreme Court in *Gray* v. *Richford*, 2 S. C. R. 431. From our note of the case, it appears that the widow of an intestate who died in 1864 continued in sole possession of the land in question till 1881, when she died, devising the land to the plaintiff. It was held that the widow had acquired a valid title, in fee, to the whole estate, under the Statute of Limitations against the heirs-at-law of her deceased husband. *Gray* v. *Richford* established the wholesome rule that when a person having a rightful title to possession, is in possession of land, his possession must be attributable to his rightful title, and not to a wrongful one. Now, if this rule were applied in the case of *Johnson* v. *Oliver* it appears to us that it must follow, that, at all events as to an undivided one-third of the land in question, as to which the widow was equitably entitled to possession in right of her dower, she could acquire no title to the fee simply by possession, as against the heirs-at-law. The want of a formal assignment of dower is in equity of no account, see *Hamilton* v. *Mohern*, 1 P. W. 122, quoted with approval by Blake and Proudfoot, VV. C., in *Laidlaw* v. *Jackes*, 27 Gr. 101, and even if it were of any account at law, the rule of equity must, since the Judicature Act, prevail. The proper test appears to be this: could the widow, during her possession, have been evicted by the heirs-at-law from an undivided one-third? Would not the widow, in equity, have had, even before assignment of dower, a good, equitable title to possession of an undivided one-third as doweress? We think she would, and if we are correct in this, we do not see how, applying the rule laid down in *Gray* v. *Richford*, she could acquire any possessory title to the fee of that one-third, no matter how long she might remain in possession. We are aware that it was held by the Court of Chancery in *Laidlaw* v. *Jackes* that a widow, who had been in actual occupation of land of which she was dowable for over twenty years without assignment of dower, had lost her right of action to recover for future dower. As a proposition of law that may have been correct, and that it also worked a grievous piece of injustice to the widow, no one will deny. A legislative remedy has since been applied by 43 Vict., c. 14 (O). At the same time we do not think that case in any way conflicts with the opinion we have ventured to express. *Jackes* v. *Laidlaw* altogether turned, as to this branch of the case, on construction of R. S. O., c. 108 and 25, which bars the action for dower if not prosecuted within the prescribed time. But the question is whether though the widow might be unable actively to enforce her claim for dower by action, she might not, nevertheless, be entitled to set up her claim as doweress, as a solid defence to an ejectment by the heirs-at-law, to recover possession of more than the undivided two-thirds? Beyond all question this defence, it appears to us, would have been available at any time within the period allowed to the widow for bringing an action to enforce her claim for dower, viz., ten years from her husband's death, and we are also inclined to think it would be a *good defence* even at any subsequent period of her possession; but whether it would, or not, can the rightful possession be said to have come to an end before the ten years allowed

for bringing the action of dower had expired, which would not be until 1874? and if not, then the subsequent possession was insufficient to confer a title.

THE Weekly Notes for Aug. 4 contains in the form of a supplement the new consolidated Rules of Court, dated January 12th, 1883, but not to come into operation until October 24th, 1883. The projected rules have been creating a great stir among the legal fraternity in England. On the one hand the junior barristers, "fresh and hearty," but "impecunious parties," complain that pleadings from which they have been in the habit of making no small gain, are practically abolished, and the newly elected Bar committee has petitioned Parliament to petition Her Majesty to amend them. So likewise have the Incorporated Law Society who complain not only of injury to the interests of solicitors, but also of the fact that they were not consulted by the Judges who framed the rules. In the London *Mail* of 13th ult., will be found an interesting debate in the Commons, arising from the presentation by Sir H. Giffard of these petitions. We purpose reprinting his speech in our next issue, as it will interest many of our readers. It appears that of 1045 rules, 125 are new, and involve very great innovations. Amongst others the equivalent of our Rule 80 is extended to actions for the recovery of land. Then, Rule 285 is as follows: "No demurrer shall be allowed;" Rule 286, showing that the consent of the Court or Judge must be obtained before a point of law raised by the pleading can be disposed of before the trial. Again, much commotion has been raised by Rule 462, which provides that the Judge may in all cases disallow any questions put in cross-examination of any party or other witness which may appear io him to be vexatious and not relevant to any matter proper to be enquired into in the cause or matter. So too Rule 368 is startling and has startled. It provides: "Any party seeking discovery by interrogatories shall, before delivery of interrogatories, pay into Court the sum of £5, and if the number of folios exceed five, the further sum of 10s. for every additional folio. Any party seeking discovery otherwise than by interrogatories shall, before making application for discovery, pay into Court . . . the sum of £5, and may be ordered further to pay into Court as aforesaid such additional sum as the Court or Judge shall direct." It is further complained that a fresh blow has been struck at trial by jury in increased discretion given to the Judges in respect to allowing a jury. We hope in our next number to give our readers further information as to these new rules, which it appears are to come into operation notwithstanding the above mentioned petition.

HUMOURS OF THE LAW.

If any member of the legal profession ever says from his heart, with Burns—

> "O wad some power the giftie gie us,
> To see oursels as ithers see us."

or utters words to the like effect, he can easily have his desires satisfied by buying and perusing Mr. Browne's book on the "Humorous Phases of the Law." In it Mr. Browne, who is a veritable *belluo librorum* with a perfect *cacoethes scribendi*, shows how law and lawyers have been depicted in literature—and verily the dramatists, novelists, historians, essayists, and moralists which he quotes, were by no means æsthetic in their tastes; they used no neutral tints, but laid on the strongest shades with no sparing hand; they painted as if they had nothing but black upon their palettes.

Too many of those who have in their works touched upon law and lawyers, have forgotten that old Burton called them the oracles and pilots of a well governed commonwealth, and have remembered only that the anatomist apparently, in one of his darkest hours of melancholy, upbraided them as

"a purse-milking nation, a clamorous company, gowned vultures, thieves, and seminaries of discord . . . irreligious harpies, ramping, griping catchpoles," and have dipped their pens into the same gall and rung the changes upon Burton's phrases. Who can say how many of those who threw so much vinegar into their remarks had reason to remember the heavy hands of the servants and ministers of justice—the queen of all virtues—whom they so abused?

Mr. Browne has produced a book of elegant extracts, and, with the aid of his publishers, an elegant book of elegant extracts. At times he introduces the quotation with such words as may be necessary to enable the reader the better to appreciate it, and sometimes adds notes of illustration, suggestion or protest. He quotes Aristophanes, Terence, Ammianus, Marcellinus, Juvenal, Horace, Martial, and others of the ancients; Quevedo from among the Spaniards; Montaigne, Napoleon, LaFontaine, and others of the writers of France, while he takes tribute from over a hundred of the chief authors of England and America. We are favoured with poetry and prose, and translations both from and in these two great divisions of literature.

In his eight chapters Mr. B. gives us the views of, i. the dramatists; ii. the novelists; iii. the moralists, essayists, historians, and satirists; iv. the poets; and v. the epigrammatists. Then we have, vi. songs, odes, and burlesques; vii. curious imaginary trials; and lastly, viii. something about law clerks and students.

