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THE Law School opens on the 23rd instant. An Easter vacation is now added to the curriculum.

SOME members of the profession seem to be still unaware that the Supreme Court Reports are being furnished to them free. We assume that they do not know this fact, inasmuch as many numbers have been returned "refused" to the post office. We would have supposed that in these hard times the profession would be glad to take everything useful which comes without charge.

THE condition of the laws in New Brunswick has been engaging the attention of the press there, and complaints are made that in all matters pertaining to the administration of the law, and, in fact, as to the laws themselves, things are in a wretched state. One writer speaks as follows: "No one who compares the present state of the statute laws of New Brunswick with the present state of the statute laws of England, the statute laws of the Province of Ontario, and the statute laws of most of the States of the United States of America, can help but think, as well as come to the conclusion, that we are a long distance, indeed, behind England, the Province of Ontario, and most of the States of the United States of America in modern law reform; and let it be added that in these days modern law reform stands for about nine-tenths of the progress and prosperity of a people. The fact of the matter is our statute laws are in such an obsolete and antiquated condition that modern jurisprudence—the work

and labour and thought of modern statesmen and jurists—is, in this Province, almost useless, and in a few years more, unless some radical change takes place, it will be, except in a few fundamental principles, wholly and completely useless in our practice. Our substantive law and procedure are so utterly and violently different from every other civilized country that the decisions of our Supreme Court are scarcely ever referred to or consulted, or even looked at, outside of the Province." It is alleged that the blame for this state of affairs lies on the legal profession itself. One difficulty seems to be, if the writer be correct, that there is no Law Society or Bar Association such as we have in Ontario, and such as are to be found in England and the United States. They have at Fredericton a Barristers' Society, which is supposed to meet once a year, but is very badly attended. There is also a St. John Law Society, which is said to be somewhat better, but neither of them is equal to the occasion. We trust that the matter, having been brought prominently before the profession in our sister Province, through the press there, will receive such attention as it certainly merits.

THE new addition to the Library at Osgoode Hall is now complete, and, thanks to the skill of Mr. Lennox, is a creditable piece of architecture. It has been devoted principally to the American reports, which are already almost sufficient to fill it, so that in a few years, with more States constantly being formed and more courts established, a further *annex* will be needed. In view of the variety of opinions on all subjects for which these reports may be cited, our friend Briefless suggests that the Benchers should inscribe over the portals of the new room the following lines, which he has considerately composed for the occasion :

Come, all you weary lawyers, enter here,
And find authority most straight and clear
For every legal nut you have to crack,
Though it be "black is white," or "white is black,"
Whate'er the point it does not matter ;
You're sure to find some learned chatter
That will maintain the proposition,
And prove it 'gainst all opposition.

AMERICAN BAR ASSOCIATION.

One of the most interesting legal events for our brethren of the long robe (which, by the way, they do not wear) to the south of us is the annual meeting of the American Bar Association. The eighteenth of the series was recently held at Detroit, and is said to have been one of the most interesting in the history of the association, extending over a period of four days instead of three as heretofore, so as to enable the Detroit Bar to extend courtesy to the association, which would have been impossible within the more limited time.

We speak of this meeting now from a summary of its proceedings in a late number of *The Albany Law Journal.*

The annual address, delivered by Judge Taft, was principally occupied with a discussion of the legal phases of the Chicago riots of last year, and, albeit rather lengthy, was received with great attention.

Mr. Justice Brewer, of the United States Supreme Court, in his address, took strong ground in favour of higher legal education, not merely in reference to careful and systematic teaching and study of the laws, but for a wide and liberal education, so as to make the Bar useful and influential in guiding and governing public affairs. No lover of this profession but will be glad to know that the best men at the American Bar are fully alive to that which has been the pride of the Bar in England, an example which we have sought to follow in the Province of Ontario.

A very exhaustive report was presented by the Committee on Law Reporting, which is published in full in *The Albany Law Journal.* We would call attention to this report, which would be read with benefit by those of our Benchers who have the charge of this important subject. It speaks of what is a much greater evil in the United States than in this country, but which, even here, is becoming a subject worthy of consideration. We refer to the multiplicity of reported cases. The whole matter is very ably and fully discussed, and a suggestion is given to lessen, though the committee does not pretend to be able to suggest any sufficient remedy for the evils complained of.

It would seem that the hospitality of the city of Detroit and its Bar was unstinted, and was extended to many who did not belong to the profession in the United States. Notably, the

meeting was attended by the Hon. J. R. Gowan, now a Senator, and formerly the best known of our County Judges, and whose ability is not unknown across the border.

It would, of course, be impossible for our American brethren not to have something amusing as well as instructive to say on an occasion of this kind. For example (and the reminiscence is interesting in view of the low state of legal education in some of the States many years ago), Ex-Governor Alger, in his after-dinner speech, said that he had in his early days been admitted as a member of the Bar, the committee having reported favourably upon his answers to three questions, as to one of which the answer was wrong, and, as to two, right. He followed this by saying that he undertook to answer the first question, and was informed that he was wrong; and, in reply to the next two questions, he said he did not know, and was promptly informed by the committee that he was probably right.

We think it may safely be said that amongst the leaders of the Bar in the United States are to be found those who best understand, and are most desirous of meeting, the dangers which beset the welfare of the republican form of government as developed in the United States of America. This came out very strongly in the report of the American Bar Association for 1894, where some of these dangers were frankly admitted, and honestly discussed at considerable length. We have not space to refer to more than one important feature, which is of special interest to ourselves. Mr. Moorfield Storey (who, by the way, is the newly-elected president of the association), in his address last year, spoke thus:

"From the most august legislative body in the country, the Senate of the United States, down to the Aldermen of New York, the citizen too often distrusts, fears, and is ashamed of his representatives. The business community throughout the country welcomes the adjournment of Congress as the end of a season filled with perplexity and dread. If we applaud Congress, it is rather because bad laws have been repealed or bad propositions have been defeated than because good laws have been passed. We congratulate ourselves upon our narrow escapes, and wonder whether we shall be equally fortunate again. The citizen who seeks reform, whether he sits in Congress or stands without its doors, must be wonderfully per-

sistent if he is not discouraged by the singular incapacity of that body to deal with great public questions upon public grounds. I forbear to state the case as strongly as I could. . . . When a State legislature meets, every great corporation within its reach prepares for self-defence, knowing by bitter experience how hospitably attacks upon its property are received in committees and on the floor. The private citizen on his part never knows what cherished right may not be endangered by existing monopolies or by schemers in search of valuable franchises. . . . This popular fear of the legislature shows itself in all the more recent American Constitutions. Biennial sessions are the rule, and in many cases the length of the session is limited. Where it is not, protracted sessions are disapproved. The people cannot endure so long or so frequent assemblies of their representatives as they once desired. . . . Whether, then, we look at the constitutions which the people adopt and the rules of the House of Representatives, or listen to the common speech of men, we find that the faith in the representatives of the people on which our government was founded is gradually weakening. Of our historical representatives we are justly proud. On our possible representatives we still rely, but our actual representatives we fear and distrust."

We may not be, and are not, we trust, as yet, quite in this position, so far as our legislatures are concerned; but Mr. Storey's added remarks as to municipal government in cities and towns come home to us very strongly. He says:

"When we come to municipal legislatures, the same feeling is found. The city councils of our great cities have not retained public respect, and everywhere men seek an escape from their misrule in laws which shall deprive them of power, and concentrate authority in a single magistrate. The tendency here is from representative government to absolute power."

The citizens of Toronto, at least, might suppose that the above remarks were written for their special benefit. Some action in that direction would not, we apprehend, be thought out of place by a majority of the ratepayers of that city at the present time.

THE JUDICATURE ACT IN MANITOBA.

We have received a copy of "The Queen's Bench Act," 1895, passed by the Manitoba Legislature at its last session. This Act comes into force on the 1st of October next. Manitoba thus falls into line with Ontario in adopting the system of legal practice and procedure known as The Judicature Act; and a brief summary of the changes introduced into the law by this Act may be of use to the profession, both of Manitoba and other Provinces.

The Court retains the same name as heretofore, namely, the Queen's Bench. It is not divided into two or more branches or divisions, as in Ontario, but is to administer every kind of relief heretofore granted in the Court on its common law and equity sides. The Act itself is a short one, containing ninety-seven sections in thirty pages, but it is followed by two hundred and eighty-nine pages of rules and forms, which are declared to be a part of the Act.

Rules 984 and 985 declare that it is the purpose of the Act to fuse and amalgamate the former systems of law and equity practice into one system, and that the new law and practice shall be applied to all matters, causes, suits, actions, and proceedings, without distinction as to whether the rights or remedies would formerly have been legal or equitable, in such a way as, in the judgment of the court, will conduce to the just, speedy, and inexpensive determination of the rights of all parties in question therein.

All suits and actions formerly commenced by writ of summons at common law, or by bill of complaint or information in equity, must now be commenced by a statement of claim. This is to be prepared by the plaintiff and taken to the officer of the court, who will sign and seal it, and return it to the attorney after a copy has been filed.

The writ of summons is entirely abolished, and the same form of statement shall be used, and service thereof shall be made in the same manner, whether the service is to be made in Manitoba or elsewhere, and whether the defendant is, or is not, a British subject.

A defendant served within Manitoba will have sixteen days to file his statement of defence. No other pleadings are allowed, and separate demurrers are abolished; but the defendant may incorporate a demurrer with his statement of defence. Where

the plaintiff wishes to reply to any matters in the statement of defence, he must amend his statement of claim. Provisions are inserted for determining questions between the defendant and third parties who may be brought into the action, as by The Judicature Act in Ontario.

Pleas in abatement and new assignments are abolished. Liberal provisions are made for amendments of all kinds, and for the most generous relief, in case a party or an attorney makes any slip or omission, or commits any irregularity, in the course of the proceedings. It will even be permitted that a party may supply new material where the material filed is afterwards held to be defective.

The usual provisions for the examination of parties for discovery and for the production of documents appear in the Act.

All applications to be made in any action or proceeding are hereafter to be made by motion, and not by summons, rule, or order to show cause.

Rule 555 makes liberal provision for the relief of a party who, through accident, inadvertence, or mistake, the absence of a witness or document, or other cause, omits or fails to prove some fact material to his case at the trial.

With regard to the enforcement of judgments, a radical change has been introduced as to executions against goods and chattels. All moneys realized by a sheriff thereunder are to be distributed rateably amongst all execution creditors, and three months are allowed for the creditors to get judgments, but the distribution may be delayed for a longer time by order of a judge to enable other creditors to share. The law is unchanged, however, as to the enforcement of judgments against the lands of the judgment debtor, and certificates of judgment will still rank according to the order of their registration.

As to the cases in which there may be a trial by jury, sections 49 and 50 provide as follows:

49. Actions for libel, slander, breach of promise of marriage, illegal or excessive distress, illegal or excessive seizure, criminal conversation, seduction, malicious arrest, malicious prosecution, false imprisonment, breach of warranty, and for the recovery of damages under "The Workmen's Compensation for Injuries Act," shall be tried by jury, unless the parties in person, or by their solicitors or counsel, expressly waive such trial.

(2) Except in cases of libel and slander, the right to a jury shall be held to be abandoned, and the case shall be tried without a jury, unless a jury fee of twenty-five dollars in law stamps be paid to the prothonotary or deputy clerk of the Crown and Pleas. The officer shall require payment of such fee before entering the case.

(*b*) Subject to the provisions of this section, all actions, causes, matters and issues, shall be tried by a judge without a jury, unless otherwise ordered by a judge.

50. Notwithstanding anything in the next preceding section contained, a judge presiding at a trial may, in his discretion, direct that the action or issues shall be tried, or the damages assessed, by a jury. O.J.A., s. 80.

This is quite a change in the practice that has obtained during the last few years, when it has been difficult to get a jury trial except in actions for libel and slander.