Our author does not quote from Shakespeare, believing that every one knows his bard of Avon as well as Macaulay did his kings of England, (an erroneous supposition we fear), and instead of the trial scene in the Merchant of Venice we have a clever burlesque of it by Mr. Esek Cowen, of Troy, N.Y. *Apropos* of Dickens, another member of the Trojan bar gives an account of the "proceedings and resolutions of the attorneys and solicitors of London upon the death of Sampson Brass, Esq., late of Bevismarks." When referring to the suggestion of Cowper, that law reports should be in rhyme, as thereby they would be more likely to be remembered, he quotes the poet as saying, "and, lastly, they would, by this means, be rendered susceptible of musical embellishments, which . . . could not fail to disperse that heavy atmosphere of sadness and gravity which hangs over the jurisprudence of our country;" and then our author cleverly shows how the technical machinery of the law might be made to conform to such a state of things: "In choosing the key, judgments upon the rights of infants would be set in the *minor*, and courts-martial would be conducted in the *major*. Causes involving small amounts of money should be dashed off in a *presto* movement; but large estates, especially where the costs come out of the fund, should be inquired into at the deliberate pace of an *adagio*. Personal actions, such as slander, assault and battery, and particularly breach of promise of marriage, ought to be treated in *flats*. Musical terms might be used to describe legal process and remedies. For instance, an order appointing a receiver might appropriately be indicated by a *bold;* a stay of proceedings by a *rest;* an order of arrest by a *slur;* while a re-argument might properly be called a *repeat* or *da capo*—back to the beginning. The fund in litigation would generally be *diminuendo*, and the costs *crescendo*—to the end. The course of some litigations, in which one judge enjoins another, would be described by a passage full of *accidentals*. Famous music already written could be adapted to the necessities of the law. Thus an argument on the law of descent could well be illustrated by the music of the opera of 'Orpheus;' a trial for murder by poisoning could be preluded by the strains of 'Lucretia Borgia;' a bill of discovery would be adequately set to an air from 'La Somnambula," in which groping in sleep and darkness is so thrillingly described; those pleas of insanity which inevitably accompany

the defence of people who avenge their own domestic grievances, would fitly be conveyed in the harmonies of 'Hamlet;' and the ease with which the marriage relation is dissolved in some parts of our favoured country, could be admirably set out by the melodious story of 'Don Pasquale.'"

To burlesque the detailed bills of costs which law and custom insist upon a solicitor rendering, we have an account sent by a tailor to his lawyer for a suit of clothes, and which was designed as a set off against the latter's charges.

Our author points out the ignorance and mistakes of Lever, Reade, Cowper, and others, in matters of law. Warren and his "Ten Thousand a Year" are referred to in terms that appear to us to be scarcely warranted. All know what is said of a lawyer who pleads in his own case, and how unfortunate have been such legal luminaries as St. Leonards, Saunders, C. J., Holt, C. J., and Sir Samuel Romilly, who drew their own wills; so Mr. Browne need not have been surprised into strong expressions because a lawyer who writes a novel makes a false step or two in his law. Lord Lytton submitted the whole case of *Beaufort* v. *Beaufort*, in "Night and Morning," to counsel, and yet his lordship found that the law of his story was questioned and doubted. Trollope is not a favourite with our author, but Dickens he considers "the most engaging and influential writer of English fiction since Shakespeare."

This book is not one to read through at a sitting any more than is a dictionary, but it is one to be taken up time and time again, and read and re-read, whenever one wishes to know what the great, and the wise, and the good, or the little, the foolish and the bad, have said about the legal profession. It shows great research, extensive acquaintance with the literature of the past and the present, good judgment in the use of scissors, quickness to see a weak spot, readiness to take advantage thereof. Mr. Irving Browne has most certainly not been one of those lawyers spoken of by Edward Everett, "who do not, in any branch of knowledge not connected with their immediate profession, read the amount of an octavo volume in the course of a season." He gathers honey from every opening flower he can see and from which he can extract anything. If it should again become the fashion to write in hieroglyphics he might with propriety adopt as his autograph an eye and a bee.

RECENT ENGLISH DECISIONS.

MAINTENANCE.

The July numbers of the *Law Reports* comprise 11 Q. B. D. p. 1-144; 8 P. D. 117-129; and 23 Ch. D. 209-369. The first of these commences with the case of *Bradlaugh* v. *Newdegate*. It will be remembered that Mr. Newdegate, a well-known member of Parliament, instigated a common informer to sue Mr. Bradlaugh for the penalty imposed by Imp. 29-30 Vict. c. 19, s. 5, for having sat and voted as a member of Parliament without having made and subscribed the oath appointed by that section, &c. It appeared that Mr. Newdegate, after the commencement of the action for the penalty, gave the informer, who was himself a man of no means, a bond of indemnity against all costs and expenses he might incur in consequence of the action. Mr. Bradlaugh now brought the present action against Mr. Newdegate for maintenance, and Coleridge, C. J. in a judgment in which he goes at length into the subject of maintenance, decided that Mr. Newdegate's conduct amounted to maintenance, and that Mr. Bradlaugh was entitled to indemnity from Mr. Newdegate for everything which Mr. Newdegate's maintenance of the informer had caused him. After reviewing the authorities, Lord Coleridge says at p. 9—"It results, I conceive, from all these cases, and the number might be largely increased, that to bind oneself after the commencement of a suit to pay the expenses of

another in that suit, more especially if that other be a person himself of no means, and the suit be one which he cannot bring, is still, as it always was, maintenance; and that for such maintenance an action will lie." And later on he says:—"It is true that this action is of the rarest; very few examples of it in any modern books are to be found. As a rule the doctrines and principles applicable to maintenance are discussed and laid down in judgments upon pleas, defences to actions of the more ordinary kinds, in which the defendant has sought to set aside a contract, or to be relieved from an obligation, on the ground that the contract was void or illegal, or the obligation not binding, because founded upon what was, or what savoured of maintenance. But I think it has been shown, not only from old abridgements and digests and text writers, but by a chain of authorities from Lord Loughborough and Lord Eldon down to the present time, that the doctrine of maintenance is a living doctrine, and the action of maintenance is one which, in a fit case, the Courts of this day will support."

LIBEL—PUBLICATION OF PRIVILEGED COMMUNICATION BY MISTAKE.

The next case requiring notice is *Tompson* v. *Dashwood*, p. 43, and is of a peculiar character. The defendant wrote defamatory statements of the plaintiff in a letter to W. under circumstances which made the publication of the letter to W. privileged, but by mistake the defendant put it in an envelope directed to another person, who received and read the letter. The full court now held that the publication was nevertheless privileged. Watkin Williams, J., said:—"The defendant's state of mind was never altered. His intention was always honestly to do that which he conceived to be his duty. I can see nothing to justify the conclusion, as a matter of law, that by reason of the defendant's inadvertence the case is taken out of the category of privilege, so that malice should be implied. There is no direct authority on the question, though there have been cases to the effect that mere accident or inadvertence in using language, or publishing writing, spoken or written on a privileged occasion will not supply the necessary evidence of malice in fact which will destroy the privilege." Mathew, J., expressed concurrence.

BILL OF LADING—PERILS OF THE SEA.