Rules 413 and 414 of the Act, which are of greater scope than the Ontario Rules, are as follows:

"Where any application is made, either under the provisions of this Act or under any other law or statute, to the court, or a judge, or to a local judge or referee, and it appears that the material upon which the said application is made is defective and insufficient in substance or in form, if it appears to the court, judge, local judge or referee, from statements of counsel or otherwise, that such material can be perfected by the applicant within a reasonable time, the application shall not be dismissed on account of such defective or insufficient material, but the applicant may be given leave to perfect such material upon payment of the costs occasioned to the opposing party by his additional attendance."

"Upon an application to the court or judge to set aside or vacate any rule or order on account of the same having been obtained upon defective or insufficient material, the party who has obtained such rule or order shall be allowed a reasonable time to perfect the material upon which such rule or order was obtained by filing additional material."

One effect of the Act will be to encourage assignments by traders for the benefit of their creditors, as "snap" or preferential judgments are practically done away with, and there will be less, if any, necessity for a bankruptcy Act hereafter in Manitoba.

Rule 225 provides that a married woman may sue or defend or become a party to any proceeding or matter in the court in all cases without a next friend.

The rules appended to the Act are substituted for all the common law and equity rules of pleading and practice in force hitherto : Rules 292 and 333.

The time of the long vacation is changed and will hereafter be from July 15th to September 14th, both days inclusive.

Rule 695*a* provides that an assignment for the general benefit of creditors shall take precedence of all judgments, and of all executions not completely executed by payment to the creditor, subject to the lien, if any, of execution creditors for their costs.

Rule 808 abolishes arrest and imprisonment for debt in all cases, including *capias* in case of a debtor about to leave the Province.

As to costs, the new rules which will more particularly affect solicitors are the following :

932. The court and every judge thereof, in so far as it or he may be able so to do without injustice, shall adopt and carry out the principle that no costs of any interlocutory motion before judgment, or before an order to enter judgment is obtained, shall be allowed, unless in the opinion of the judge or officer making the same, or of the taxing officer, such order was necessary to the proper trial or disposition of the case, or to do justice between the parties ; and all costs of motions made before final judgment, where costs are allowed, shall, unless otherwise ordered, be taxed at the taxation of the general costs of the cause, subject to all just rights of set-off. In cases where an application is made which, though within the strict right of the applicant, is considered by the court or judge to be vexatious or unnecessary, costs may be given against the applicant ; and

938, which provides for payment of the solicitor's fees in an administration or partition suit by a commission on the amount involved, as in Ontario, in lieu of ordinary taxable fees.

A tariff of fees to be allowed to barristers, solicitors, and sheriffs, under the Act, is to be promulgated by the judges, and published in the Manitoba *Gazette*.

On the whole, it may be fairly said that the Act contains many improvements in the law and in the practice and pro-

cedure of the court, but there can be little doubt that one result of the Act will be to increase the cost of a defended common law action. Whether this will tend to diminish the number of such actions, remains to be seen.

CURRENT ENGLISH CASES.

The Law Reports for July comprise (1895) 2 Q.B., pp, 1-173; (1895) P., pp. 217-273; and (1895) 2 Ch., pp. 132-272.

MASTER AND SERVANT—INFORMATION OBTAINED BY SERVANT IN SERVICE OF MASTER—SERVANT, LIABILITY OF—INJUNCTION.

Robb v. *Green*, (1895) 2 Q.B. 1. was an action brought by a master against a former servant for improperly using information acquired while in his service to the prejudice of the plaintiff. The defendant, after quitting the plaintiff's service, had set up a similar business to that of the plaintiff, and had sent circulars soliciting custom to the plaintiff's customers, whose names and addresses he had clandestinely copied from the plaintiff's books while in his service. This Hawkins, J., held to be an unlawful act, and contrary to an implied term of the contract of service, and he gave judgment for the plaintiff for £150 damages, and an injunction.

MALICIOUSLY INDUCING EMPLOYER TO DISMISS SERVANT—MALICIOUSLY INDUCING A PERSON TO ABSTAIN FROM EMPLOYING ANOTHER—LIABILITY OF MEMBERS OF TRADES UNION FOR ACTS OF DELEGATE—TRADE UNION.

Flood v. *Jackson*, (1895) 2 Q.B. 21; 14 R. June, 147, is a decision which ought to have a wholesome effect on the action of trades unions, and put an end to their interference with the employment of those who do not care to be subject to their behests. The plaintiffs were workmen engaged as shipwrights by the Glengall Dock Company. While so engaged certain other workmen, members of a trades union, refused to work for this company unless the plaintiffs were dismissed. Allen, one of the defendants, who was district delegate of the union, thereupon waited upon the Glengall Company, and notified them that the plaintiffs must be dismissed and not again employed, or that the members of the union would leave work. The company thereupon dismissed the plaintiffs and refused to employ them again, but their

doing so involved no breach of contract on their part. The other two defendants were the chairman and general secretary of the union, but it did not appear that they were parties or privies to Allen's action. The jury found that the defendant Allen had maliciously induced the Glengall Company to dismiss the plaintiffs, and to abstain from employing them again; but that the other defendants had not authorized him so to do, and they assessed the plaintiffs' damages at £20 each. The defendants other than Allen were sought to be made liable for Allen's acts on the ground of their being members of the union, and as such answerable for his acts. But Kennedy, J., while giving judgment in favour of the plaintiffs against Allen, dismissed the action against the other defendants with costs, and his decision was affirmed by the Court of Appeal (Lord Esher, M.R., and Lopes and Rigby, L.JJ.). The position of Allen with regard to the other members of the union was held not to be that of agent or servant, but rather that of a principal, whose orders the other members had bound themselves to obey.

SHIP—SEAMAN - CONTRACT OF SERVICE—INCREASED DANGER RESULTING FROM DECLARATION OF WAR—UNCOMPLETED VOYAGE—RIGHT TO WAGES.

The case of *O'Neil* v. *Armstrong*, (1895) 2 Q.B. 70, is interesting as establishing a point of general interest, to the effect that where a master increases the danger attending his servant's employment, the latter is entitled to quit his employment, and to recover the wages for the full time of his contract. In the present case, the plaintiff was employed as a seaman by the agents of the Japanese Government to navigate a torpedo ship from the Tyne to Yokohama. After the voyage had been partly accomplished, war was declared between China and Japan, whereupon the plaintiff refused to continue the voyage, and brought the action to recover the full amount of wages, which Lord Russell, C.J., and Charles, J., affirming a County Court judge, held he was entitled to do.

INNKEEPER—LIEN OF INNKEEPER ON GOODS OF THIRD PERSON.

Robins v. *Gray*, (1895) 2 Q.B. 78, was a question of innkeeper's lien; and the point in controversy was whether the lien attached on goods of a third person, sent to a guest at the defendant's inn for sale, and known by the defendant to belong to a third person. The lien was claimed for board and

lodging. Wills, J., held that the lien did attach; the guest was a commercial traveller, and the fact that the goods were sent to him and not taken by him to the inn was held not material.

MASTER AND SERVANT—SERVANT'S AUTHORITY TO BIND MASTER—SUDDEN EMERGENCY—IMPLIED AUTHORITY OF SERVANT—AGENT OF NECESSITY.

In *Gwilliam* v. *Twist*, (1895) 2 Q.B. 84; 14 R. July, 217, the Court of Appeal (Lord Esher, M.R., and Smith and Rigby, L.JJ.) have been unable to agree with the decision of Lawrance and Wright, JJ., (1895) 1 Q.B. 557 (noted *ante* p. 263), on the ground that the defendants might have been communicated with, and, therefore, there was no necessity for their servants to employ another person to drive their omnibus home, and, therefore, that the defendants were not liable for the negligence of the person so employed. The foundation of the doctrine that a servant becomes an agent of necessity for his master is that he is unable to communicate with his master; when he is able to do so the agency of necessity does not arise.

PRACTICE—DISCOVERY—LIBEL—PARTICULARS OF DEFENCE OF JUSTIFICATION—INSPECTION OF DOCUMENTS—MITIGATION OF DAMAGES.

Yorkshire Provident Life Assurance Company v. *Gilbert*, (1895) 2 Q.B. 148; 14 R. July, 161, was an appeal on a point of practice from an order of Day, J. The action was for libel, the alleged libel being a statement that the plaintiffs habitually refused to pay claims on policies issued by them. The defendants pleaded justification, and delivered particulars of thirty cases in which the plaintiffs had refused to pay claims. They also, without leave, delivered further particulars of alleged misconduct by the plaintiffs in mitigation of damages. The defendants then obtained an order for discovery of documents, and claimed thereunder to be entitled to a general inspection of the plaintiffs' register of policies and register of claims. The plaintiffs refused to permit an inspection, except as to the entries relating to the claims mentioned in the defendants' particulars. Day, J., ruled that the defendants were entitled to a general inspection, but the Court of Appeal (Lindley and Smith, L.JJ.) upheld the plaintiffs' contention, being of opinion that upon the delivery of particulars the issues to be tried under the plea of justification are limited to the matters referred to in the particulars, and that the

delivery of the particulars in mitigation of damages did not enlarge the defendants' right of discovery, the delivery of such particulars without leave being irregular.

CORPORATION—LIBEL—PRIVILEGED COMMUNICATION — EXCESS OF PRIVILEGE—MALICE.

Nevill v. *Fine Arts Insurance Company*, (1895) 2 Q.B. 156, was an action for libel. The libel was contained in a circular issued by the defendant company to its customers asking for payment of renewal premiums. This circular was composed by a clerk in the defendants' office. The libel consisted in these apparently innocent words: "The agency of Lord William Nevill at 27 Charles street has been closed by the directors." The plaintiff claimed that this meant that the plaintiff had been dismissed for some reason discreditable to him. The jury found that it was a libel, that it was untrue, and if published on a privileged occasion the privilege had been exceeded, and they assessed the damages at £100, and Pollock, B., on these findings, directed judgment to be entered for the plaintiff. But the Court of Appeal (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) reversed the judgment, and all the members seemed to think (though not actually deciding so) that the words complained of were as nearly as possible incapable of a defamatory meaning; but they held that even assuming them to be a libel, the occasion being privileged, it was necessary to prove actual malice, and as no actual malice was shown, either on the part of the directors of the company or of any of its servants, and there was no evidence of any excess of privilege, the plaintiff could not recover.

COLLISION—DAMAGES—CONTRACT OVERRIDING PROVISIONS OF MERCHANT SHIPPING ACT, 1862 (25 & 26 VICT., c. 63), s. 54.

The Satanita, (1895) P. 248; 11 R.May, 97, is a case which may be interesting to some readers, particularly at this season of the year. It is an admiralty case which arose out of the sinking of Lord Dunraven's yacht, *Valkyrie*. The *Satanita* had entered a yacht race with the *Valkyrie*, and the owners of the competing yachts bound themselves to observe certain rules and to pay all damages which might result from their committing any breach of the rules. In the course of the race the *Satanita* committed a breach of one of the rules, which resulted in a collision with, and

sinking of the *Valkyrie*. The owners of the *Satanita* paid into court damages to the amount of £8 per ton of the *Valkyrie's* tonnage under the Merchant Shipping Act, 1862, s. 54 (see, now, Merchant Shipping Act, 1894, s. 503), which Bruce, J., held to be a discharge of their liability; but the Court of Appeal (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) reversed his decision, holding that the rules to which the owners of the *Satanita* had agreed to conform constituted an express contract to pay "all damages," and therefore excluded the provisions of the Act limiting the liability of shipowners for collisions.

FUND IN COURT—INCUMBRANCE ON FUND IN COURT—PRIORITY—STOP ORDER—POST-NUPTIAL SETTLEMENT—COVENANT TO SETTLE AFTER-ACQUIRED PROPERTY—MUTUAL COVENANTS—CONSIDERATION.