The next case *Woodley & Co.* v. *Mitchell*, p. 47, concerns the question what is and what is not included within the "perils of the sea," in the usual exception in a bill of lading, and the point here decided is sufficiently indicated in the passage in the judgment of Brett, L. J., where he says that "although a collision when brought about without any negligence of either vessel is or may be a peril of the sea, a collision brought about by the negligence *of either of the vessels* so that without that negligence it would not have happened, is not a peril of the sea within the terms of the exception in a bill of lading."

MALICIOUS PROSECUTION—"REASONABLE AND PROBABLE CAUSE"—ONUS.

The next case requiring notice is *Abrath* v. *The North Eastern Railway Company*, p. 79, and is a case on a point on which it is said, there was no express authority. It was for malicious prosecution by the defendant of the plaintiff for conspiracy to defraud. The present application was for a new trial on the ground of misdirection. The misdirection was in the learned judge before whom the action was tried stating to the jury that the onus was upon the plaintiff of proving that the defendants did not take the reasonable and proper care to inform themselves of the true state of the case in prosecuting the plaintiff, and that they did not honestly believe the case which they laid before the magistrates. This the court now held to be a misdirection. Grove, J., with whom Lopes, J., concurred, says:—"In *Panton* v. *Williams*, L. R. 2 Q. B. 169, it was held—and the principle of that decision has been followed in many subsequent cases, and reaffirmed by the House of Lords in *Lister* v. *Perryman*, L. R. 4 H. L. 521—that it is for

the Judge to say whether there was reasonable and probable cause, though the jury should be asked to find every fact in dispute which may assist him or he may consider necessary in determining that question. There may perhaps be uncontradicted facts other than these left to the jury, and the Judge no doubt may take these uncontradicted facts into consideration, but it was argued for the plaintiff that, where the defendant undertakes to bring forward facts for the purpose of satisfying not the jury but the Judge that there was reasonable and probable cause for prosecuting, the onus of proving these facts is upon the person who brings them forward. On consideration I am satisfied that this contention is founded upon a right view of the law. The existence of these facts is presumably known only to the defendants. It is impossible for the plaintiff in an action for malicious prosecution to know what course the defendant took to satisfy himself, or by what means he did satisfy himself, of the probable truth of the information conveyed to him, upon which he determined to prosecute. I think, therefore, that the general rule of law should be followed here, which is that the onus rests on the person affirming—the person who for his own purposes asserts facts to the truth of which he pledges himself."

CONVERSION—STATUTE OF LIMITATIONS.

Spackman v. *Foster*, p. 99, which must now be noticed, was a somewhat strange case on Statute of Limitations. Title deeds of the plaintiffs were fraudulently taken from them and deposited by a third party, without their knowledge, with the defendant in 1859, who held them without knowledge of the fraud, to secure the repayment of a loan. The plaintiff on discovering the loss of the deeds in 1882, demanded them of the defendant, and upon his refusal to give them up brought an action to recover them, to which the defendant pleaded the Statute of Limitations. The Court now held that until demand and refusal to give up the deeds to the real owners they had no right of action against which the statute would run. Grove, J., with whom the other judges concurred, said—"Several points were raised in argument, but the only one material to our decision is whether the plaintiff could have brought an action for the detention of the deeds without previously having demanded them. The defendant when he received these deeds had no knowledge that the person who pledged them had no title to them. He kept them as depositee or bailee, bound to return them on payment of the money he had advanced. He held them against the person who had deposited them, but not against the real owner, and *non constat* that he would not have given them up if the real owner had demanded them. This does not seem to me to be conversion. There was no injury to the property which would render it impossible to return it, nor claim of title to it, nor claim to hold it against the owner. . . . On the whole, I think that there was no conversion, and consequently no right of action against which the statute would run till the demand and refusal to give up the deeds."

STATUTE OF FRAUDS, S. 4—PART PERFORMANCE OF PERSONAL CONTRACT.

Next has to be noticed the case of *Britain* v. *Rossiter*, p. 123, which was decided as far back as 1879, though it does not appear how it is that it only now appears in the *Law Reports*. That case is authority for the proposition that (1), a contract which is not enforceable by reason of the provisions of section 4 of the Statute of Frauds is not therefore void altogether, but is an existing contract; (2), where there is an existing contract, a fresh contract cannot be implied from acts done in pursuance of it; (3), that the doctrine as to part performance, whereby a contract not enforceable by an action at law, owing to the provisions of section 4 of the Statute of Frauds was rendered enforceable in equity, was confined to suits as to the sale of interests in land, and its operation has not been extended by

the provisions of the Judicature Act. As to the last point that the equitable doctrine of part performance has not been extended by the Judicature Act, this decision will be found noted among our recent English practice cases. As to the equitable doctrine of part performance, at p. 130, Cotton, L. J., makes some interesting remarks as to what that doctrine really is. He says—"It has been said that the principle of that doctrine is that the Court will not allow one party to a contract to take advantage of part performance of the contract and to permit the other party to change his position, or incur expense or risk under the contract, and then to allege that the contract does not exist; for this would be contrary to conscience. It is true that some *dicta* of judges may be found to support this view, but it is not the real explanation of the doctrine, for if it were, part payment of the purchase money would defeat the operation of the statute. But it is well established, and cannot be denied that the receipt of any sum, however large, by one party under the contract, will not entitle the other to enforce a contract which comes within the 4th sect. What can be more contrary to conscience than that after a man has received a large sum of money in pursuance of a contract, he should allege that it was never entered into? The true ground of the doctrine in equity is that if the Court found a man in occupation of land, or doing such acts with regard to it as would *prima facie* make him liable at law to an action of trespass, the Court would hold that there was strong evidence from the nature of the user of the land that a contract existed, and would therefore allow verbal evidence to be given to show the real circumstances under which possession was taken." But it is a curious thing that at p. 133, Thesiger, L. J., without noticing these remarks of his colleague, says—"I confess that on principle I do not see why a similar doctrine should not be applied to the case of a contract of service, and as the doctrine of equity is based upon the theory that the Court will not allow a fraud on the part of one party to a contract on the faith of which the other party has altered his position, I do not see why a similar doctrine should not comprehend a contract of service." But that the doctrine of part performance did not comprehend a contract of service all the judges of the Court of Appeal agreed. As to a contract which comes within section 4 of the Statute of Frauds, but does not comply with its provisions being, not void, but only unenforceable, notwithstanding certain *dicta* to the contrary, Lords Justices are also agreed.

The cases in the Probate Division comprise three shipping decisions, which are not of such a nature as to require notice here.

APPOINTMENT OF NEW TRUSTEES.

In the July number of the Chancery Division (23 Ch. D. p. 209—p. 369), *In re Aston*, p. 217, requires a word of notice. In it the practice of the Court where a testator has appointed four trustees in his will, and one is of unsound mind, is declared to be, not to re-appoint the other trustees in the place of themselves and the lunatic trustee, for the purpose of excluding the lunatic trustee from the trust, but to appoint a new trustee in his place.

RESIDUARY ESTATE—VOID BEQUEST.

In the next case of *Blight* v. *Hartnoll*, p. 218, a testatrix made a will as follows:—"I give to C. H. all my personal property, with the exception of my wharf at L." The bequest of the wharf failed for remoteness. The questions were (1), whether the above was a residuary gift; and (2), whether the wharf fell into the residue. The Court of Appeal decided both cases in the affirmative. As to the first question Jessel, M. R., says—"You may have a residuary bequest in various forms; the same thing may be meant though not expressed in the same words. But, however it is expressed, the effect must be that it is intended to comprise all which is not disposed of by the will. It is not a true residue if there is some part not disposed of by the will to

anybody at all." Hence, he draws a distinction between a case like the present, or a case where a testator says—"I give all my personal estate, except my gold watch, which I give to A., and my leasehold house, which I give to B," and a case where a testator gives everything to A. except his gold watch and his leasehold estate, and does not give them to anybody else. In the former case there is a true residuary gift, but not in the latter. Having determined that there was in the present case a true residuary gift, the M. R. deals with the second question of whether there was any intention to exclude the void bequest from falling into the residue, according to the usual statutory rule. As to this he says, with his usual force—"It appears to me very difficult to suppose that a testator should intend that a legacy which fails from being void should not go into the residue. Unless you find express words shewing that the testator doubted whether a bequest in his will was void or not, it is impossible to suppose that he contemplated what would happen if the bequest was invalid."

STAY OF PROCEEDINGS—SUIT BETWEEN THE SAME PARTIES IN HOME AND FOREIGN COURTS.

The next case, the *Peruvian Guano Company* v. *Bockwoldt*, p. 225, was an application on behalf of the defendant that the plaintiffs might be ordered within seven days to elect whether they would proceed with the action, or with proceedings which they had instituted in a Court in France in relation to the same subject matter. It does not seem necessary to notice it here, as it simply applies the principles laid down in *M'Henry* v. *Lewis*, L. R. 22 Ch. D. 397, a case which was noticed at length, *supra.*, p. 145, and which Lindley, L. J., characterises here as "a most valuable decision."

VOLUNTARY SETTLEMENT—GROUNDS FOR SETTING ASIDE.

The next case to be noticed is *Dutton* v. *Thompson*, p. 278, in which the plaintiff sought to have a certain voluntary settlement of his property set aside which he had executed at the suggestion of the defendant, his uncle and trustee of the settlement, and as it appeared that the plaintiff was very weak minded, and had not understood what he was doing, the relief asked for was granted. Jessel, M. R., made the following remarks on the general subject involved:—"I think the deed cannot stand, on the ground alleged in the statement of claim, namely, that the plaintiff did not understand it. I emphatically disagree with the ground on which some judges have set aside voluntary settlements, viz., that there were provisions in them which were not proper to be inserted in such settlements. It is not the province of a Court of Justice to decide on what terms or conditions a man of competent understanding may choose to dispose of his property. If he thoroughly understands what he is about, it is not the duty of a Court of Justice to set aside a settlement which he chooses to execute on the ground that it contains clauses which are not proper."

VENDOR AND PURCHASER—WAIVER OF OBJECTIONS TO TITLE.

The last case in the July number of the Chancery Division to be noticed here is *In re Gloag and Miller's contract*, p. 320, wherein Fry, J., lays down the law as follows:—"When the contract is silent as to the title which is to be shown by the vendor, and the purchaser's right to a good title is merely implied by law, that legal implication may be rebutted by showing that the purchaser had notice before the contract that the vendor could not give a good title. If the vendor before the execution of the contract said to the purchaser, I cannot make out a perfect title to the property, that notice would repel the purchaser's right to require a good title to be shown. But, if the contract expressly provides that a good title shall be shown, then, inasmuch as a notice by the vendor that he could not show a good title would be inconsistent with the contract, such a notice would be unavailing, and whatever notice of a defect in the title might have been given to the purchaser, he could still be entitled to insist on a good title." He also holds in this case that if the contract con-

tains no stipulation as to possession being taken by the purchaser before completion, and he takes possession with knowledge that there are defects in the title which the vendor cannot remove, the taking possession amounts to a waiver of the purchaser's right to require the removal of those defects, or to repudiate his contract. If, on the other hand, the defects are removable by the vendor, the taking of possession does not amount to such a waiver.

A.H.F.L.

FREDERICK HARRISON ON THE ENGLISH SCHOOL OF JURISPRUDENCE.

Austin's analysis of our primary ideas of law is vigorously attacked by Frederick Harrison in the *Fortnightly Review* of October and November 1878. With the keen pen of an accurate analyist, the writer attempts to show that the school of legal philosophers represented by Bentham and Hobbes in the earlier stages of its growth, by Austin in the more recent, is incorrect in the fundamental analysis it makes of the elements of which a law is composed. The school is ably represented in its comparatively early history by Bodin, whom Hallam terms not inaptly the Aristotle and Machiavelli of France. While the germs of the analysis that this school has continued to claim as all-comprehensive and, therefore, unimpeachable, are to be found in Bodin's definition of law, it remained for Hobbes and Bentham to develope the theory in concert, and for Austin, by force of his clear-cut style of analysis, to clarify what was previously but dimly scrutinised and to commend to the judicial judgment of all who examined it the definition and analysis of law that now bears the impress of his authority. Let us recall the main points of Austin's theory, and then note the objections urged against it by Harrison. A sovereign or supreme power is essential to law in order to give it nascent authority. It involves according to Austin a command, a sanction and a legal obligation or duty. The supreme authority may be of different degrees, as, for example, that of the Government of a province, limited, as it is, to its own local sphere. The Dominion Government is supreme as regards the exertion of its constitutionally given powers. The Imperial Government is supreme with regard to all powers not constitutionally granted to colonial governments. But as the essential principle of constitutional government is reasonable limitation, the supreme power, of whatever degree it may be, is subject to this check. Harrison appears to lose sight of this important fact, when he states that there are no limits to the absolute power of the sovereign within the range of *municipal law*, nor does he improve his position when he adds explanatorily "or, in other words, to the lawyers there are none." The sanction, it should be observed, is different according to the circumstances of the case. In civil codes, it is the absence of the benefit derivable from following the explicit directions of the code. In criminal codes, it is the punishment or penalty that follows the violation of the law. Now this leads to the chief objection to Austin's definition that some laws are merely directory or enabling and appear at first sight to involve no command. They do not order a thing to be done. They merely regulate the method of doing it. They are regulations rather than laws. And yet they are imperative in their own way, and partake of the nature of a command. To direct how a thing shall be done is virtually to order that it be not done in any different way. Harrison's objection may therefore be met by including in the definition the idea of prohibition as well as of a command. The sanction in such cases is the imperative effect of the act if done in a manner different from that which is laid down in the Statute. The duty or obligation, being the third element in the analysis, is found in the moral responsibility under which the public labour to do whatever the enabling