In *Stephens* v. *Green*, (1895) 2 Ch. 148; 12 R. June, 34, there was a contest for priority between two assignees of a fund in court. The fund was originally bequeathed by a father to his son contingently. While the interest was still contingent, and after the fund had been paid into court in a suit for the administration of the father's estate, the son died, and bequeathed his interest in it to his daughter, and while the interest was still contingent she assigned the fund successively to A. and B. B., having no notice of A.'s assignment, obtained a stop order. A. did not obtain a stop order, but gave notice of his assignment to the executor of the son's estate, who had never assented to the legacy. Under these circumstances Stirling, J., held that A. was entitled to priority, and the Court of Appeal (Lindley, Lopes, and Kay, L.JJ.) affirmed his decision, holding that the stop order in effect only gave notice to the trustees of the original testator's will, but that in order for B. to obtain priority over A. a prior notice of his assignment to the son's executor was necessary. The statement in Lewin, p. 800, that "where there are two settlements, one original, the other derivative, the notice should be given to the trustees of the original settlement who hold the property," is held to be erroneous. On appeal, the question was raised whether A.'s assignment was for value, it being a post-nuptial settlement. The settlement had been made by the lady and her husband to prevent proceedings against the husband for contempt, he having married his wife without leave whilst she was a ward of court, and it contained mutual covenants to settle after-acquired

property. The Court of Appeal held that this covenant on the part of the husband constituted a valuable consideration for the settlement.

TRADE MARK—FANCY WORD—INVENTED WORD.

In re Densham's Trade Mark, (1895) 2 Ch. 176; 12 R. June, 65, an attempt was made to expunge the registration of the word "Mazawattee" as a trade mark for tea. The word is composed of a Hindustani word, "maza," which means "relish," and the Cingalese word, "wattee," which means "garden" or "estate," but the compound word has no meaning in either language. The Court of Appeal (Lindley, Lopes, and Kay, L.JJ.) agreed with Romer, J., that the word was a good trade mark.

PRACTICE—TRUSTEES' COSTS OF ACTION BY CESTUI QUE TRUST—RIGHT OF TRUSTEE TO RETAIN COSTS OUT OF TRUST ESTATE—"THE COURT DOTH NOT SEE FIT TO MAKE ANY ORDER AS TO COSTS," EFFECT OF.

In re Hodgkinson, Hodgkinson v. *Hodgkinson*, (1895) 2 Ch. 190; 12 R. July 73, the question was whether a trustee was entitled to retain his costs of certain proceedings out of the trust estate. The proceedings in question had been instituted by a *cestui que trust*, and in the order that was made it was declared "that the court did not think fit to make any order as to the costs of the action." Notwithstanding this, the trustee claimed the right, on subsequently passing his accounts, to deduct his costs of the proceedings out of the trust estate. Kekewich, J., who made the original order, held that it was an adjudication that the trustee was not entitled to costs, and, therefore, that he had no right to retain them out of the estate, and the Court of Appeal (Lindley, Lopes, and Kay, L.JJ.) affirmed his decision. It is to be noted that the action in which the order was made was between the *cestui que trust* and the trustee, in which, if the court had seen fit, it could have ordered the costs to be paid out of the estate. It does not, therefore, follow that a similar order made in an action between a stranger and the trustee would have the same effect, in depriving the trustee of his right to indemnity out of the estate.

WILL—CONSTRUCTION—GIFT PER STIRPES, OR PER CAPITA.

In re Stone, Baker v. *Stone*, (1895) 2 Ch. 196, the Court of Appeal (Lindley, Lopes, and Kay, L.JJ.) differed with Stirling, J., on the construction of a will. The testator gave the income of

his real and personal estate to be divided equally between his brother and sisters, and "at the decease of either of my before-named brother or sisters, their interest herein to be equally divided amongst their children, and, after the decease of all, I desire the whole of my property . . . to be equally divided between the children of the aforesaid, share and share alike." The question was whether the ultimate gift to the nephews and nieces was *per stirpes* or *per capita*. Stirling, J., held it was *per stirpes*, but the Court of Appeal came to the conclusion that it was clearly a gift *per capita*, and could not be controlled by the fact that so long as any brother or sister lived the income was divisible *per stirpes*.

SETTLEMENT—VOLUNTARY DEED—RECTIFICATION.

In *Bonhote* v. *Henderson*, (1895) 2 Ch. 202, the Court of Appeal (Lindley, Lopes, and Kay, L.JJ.) have affirmed the decision of Kekewich, J., (1895) 1 Ch. 742; 13 R. July, 121, noted *ante* p. 377,) on the ground that the evidence failed to establish that at the time the settlement was made the settlors had any different intention from that carried out by the deed.

ADMINISTRATION—MARSHALLING ASSETS—REAL ESTATE CHARGED WITH DEBTS.

In re Salt, Brothwood v. *Keeling*, (1895) 2 Ch. 203; 13 R. June, 113, is a case which, since the Devolution of Estates Act, may not have very much bearing in Ontario. The question was as to the right of a legatee to have the assets marshalled in his favour. The testator, after directing payment of his debts and funeral and testamentary expenses, gave a legacy of £1,500 to his son, and devised and bequeathed all his real, and the residue of his personal estate, upon trusts for sale and investment, to pay the income to his wife for life, and after her death to divide the estate among his children. The personal estate was insufficient to pay the legacy in full after satisfying the debts, funeral, and testamentary expenses. Chitty, J., held that the legatee was entitled to have the assets marshalled so as to stand in the place of creditors against the real estate to the extent to which the personal estate had been applied in the payment of the debts, funeral, and testamentary expenses, and in doing so followed *Re Stokes*, 67 L.T. 223, in preference to *Re Bate*, 43 Ch. D. 600.

COMPROMISE—SPECIFIC PERFORMANCE—SILENCE AS TO FACT KNOWN TO ONE PARTY ONLY.

Turner v. *Green*, (1895) 2 Ch., 205; 13 R. July, 149, was an action for the specific performance of an agreement of compromise which the defendant claimed to rescind on the ground that when the agreement was entered into the plaintiff's solicitor was in possession of information that certain proceedings in the action, which was the subject of the compromise, had resulted in favour of the defendant, and that he had neglected to disclose this to the defendant; but Chitty, J., held that there was no duty on the part of the plaintiff or his solicitor to disclose this fact, and, therefore, its non-disclosure furnished no ground for rescinding the agreement. "Mere silence as regards a material fact which the one party is not under an obligation to disclose to the other cannot be a ground for rescission, or a defence to specific performance": Fry on Specific Performance, 3rd edition, par. 705, is held to be sound law. The suppression of a material fact can only be a ground for rescission where there is an obligation to disclose the fact suppressed. But the learned judge seems to admit that even silence, though not constituting a fraud, might, nevertheless, constitute such unfairness in a contract as to prevent the court specifically enforcing it.