or directory statute regulates whenever the interest of the public require it. The ballot provides for secret voting. It does not enjoin compulsory voting. The method to be observed by the voter in recording his vote is laid down. The voter is prohibited from voting otherwise than as the Statute provides. The sanction is here the nullification of the vote if the regulations are not complied with. The duty or obligation is to secure secrecy as far as possible. But there is no positive *command* to vote. There are regulations therefore that involve a prohibition, a sanction, and a duty or obligation. Harrison endeavours to show that three elements named in the analysis of Austin do not of necessity constitute a law, and that there may be a law without the three essentials claimed by Austin. Does not the substitution we propose of a prohibition instead of a command in the case of regulations solve the difficulty! When enabling clauses or directory amendments are appended to positive enactments, then there are both commands and prohibitions involved in the law, and in fact the law is complex, being both a command and a regulation. In forming a system of jurisprudence it is desirable to avoid technicality. The choice between technicality and practical feasibility should in every case be made in favour of the latter. Happily the spirit of the age is innocently utilitarian in this regard. The adoption of the English system of procedure in our courts marks a stage in the geological formation of our laws. If some fossil remains should happen to be found therein, they may be of interest to the student of law in its historical aspects, while they are comparatively innocuous in the statutory structures in which they occur. By degrees they are chipped out and laid aside as curiosities, while the formations in which they occur will remain intact. It is not by over-refining that jurisprudence will become scientifically established—rather by placing a broad and liberal ideal before the jurist, and thereby making all the details of the system conform as closely as possible thereto. In the description of the reasons why man should obey the law, it should be borne in mind that law invests itself in imperial dignity only when it is ethical in the highest degree. The moral basis for law is not sufficient. It lacks the authority that alone can give it weight. It is simply obvious utility. But the spiritual basis of law not unfrequently inserts a prohibition when utility would issue a command. That no system of jurisprudence, void of this spiritual element can survive the shocks of aggravated wrong, is so palpable a truism as scarcely to need expression. That mere authority founded on precedents must give way—that the self-interested utilitarianism of the age which is quickly "ringing down the corridors of time" must weaken and disappear before a spiritual ethics that will shortly reign in its stead, is the hopeful dream of the true jurist and the conscientious legal philosopher.

R. W. WILSON.

REPORTS

RECENT ENGLISH PRACTICE CASES.

WEBB V. STENTON.

Imp. O. 45, r. 2.—Ont. Rule 370.

Attachment of debt—Garnishee order.

[W. N. 83, p. 108.

Plaintiff sought to attach, under above rule, the interest of H. under a will, such interest being a share of an income from a trust fund of which the garnishees were trustees, which share was payable half-yearly. At the time when the garnishee order was applied for nothing was due in respect of such annuity in the hands of the trustees.

Held, by Court of Appeal, there was no debt legal or equitable "owing or accruing" from the garnishees within the meaning of the above rule, which could be attached.

RUSSELL v. DAVIES.

Imp. O. 52, r. 1.—Ont. Rule 396.

Interim order for custody of property.

[W. N. 83, p. 109.

This action was brought to recover the arrears of a certain annuity. The plaintiff was in a state of destitution, and Bacon, V.C., made an interim order that the defendant should pay the arrears of the annuity, and continue to pay it until the trial or further order.

Held now, by Court of Appeal, the order could not be supported, it appearing on the evidence that the defendant had a *prima facie* case for insisting that the annuity had determined, and the plaintiff being wholly unable to repay anything if the decision should be against her at the trial.

FRASER v. COOPER HALL & CO.

Imp. O. 22, rr. 5, 6, 7.—Ont. Rules 164, 165, 166.

Counter-claim—Appearance by defendant to counter-claim.

[W. N. 83, p. —

A person not a party to an action, when made a defendant to a counter-claim, is not entitled to enter an appearance gratis, unless and until he has been regularly served with a copy of the defence; and if he appears without having been so served the appearance may be discharged on motion by the plaintiff in the counter-claim.

CHAPMAN v. BIGGS.

Imp. O. 45, r. 2.—Ont. Rule 370.

Attachment of separate property of married woman.

[L. R. 11 Q. B. D. 27.

Judgment having been signed in an action against the defendants, a man and his wife, it was sought to attach in execution moneys in the hands of trustees forming part of the income of trust funds payable to the wife to her separate use, which had accrued since the judgment. The will by which the trust was created contained a clause restraining anticipation by the wife. It appeared that the action was for the amount of a promissory note made by the husband and wife jointly during the coverture:—

Held, the moneys in question could not be attached in execution.

Per W. WILLIAMS, J.—It seems to me that, if this form of execution could be obtained under the circumstances of this case, the restraint on anticipation could always be evaded.

IN RE MASON, TURNER v. MASON.

Imp. O. 16, r. 14—Ont. Rule 103.

Leave to amend after judgment.

[W. N. 83, p. 134, ib. p. 147.

In this case leave was given by CHITTY J. to amend the writ and statement of claim by adding a party defendant to the action after judgment and issue of the Chief Clerk's certificate; but subsequently this order was discharged by the same judge, he considering it doubtful whether the court had power to make an order where the proposed new defendant did not appear upon the application, and consent to being added as a party.

KNIGHT v. GARDNER.

Imp. O. 38, r. 4.—Ont. Rule 304.

Affidavit—Cross-examination on.

[W. N. 83, p. 152.

The party producing deponents for cross-examination upon their affidavits made in proceedings before the Chief Clerk in Chambers, and not the party requiring such defendants to attend for the purpose of being cross-examined, is liable in the first instance for the expenses of their attendance.

THE NORTH LONDON RAILWAY CO. v. THE GREAT NORTHERN RAILWAY CO.

Imp. J. A. s. 25, subs. 8—Ont. J. A. s. 17, subs. 8.

Injunction—Jurisdiction.

[L. R. 11, Q. B. D. 35.

The above section has not given power to a judge of the High Court to issue an injunction in a case where no court before the Judicature Act could have given any remedy whatever.

Per BRETT, L. J.—I personally have a very strong opinion that the Judicature Act has not dealt with jurisdiction at all, but only with procedure . . . Individually I should be inclined to hold that if no Court had the power of issuing an injunction before the Judicature Act,

no part of the High Court has power to issue such an injunction now; but it is not necessary to decide that.

Aslatt v. *Corporation of Southampton*, L. R. 16, Ch. D. 143, doubted.

Per COTTON, L. J.—In my opinion the sole intention of the section is this: that where there is a legal right which was, independently of the Act, capable of being enforced either at law or in equity then, whatever may have been the previous practice, the High Court may interfere by injunction in protection of that right.

THE CAMPAGNIE FINANCIERE v. THE PERUVIAN GUANO CO.

Imp. O. 31, r. 12.—Ont. Rule 222.

Production—Relating to matters in question in the action.

[L. R. 11 Q. B. D. 55.

A document which it is not unreasonable to suppose, may tend either to advance the case of the party seeking discovery, or to damage the case of his adversary, should be regarded as a document relating to a matter in question in the action.

Per BRETT, L. J.—I do not think that the Court is bound any more on the second summons than on the first to accept absolutely everything which the party swearing the affidavit says about the documents, but the Court is bound to take his description of their nature. The question must be, whether from the description either in the first affidavit itself, or in the list of documents referred to in the first affidavit, or in the pleadings of the action, these are still documents in the possession of the party making the first affidavit which it is not unreasonable to suppose do contain information which may, either directly or indirectly, enable the party requiring the further affidavit either to advance his own case, or to damage the case of his adversary.

Jones v. *Monte Video Gas Co.* L. R. 5 Q. B. D. 556, applied and discussed.

BRITAIN v. ROSSITER.