JUDGMENT FOR PAYMENT OF MONEY INTO COURT—ENFORCING JUDGMENT—GARNISHEE PROCESS—MONEY IN SHERIFF'S HANDS.

In re Greer, Napper v. *Fanshawe*, (1895) 2 Ch. 217, Chitty, J., decided that a judgment for the payment of money into court cannot be enforced by garnishee proceedings. But in view of the provisions of Ont. Rule 934 (*a*), it would seem that this case would not be authority in Ontario on that point. The case also decides that, apart from certain provisions in the English Bankruptcy Act, 1890, money in the hands of a sheriff may be garnished. This case is not reported in 13 R., Aug. 129.

PARTNERSHIP—INTEREST OF DECEASED PARTNER IN ASSETS—ANNUAL ACCOUNT—DEATH OF PARTNER BEFORE ACCOUNT TAKEN—GOOD WILL, HOW FAR AN ASSET—SALE OF GOOD WILL AFTER DEATH OF PARTNER.

In *Hunter* v. *Dowling*, (1895) 2 Ch. 223; 13 R. June, 88, the decision turns upon a question arising on the taking of a partnership account for the purpose of ascertaining the share of a deceased partner. By the articles of partnership the accounts

were to be taken annually, and, in the event of the death of a partner, his share was to be taken as the amount appearing at his credit at the last annual account. The annual account was to be taken on March 31st; on April 10th, and before it had actually been taken, a partner died. At the time of his death, negotiations were pending for the sale of the partnership business. These negotiations were completed the day after the partner's death. The surviving partners had made an offer to accept £22,470, which was made up of items for "leasehold interest," "plant," "good will," and "disturbance and removal." The purchasers offered £19,000 in satisfaction of all claims, which was accepted. In taking the account of the deceased partner's share, the chief clerk apportioned the £19,000 between the three items of the claim other than for "disturbance and removal," and, on appeal from his decision, North J., held that the plaintiff, who was the representative of the deceased partner, was entitled to have the amounts which had been apportioned in respect of the leasehold and plant brought into account, but not the sum apportioned as the price of the good will; because in taking the annual accounts the good will had never been reckoned as an asset, nor, in the opinion of North, J., was it proper that it should be.

Reviews and Notices of Books.

Probate, Administration, and Guardianship: common form and contentious business, with statutes and rules governing the Surrogate Courts of Ontario; also Forms and Tables of Fees. By Alfred Howell, of Osgoode Hall, Barrister-at-Law. Second edition. Toronto: The Carswell Co., Ltd., 1895.

This well-known work on a most important branch of practice has just been issued in an improved style as a second edition. During the fifteen years which have elapsed since the first edition, the volume of business has, with the increase of population and wealth in the country, greatly increased, and many changes have been made in the law and rules of court, notably the Devolution of Estates Act, and amendments thereto, and the Act of 1890—"An Act to amend the Surrogate Courts

Act," striking out the word "goods," the words "personal estate," and words of like import, and substituting the word "property," and directing that the Surrogate Courts Act should be taken as amended so as to conform to the intent and meaning of the Devolution of Estates Act; and in effect, as has been held, abolishing the distinction between real and personal estate for the purposes of administration. The Succession Duty Act. The Act respecting Ancillary Grants of Probate and Administration, etc., and have also made material changes in the law affecting Surrogate Courts.

A considerable part of this volume is occupied with Probate Law generally, as administered in England, and in Ontario and other Provinces which follow the English system; it describes also the practice of Courts of Probate, using that expression with reference to the general signification attached to it by the interpretation clause of the Colonial Probates Act, 1892. The leading cases in England, as well as in Canada, in which the validity of wills has been contested on the ground of the testator's incapacity, have been introduced and cited; all phases of such incapacity being dealt with. There are also references to authorities in certain States of the United States of America.

The English Judicature Acts and Rules having been in substance re-enacted in the Province of Ontario, and the Judicature Rules of Ontario having recently, in 1892, been made applicable to contentious business in the Surrogate Courts of Ontario (excepting the institution of actions by writ of summons), an assimilation of the practice to that of the High Court of Justice has taken place. The present treatise includes therefore a large number of cases decided upon the English Judicature Rules, in addition to those decided before those Rules, as well as cases decided in this and other Provinces of the Dominion. Special attention has, however, been given to the practice in the Surrogate Courts of Ontario in all matters within their jurisdiction.

The subject of auditing and passing accounts of trustees, executors, and administrators, to which the practice of the High Court has also been made applicable, and the question of compensation or Commission, is fully dealt with. The guardianship and custody of infants, and the powers and jurisdiction of the courts as to the same, and as to the rights of the parents, and the

father's authority as to the religious faith in which his children shall be educated, are also described at considerable length.

Leading cases on probate and succession duty have been inserted, though necessarily in a condensed form.

A new feature of probate practice introduced in this treatise is the re-sealing of grants in accordance with the provision of the Colonial Probate Act 1892, (Imp.), entitled, "An Act to provide for the recognition in the United Kingdom of probates and letters of administration granted in British Possessions"; and of the Act entitled, "An Act respecting ancillary probates and letters of administration."

The book is sure to be of great service to all persons having business in the courts referred to, or in connection with the estates of deceased persons.

Correspondence.

To the Editor of THE CANADA LAW JOURNAL:

SIR,—I heard a rumour some short time ago that there was a possibility of the "Notes on Current English Cases" published in your valuable periodical being discontinued. I am much pleased to notice that this idea, if it ever was seriously contemplated, has not been carried into effect. While it is quite true that the library of a practising barrister can hardly be said to be complete without the English as well as our own law reports, the professional man who carefully reads these notes is furnished with the gist of the current law of the kingdom, and has a synopsis of English cases that must prove of real value. The notes are also of much assistance to the *busy* professional man, and, as time-savers alone, are worth more than the subscription price of your journal. They show in themselves much ability and care, and are evidently the work of a trained legal mind. I desire that you should know that in many quarters this *unique* feature of THE CANADA LAW JOURNAL is appreciated, so that you may feel yourself justified in still giving it a prominent place in your journal. The value of legal *articles* depends on the standing of the writers; these notes are boiled down case law of the best kind.

BARRISTER.

Barrie, Sept. 9th.

DIARY FOR SEPTEMBER.

1. Sunday.....*12th Sunday after Trinity.*
2. Monday.....Labor day. De Beauharnois, Governor, 1726.
8. Sunday.....*13th Sunday after Trinity.* Irish Home Rule Bill rejected, 1893.
9. Monday.....Trinity Term for Law Society begins. Convocation meets.
10. Tuesday.....Court of Appeal sits. County Court Jury and non Jury Sittings in York.
12. Thursday.....Frontenac, Governor of Canada, 1692.
13. Friday.....Convocation meets.
14. Saturday.....Jacques Cartier arrived at Quebec, 1535. Quebec taken and death of Wolfe, 1759.
15. Sunday.....*14th Sunday after Trinity.*
17 Tuesday.....First Parliament of U.C. met at Niagara, 1792.
18. Wednesday.....Earl of Aberdeen, Gov.-Gen., 1893. Quebec surrendered to British, 1759.
19. Thursday.....Jewish year 5656 begins.
20. Friday.....Convocation meets.
21. Saturday.....St. Matthew.
22. Sunday.....*15th Sunday after Trinity.* Courcelles, Governor of Canada, 1665.
23. Monday.....Law School opens.
24. Tuesday.....Guy Carleton, Lieut.-Gov. and Com.-in-Chief, 1766.
25. Wednesday.....Sir Wm. Johnston Ritchie died, 1892.
28. Saturday.....W. H. Blake, 1st Chancellor of U.C., 1849.
29. Sunday.....*16th Sunday after Trinity.* Michaelmas day.
30. Monday.....Sir Isaac Brock, Administrator, 1811.

Notes of Canadian Cases.

SUPREME COURT OF CANADA.

Ontario.] [May 6.

BARTHEL *v.* SCOTTEN.

Deed conveying land—Description—Patent ambiguity—Legal maxims—Res magis valeat quam pereat—Verba fortius accipiuntur contra proferentem—Intention of parties.

Land was conveyed by the following description : "All that certain tract or parcel of land situate, etc., being part of lot 43 . . . commencing in the southerly limit of said lot 43, at a distance of 20 feet from the water's edge of the Detroit River, thence northerly parallel to the water's edge 208 feet, thence westerly parallel to the said southerly limit 600 feet, more or less, to the channel bank of the Detroit River, thence southerly following the channel bank 208 feet, thence easterly 600 feet, more or less, to the place of beginning." In an action of ejectment for land alleged to be covered by this description, in which the point of commencement was difficult to ascertain ;

Held, reversing the decision of the Court of Appeal (21 A. R. 569), KING, J., dissenting, that the construction of the description did not depend upon the terms of the patent of said lot 43 ; that it must be construed by the terms of the instrument alone, read in the light of surrounding circumstances tending to explain it, even if such construction should make the grantor pur-

port to convey more than he had title to; that the maxim *res magis valeat quam pereat* does not authorize a construction contrary to the plain intention of the parties; and that the maxim *verba fortius accipiuntur contra proferentem* cannot be applied to explain away a patent ambiguity.

Appeal allowed with costs.

Armour, Q.C., for the appellants.

McCarthy, Q.C., and *Nesbitt* for the respondent.

Ontario.] [May 6.

KING *v.* EVANS.

Will—Construction of devise—Devise for life, remainder to issue "to hold in fee simple"—Rule in Shelley's Case—Intention of testator.

A testator, by the third clause of his will, devised land as follows: "To my son James, for the full term of his natural life, and, from and after his decease, to the lawful issue of my said son James to hold in fee simple." The will then provided that, in default of issue, the land should go to a daughter for life, with a like reversion to issue, failing which, to brothers and sisters and their heirs. Another clause was as follows: "It is my intention that, upon the decease of either of my children without issue, if any other child be then dead, the issue of such latter child (if any) shall at once take the fee simple of the devise mentioned in the second and third clauses of this my will."

Held, affirming the decision of the Court of Appeal (21 A. R. 519), which reversed that of the Divisional Court (23 O.R. 404), that, if the limitation had been to the heirs general of the issue, the son James would have taken an estate tail according the rule in Shelley's Case; that the word "issue," though *prima facie* a word of limitation and equivalent to "heirs of the body," is a more flexible term than the latter, and more readily diverted by force of a context or superadded limitations from its *prima facie* meaning; that the expression "to hold in fee simple" is one of known legal import, admitting of no secondary or alternative meaning, and must prevail over the fluctuating word "issue"; and that effect must be given to the manifest intention of the testator that the issue were to take a fee.

Appeal dismissed with costs.

Armour, Q.C., and *McBrayne* for the appellants.

Nesbitt, Q.C., and *Bicknell* for the respondents.

Quebec.] [May 6.

ROLLAND *v.* LA CAISSE D'ECONOMIE DE NOTRE-DAME DE QUEBEC.

Debtor and creditor—Loan by savings bank—Pledge of securities as collateral—Letters of credit—Validity of loan—Obligation to repay—Nullity—Public order—Arts. 989, 990, C.C.—R.S.C., c. 122, s. 20.

L. borrowed a sum of money from La Caisse d'Economie, a savings bank in Quebec, giving as collateral security letters of credit on the Government of Quebec. L. having become insolvent, the bank filed a claim with the curator of his estate for the amount so loaned, with interest, which claim the curator contested on the ground that the bank was not authorized to lend money on

the security of letters of credit which were not securities of the kind mentioned in s. 20 of the Savings Banks Act, R.S.C., c. 122, and the loan was, therefore, null; and that it was a radical nullity, being contrary to public order, and the repayment could not be enforced. Arts. 989, 990, C.C. The Superior Court dismissed the contestation, and its judgment was varied by the Court of Queen's Bench, which held that the bank could not recover interest on the loan.