Imp. J. A. sec. ,24 *subs.* 4, 6.—*Ont. J. A. sec. 16, subs. 5, 8.*

[L. R. 11 Q. B. D. 123.

The doctrine as to part performance, whereby a contract not enforceable by an action at law owing to the provisions of the Statute of Frauds, s. 4, was rendered enforceable in equity, was confined to suits as to the sale of interests in land, and its operation has not been extended by the provisions of the Judicature Act.

Per BRETT, L. J.—I think that the true construction of the Judicature Acts is that they confer no new rights; they only confirm the rights which previously were to be found existing in Courts either of Law or of Equity; if they did more, they would alter the rights of parties, whereas in truth they only change the procedure.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

SUPREME COURT OF CANADA.

SMITH v. GOLDIE.

Patent — Combination — Novelty — Inventor—Prior Patent to person not inventor—Pleading and practice—Section 6 Patent Act—Use by others in Canada—Use by patentee in foreign countries—Section 28 Patent Act—Final decision—Judgment in rem—Section 7 Patent Act, 1872—Commencement to manufacture before application in Canada—Section 48—Use by defendant before patent—Non-suit in Chancery—Practice.

An invention consisted of the combination in a machine of three parts, or elements, A, B and C, each of which was old, and of which A had been previously combined with B in one machine and B with C in another machine, but the united action of which in the patented machine produced new and useful results.

Held, [STRONG, J., dissenting,] to be a patentable invention. To be entitled to a patent in Canada, the patentee must be the first inventor in Canada or elsewhere. A prior patent to a person who is not the true inventor is no defence against an action by the true inventor under a patent issued to him subsequently, and does not require to be cancelled or repealed by *scire facias*, whether it is vested in the defendant or in a person not a party to the suit.

The words in the 6th section of the Patent Act, 1872, "not being in public use or on sale for more than one year previous to his applica-

tion in Canada" are to be read as meaning "not being in public use or on sale *in Canada* for more than one year previous to his application."

Held, also, that the Minister of Agriculture or his Deputy has exclusive jurisdiction over questions of forfeiture under the 28th section of the Patent Act, 1872, and that a defence on the ground that a patent has become forfeited for breach of the conditions in the said 28th section, cannot be supported after a decision of the Minister of Agriculture or his Deputy declaring it not void by reason of such breach.

Per HENRY, J.—The jurisdiction of the Commissioner is administrative rather than judicial, and he may look at the motive and effect of an act of importation, and a single act, such as the importation of a sample tending to introduce the invention, is not necessarily a breach of the spirit of the conditions of the 28th section.

Under the 7th and 48th sections of the Patent Act, 1872, persons who had acquired or used one or more of the patented articles before the date of the patent, or who had commenced to manufacture before the date of the application.

Held, not entitled to a general license to make or use the invention after the issue of the patent.

The defendant at the hearing of the suit in Chancery, moved judgment by way of non suit at the close of the plaintiff's evidence, and judgment was afterwards reversed on appeal. The Supreme Court declined to order a new trial, but directed a decree for the plaintiff.

Appeal allowed with costs.

Bethune, Q.C., and *Howland*, for appellant.

Lash, Q.C., and *Walter Cassels*, for respondent.

BIRKETT ET AL v. MCGUIRE ET AL.

Partners—Giving time to principal—Blended accounts—Payments.

Hulton and McGuire, (defendants,) trading together in partnership, became indebted to Birkett et al, plaintiffs, for goods purchased from them for which the defendants gave notes of the partnership firm. They dissolved partnership in October, 1876, with the knowledge and approval of the plaintiffs, one of them having assisted in arranging it.

McGuire continued to carry on the business alone, and the plaintiffs continued to deal with him,—in so doing McGuire had several transactions with the plaintiffs, from whom he continued to receive goods on credit, until he became insolvent in the early part of the year 1880,—whereupon plaintiffs brought this action on the notes given by the firm. The circumstances attending the dissolution of the firm of McGuire and Hulton, and the subsequent dealings of the plaintiffs with McGuire, appear in the report of the case in 31 U. C. C. P. 430.

Held, [reversing the judgment of the Court of Appeal, RITCHIE, C. J., and STRONG, J., dissenting,] that Hulton was entitled to a verdict on the grounds that by the course of dealings of the plaintiffs with McGuire subsequently to the dissolution, viz.: by plaintiffs blending the two accounts, and by their taking McGuire's paper on account of the blended accounts, upon which paper McGuire from time to time made sufficient payments to pay any balance remaining due on the paper of McGuire and Hulton, which was in existence at the time of the dissolution, it must be held as a matter of fact, as well as of law, arising from the course of the said dealings, that the paper of the firm of McGuire and Hulton had been fully paid.

Appeal allowed with costs.

MacKelcan, Q.C., for appellants.

McCarthy, Q.C., and *Bruce*, for respondents.

CHANCERY DIVISION.

Wilson C. J. C. P. D.] [June 6.

MITCHELL v. SYKES.

Factor—Power to sell for repayment of advances without special authorisation—Power to sell by auction.

A., a manufacturer, borrowed money from B., and agreed with B., in writing, that B. should have the selling of the goods manufactured at his A's. factory; that A. should give B. a mortgage on the factory and premises to secure $5,000, and interest to be advanced by B., and should furnish B. all the goods manufactured at the factory, and manufacture the same to the satisfaction of B., and ship the same to B., as B. directed, at such times, and in such reasonable quantities as he from time to time should direct, and should pay B. a *del credere* commission of 7½ per cent. for selling the same and interest at 8

per cent. on all moneys advanced by B. over the $5,000, and A. covenanted, as his orders were filled, and the goods received, to advance in cash to B. 75 per cent of the wholesale trade value of such goods, and for that purpose the said goods were to be invoiced to B. at such value that he, B., could sell them to the best advantage. It was agreed, also, that all goods manufactured at the factory should be sold only by or through the plaintiff.

Held, the above agreement constituted B. a factor, not a pledgee, for he had power to sell without regard to any default in payment in the ordinary course of trade.

Held, further under the interest that B. had in the goods, and from the nature of the dealings and arrangements of A. and B., that if A. did not repay the advances made to him, or did not deliver to B. goods sufficient to keep his advances protected by a surplus of 25 per cent. of goods at the wholesale trade value, and it became necessary for B. to protect himself against such default, and he could not within a reasonable time have sold to customers, that he could sell by auction, and was not bound to delay until private sales could be made.

Watson for the defendant.

Bain, Q.C., for the plaintiff.

Ferguson, J.] [June 23

CAREY V. THE CITY OF TORONTO.

Vendor and purchaser—Sale according to a plan —Rights of purchaser—Parties.

The City of Toronto sold certain leasehold building lots by public auction, which building lots formed three sides of a square. A plan of the land was exhibited at the sale, and copies given to the bidders, and the sale was made according to the plan which was incorporated in the contracts of purchase. There was shewn on the plan three lanes running round the three sides of the square, at the rear of the building lots. The plaintiff bought a lot on the south side of the square. M. bought all the lots on the west side of the square. After the purchase M. endeavoured to close up the lane behind the lots on the west side of the square.

Held, the plaintiff was entitled to the benefit of the lanes on all three sides of the square, and to a lease in accordance with the plan according to which he made his purchase; and he had a right to maintain this suit to compel M. to remove fences placed by him in obstruction of the lane behind the lots purchased by him, M., and that without making all the other purchasers at the sale parties.

S. H. Blake, Q.C., for the plaintiff.

C. Moss, Q C., for defendant, A. Macdonell.

McWilliams for the City of Toronto.

D. Clarke for the defendants, the Bennetts.

Proudfoot, J.] [July 4.

CLARKE V. CORPORATION OF THE TOWN OF PALMERSTON.

This was an application for a mandamus to compel the Corporation of the Town of Palmerston to include in the estimate by-law for 1883, and to levy and collect a cause to be levied and collected the sinking fund, properly leviable for 1883 on all the debenture debt of the Corporation; and to levy and collect the arrears of the sinking fund not levied in former years; or to levy such a rate as would not exceed two cents in the dollars, exclusive of school rates, applying such portion of said rates as should exceed the amount for ordinary expenditure towards the arrears of sinking fund: and to continue the levying and collection of the two cent rate, similarly applying the excess until all arrears of sinking fund should be made up.

Held, the order for a mandamus should go for the levy of the rate for the current year, for the proceedings were properly taken against the Corporation, and not the Clerk of the Municipality, notwithstanding sec. 88 of the Assessment Act, R. S. O. c. 180 (Harr. Mun. Man., 4th Ed. p. 692), and *Grier* v. *St. Vincent*, 13 Gr. 512. For R. S. O. c. 180, s. 88, must be taken in connection with s. 340 of the Municipal Act (R. S. O. c. 174), and the Clerk is not to insert in the collector's roll any sums which the Council has not directed to be levied. The Council would not know how to limit the rates to be imposed to keep within the statutory limit, unless it had all the special rates also before it.

Held, however, the mandamus could not include the levy of the arrears, nor the levy of the rates in future years.

The not levying a rate for the sinking fund is

an annual breach of duty, and upon any breach a right arises to have it corrected.

Held, also, the plaintiff was entitled to his costs, for though he had not got all he asked, yet he had got what the defendants would not give him.

C. Robinson, Q.C., for respondents.

Proudfoot, J.] July 6.

KITCHING v. HICKS.

Chattel Mortgage—Registration—R. S. O. c. 119.

K. having become security for repayment by H. of a sum of $600, an agreement in writing was entered into, that in consideration thereof, H. did assign to K. all his rights and claims to the goods and stock-in-trade in his, H's., store to an amount sufficient to re-imburse K. for what he might pay as such surety. "And should there not be stock enough for that purpose in the store at such time" the balance should be made up out of H's. book debts.

The agreement was not registered, and K. did not take possession of any of the goods.

Held, the agreement was void as against creditors under R. S. O. c. 119, for want of registration, for although a mortgage of goods and chattels, which are of such a nature that possession cannot be given, is not within the statute, yet where the security covers goods and chattels of which possession may be given, as well as future goods, it must be registered. Otherwise, the statute makes it absolutely void, and it cannot be upheld as to the other part of which possession cannot in the nature of things be changed at the time of making the deed.

Held, also, that though an assignee for the benefit of creditors could not take advantage of the want of registration, yet creditors themselves might, although not creditors by judgment and execution at the time of the assignment.

Parkes v. *St. George*, 2 O. R. followed.

Magee for the plaintiff.

Akers for the defendants, Clarkson and Houston & Co.

Meredith for the defendant Hicks.

Proudfoot, J.] [July 19.

M'GREGOR v. KEILLOR.

Evidence—Surveyor's field notes—Acts of occupation—Statute of limitation.

To determine a disputed boundary line between two lots, the field notes of S., a land surveyor, were offered in evidence, but the evidence was objected to because the memoranda in the notes did not appear to have been made by S. in the execution of his duty:

Held, the objection was good, and the evidence inadmissible.

The plaintiff and M., his next adjoining neighbour, in 1868 employed a surveyor to run the line between his land and that of M. The line drawn ran through a wood. For more than ten years the plaintiff was in the habit of cutting timber up to the line, and he and the owners of the adjoining land recognised the line so drawn as the division line.

Held, a sufficient occupation by the plaintiff to give him a title by possession.

Harris v. *Mudie*, 7 App. 414, distinguished.

CORRESPONDENCE.

Errors in Law Reports.

To the Editor of the LAW JOURNAL.

SIR,—I beg to call the attention of the Law Society of Ontario, as well as of the profession generally, to the inaccuracies and blemishes to be found in our Law Reports. It will be admitted by all that they should be as complete and perfect as possible. There is no good reason why they should not be free from inaccuracies arising from careless proof-reading, much less from want of sufficient attention on the part of both reporters and editors. In the course of my reading I have noticed the following defects:—O. R., Vol. I, Nos. 7, 8, 9, p. 494, "mortgagee's fraud in obtaining money" should read "*mortgagor's* fraud in *effecting policy*." O. A. R., Vol. VII, Nos. 10 and 11, "$15 and costs" should read "$125 and costs"; Chancery Reports, Vol. XXVIII, Nos. 11 and 12, *Direct Cable Co.* v. *Dominon Telegraph Company*, the expressions, occurring frequently, "*Defendant* Company" and "*Plaintiff* Company are obvious results of carelessness in proof-reading. The Supreme Court Reports might fairly be expected to be models of accuracy, and yet in Vol. VI, No. 1, we find on page 10, "appeal dismissed with costs" where, as the judgment in the case (*Power* v. *Ellis*) shows, the appeal is *allowed* on the same terms. In Vol. V, No. 1, *Ætna Life Ins. Co.* v. *Brodie*, the fact that HENRY, J. dissented should be indicated in the head-note,

and that FOURNIER, J. agrees with the majority judgment but, as to costs, would award costs of both lower courts to the Appellants.

In the first of the above S. C. cases, (*Power* v. *Ellis*,) it is also to be noted that on page 5, *Defendant* (l. 2.) should read *Plaintiff*. Apart from these and other blunders that might be cited, there are many improvements that might be suggested in our reports. The marginal headings given in most of our best edited texts are a very great assistance. Could they not be adopted with benefit to the profession in our reports?

In my opinion our reports should be so prepared, edited and printed as to be a source of pride and satisfaction to Canadian lawyers and jurists. They ought to be a "possession for ever."

Very respectfully yours,

VERITAS.

Lord Coleridge's Visit.

To the Editor of the LAW JOURNAL.

SIR,—All the arrangements for the reception of this distinguished judge by the Bar of Ontario had been made. The programme of his movements as arranged by the committee of the New York Bar Association, both as to America and Canada, has been officially announced, and is published in England as well as the States. The time for his visit to Toronto was fixed by his Lordship, and the New York Bar Association and the secretary of our Bar Committee duly notified. Everything was ready and every one very willing except, apparently, the Chief Justice, who, we are informed, now writes a note to the secretary of the committee in Toronto, that he cannot come to Canada. I suppose he has gone on the principle "if you can't take a liberty with a friend with whom can you," and that therefore this liberty is intended as a compliment. I do not think the Bar of Ontario will look upon it in that light. We should have thought his Lordship might very reasonably have said to those who have him in charge, that occupying the representative position he does he could not, after he had made a distinct promise, acted upon to his knowledge by those interested, throw aside an engagement made with the Bench and Bar of the noblest province of the British empire.

The strangest part of the affair is that the New York Bar Association has been in correspondence with our civic authorities urging them to give the Lord Chief Justice a hearty reception and making suggestions in connection therewith. It would seem, therefore, not to be the fault of the New York Bar. It is reported, moreover, that these gentlemen are paying all Lord Coleridge's expenses. There is a good deal in this that grates on my old fashioned nerves. Everything being ready, however, for the banquet, I would suggest that as the great services of most of the recently appointed Queen's Counsel, both to the profession and their country, have not yet been full recognized, it would be a graceful act to tender to them, ere the vegetables become cold, the dinner which was prepared for the Chief Justice. I should like to see the gentleman who recommended these appointments to the Minister of Justice, included as a guest. It is feared, however, that his modesty will for ever prevent his identity being discovered.

Yours, &c.,

BARRISTER.

LATEST ADDITIONS TO OSGOODE HALL LIBRARY.

CONTRACTS :—

Principles of Contract, being a treatise on the general principles concerning the validity of agreements in the Law of England. Third edition. By F. Pollock. Stevens & Sons.

EQUITY :—

Commentaries of Equity Jurisprudence founded on Story. By T. W. Taylor, Q.C. Willing & Williamson.

MERCANTILE LAW :—

A compendium of Mercantile Law. By J. W. Smith. Ninth edition, by G. M. Dowdeswell. Stevens & Sons.

PERSONAL PROPERTY :—

Principles of the Law of Personal Property, intended for the use of students in conveyancing. By Josh. Williams. Eleventh edition. H. Sweet.

In the case of *In re Browne and Binkley*, reported *ante* p. 259, the learned Deputy Judge who heard the case says that it has been held *ultra vires* the Local Legislature to give power to a Justice of the Peace to imprison with hard labour. If the reference is to *Reg.* v. *Frawley*, that holding was reversed by the Court of Appeal: 7 O. L. R. 246.

Law Society of Upper Canada.

OSGOODE HALL.

EASTER TERM, 1883.

The following gentlemen were called to the Bar during this term, namely:—

C. L. Mahony, with honors; P. D. Crerar, with honors. (Mr. Mahony was awarded a gold medal and Mr. Crerar a silver medal.) Messrs. R. W. Leeming, C. G. O'Brian, M. MacKenzie, C. W. Plaxton, Ed. Poole, M. A. McLean, G. F. Ruttan, A. Foy, G. T. Ware, A. J. Williams, R. W. Armstrong, J. D. Gansby, A. D. Kean, D. Lennox, L. C. Smith, A. E. W. Peterson, W. H. Brouse, F. E. Curtis, A. O. Beardmore, H. C. Hamilton, C. R. Irvine and J. F. Canniff.

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

Graduates—R. F. Sutherland, A. M. Ferguson, W. Hunter, C. D. Hossack, E. A. Holman, E. J. Bristol.

Matriculants—S. W. Burns, R. A. Grant, F. H. Kilbourne, A. J. Forward and H. J. Snelgrove.

Junior Class—A. M. Grier, H. D. Cowan, G. H. Douglas, W E. Hastings, A. D. Scatcherd, M. H. Burtch, J. B. Davidson, R. H. Hall, W. Lawson, W. C. P. McGovern, F. E. Walker, C. Horgan, R. R. Ross, C. A. Ghent, H. N. Rose, J. R. Code, F. W. Carey, D. Sinclair, W. Stafford, J. Fraser, W. Geary, H. M. Cleland S. R. Wright, A. McNish, G. M. Brodie.

Mr. Donald Ross was allowed his examination as an Articled Clerk.

Trinity Term having been postponed until Monday, the 3rd September, the examinations will take place as follows:—

Primary—Junior Class, Tuesday, 14th August; Graduates and Matriculants, Thursday, 16th August.

First Intermediate—Tuesday, August 21st.

Second Intermediate—Thursday, August 23rd.

Solicitor—Tuesday, August 28th.

Call—Wednesday, August 29th.

RULES

As to Books and Subjects for Examination.

PRIMARY EXAMINATIONS FOR STUDENTS AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his Diploma, or a proper certificate of his having received his Degree. All other candidates for admission as Articled Clerks or Students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects:—

Articled Clerks.

From 1883 to 1885.
- Arithmetic.
- Euclid, Bb. I., II., and III.
- English Grammar and Composition.
- English History Queen Anne to George III.
- Modern Geography, N. America and Europe.
- Elements of Book-keeping.

In 1883, 1884, and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil at their option, which are appointed for Students-at-law in the same year.

Students-at-Law.

CLASSICS.

1883.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. VI.
- Cæsar, Bellum Britannicum.
- Cicero, Pro Archia.
- Virgil, Æneid, B. V., vv. 1-361.
- Ovid, Heroides, Epistles, V. XIII.

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

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

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

Translation from English into Latin Prose.

MATHEMATICS.

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

ENGLISH.

A paper on English Grammar.

Composition.

Critical Analysis of a selected Poem:—

1883—Marmion, with special reference to Cantos V. and VI.

1884—Elegy in a Country Churchyard.
The Traveller.

1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

HISTORY AND GEOGRAPHY.

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

Optional subjects instead of Greek:—

FRENCH.

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

1883 / 1885	Emile de Bonnechose, Lazare Hoche.	1884	Souvestre, Un philosophe sous les toits.

OR, NATURAL PHILOSOPHY.

Books—Arnott's Elements of Physics, 7th edition, and Somerville's Physical Geography.

A student of any University in this Province who shall present a certificate of having passed within four years of his application an examination in the subjects above prescribed, shall be entitled to admission as a student-at-law or articled clerk (as the case may be) upon giving the prescribed notice, and paying the prescribed fee.

From and after January 1st, 1883, the following books and subjects will be examined on :

FIRST INTERMEDIATE.

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

Three Scholarships can be competed for in connection with this intermediate.

SECOND INTERMEDIATE.

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

Three Scholarships can be competed for in connection with this intermediate.

FOR CERTIFICATE OF FITNESS.

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

FOR CALL.

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

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

The Law Society Terms begin as follows:—

Hilary Term, first Monday in February.
Easter Term, third Monday in May.
Trinity Term, first Monday in September.
Michælmas Term, third Monday in November.

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

Graduates and Matriculants of Universities will present their Diplomas or Certificates at 11 a.m. on the third Thursday before these Terms.

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

The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m.; the Solicitors Examination on the Tuesday, and the Barristers on the Wednesday before Term.

The First Intermediate Examination must be passed in the Third Year, and the Second Intermediate Examination in the Second Year before the Final Examination, and one year must elapse between each Examination, and between the Second Intermediate and the Final, except under special circumstances.

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

Articles and assignments must be filed within three months from date of execution, otherwise term of service will date from date of filing.

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

Candidates for Call to the Bar must give notice signed by a Bencher during the preceding term, and deposit fees and papers fourteen days before term.

Candidates for Certificate of Fitness are required to deposit fees and papers on or before the third Saturday before term.

FEES.

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