Held, affirming the decision of the Court of Queen's Bench (Q.R. 3 Q.B. 315), that assuming the loan to have been *ultra vires* the borrower could not avail himself of its invalidity to repudiate his obligation to pay his debt, nor could his creditors; that a contract of loan and one of pledge are so far independent that the one may stand and the other fall; and that the contestation was rightly dismissed.

Held, also, on cross-appeal, reversing the decision of the Court of Queen's Bench, that the bank was entitled to interest on its claim, as well as to the principal money.

Appeal dismissed with costs, and cross-appeal allowed with costs.

Drouin, Q.C., for the creditors, appellants.

Langelier, Q.C., and *Fitzpatrick*, Q.C., for La Caisse d'Economie, respondents.

Quebec.] [May 6.

BAKER *v.* MCLELLAN.

Construction of deed—Sale of phosphate mining rights—Option to purchase other minerals found while working—Transfer of rights—Ambiguity.

M., by deed, sold to W. the phosphate mining rights in certain land, the deed containing a provision that "in case the said purchaser, in working the said mines, should find other minerals of any kind whatever he shall have the privilege of buying the same from the said vendor or representatives by paying the price set upon the same by two arbitrators appointed by the parties." W. worked the phosphate mines for five years, and then discontinued it. Two years later he sold his mining rights in the land, which, by various conveyances, were finally transferred to B., each assignment purporting to convey "all mines, minerals, and mining rights already found, or which may hereafter be found," on said land. A year after the transfer to B. the original vendor granted the exclusive right to work mines and veins of mica on said land to W. & Co., who proceeded to develop the mica. B. then claimed an option, under the original agreement, to purchase the mica mines, and demanded an arbitration to fix the price, which was refused, and she brought an action against M. and W. & Co. to compel them to appoint an arbitrator and for damages.

Held, affirming the decision of the Court of Queen's Bench, that the option to purchase other minerals could only be exercised in respect to such as were found when actually working the phosphate, which was not the case with the mica in respect to which B. claimed it.

Held, also, that any ambiguity in the agreement granting the option must be interpreted against the purchaser.

Appeal dismissed with costs.

McDougall, Q.C., for the appellants.

Aylen for the respondents

ONTARIO.

SUPREME COURT OF JUDICATURE.

HIGH COURT OF JUSTICE.

Queen's Bench Division.

Div'l Court.] [June 13.

RE BALL AND BELL.

Division Courts—Prohibition—Mortgage—Contract or obligation to indemnify—Action for interest only—Dividing cause of action—R.S.O., c. 51, s. 77.

Where the plaintiff conveyed land to the defendant, subject to a mortgage, and after maturity thereof paid the mortgagee two gales of interest since accrued, which he sought to recover from the defendant by action in a Division Court ;

Held (reversing the judgment of ARMOUR, C.J.), there was no splitting of the cause of action within s. 77 of the Division Courts Act, R.S.O., c. 51, and, therefore, that the action was maintainable.

N. F. Davidson for the applicant.

S. W. McKeown, contra.

Div'l Court.] [June 13.

KENNEDY *v.* MERRICK.

Mortgage—Covenant of indemnity—Assignment of—Agreement by assignee to release assignor on obtaining judgment—Effect of.

C., as security for $7,000, mortgaged a number of lots to A., the mortgage containing a provision for the release of part of the mortgaged premises upon payment of a proportionate part of the mortgage money. C. conveyed his equity of redemption to D., who assumed the mortgage, and agreed to indemnify C. against same. D. conveyed his equity of redemption in half of the lots to defendant, subject to half of the mortgage, and subject to a half of another mortgage on the lots, defendant agreeing to assume the half of the said mortgages, and to indemnify D. against same. A. assigned the mortgage to plaintiff, reciting that it had been reduced to $3,500, and conveyed the land therein contained, save and except the part released. C. assigned to the plaintiff D.'s covenant of indemnity, D. agreeing to release C. from his liability upon obtaining judgment against defendant on his covenant, but such release was not to prejudice any rights plaintiff might have against any parties through whom C. might claim, or who might claim through him. D. also assigned to plaintiff all his rights under the defendant's covenant of indemnity, the plaintiff by deed agreeing to release D. on his obtaining judgment against the defendant.

Held, that the plaintiff's agreement to release C. and D. upon obtaining judgment against the defendant in no way interfered with his rights to recover such judgment.

H. J. Scott, Q.C., for the plaintiff.

E. D. Armour, Q.C., for the defendant.

Div'l Court.] [June 13.

SCARLETT *v.* NATTRASS.

Mortgage—Action on covenant—Release.

The plaintiffs and their father, J., being the owners of certain land, in 1889 entered into partnership for the manufacture of brick on the northeast corner of the land. A part of the land had been subdivided, and two of the lots sold to defendant, who gave back separate mortgages for the unpaid purchase money. On February 8th, 1890, defendant sold the said two lots to S., subject to the mortgages thereon. By a deed dated July 1st, S. sold these lots to J. subject to the mortgages, which J. covenanted to pay off. By an assignment dated July 8th, plaintiffs and J. assigned to a loan company certain mortgages on the subdivision lots. The mortgages so assigned comprised J.'s share of a number of mortgages given to the plaintiffs and J. by purchasers of such subdivision lots, according to a division thereof made between plaintiffs and J., while the mortgages taken by the plaintiffs as their share included those on the said two lots. Notwithstanding the fact of the dates of S.'s deed and the loan company's assignment, the latter was prior in point of time. On the 11th of August J. assigned to plaintiffs all his interest in the said two mortgages in question. On the 1st of October, 1894, S. assigned to defendant J.'s covenant of indemnity.

In an action against the defendant on his covenants in the two mortgages to pay the mortgage money,

Held, that the plaintiffs were entitled to recover, for that which had taken place in no way released defendant from his covenants.

The defendant also claimed to be released by reason of an alteration of the property by the change of a location of a street, but the evidence failed to substantiate this.

J. M. Clark for the plaintiffs.

McNeil for the defendant.

MEREDITH, C.J.] [March 18.

REGINA *v.* WELTER AND HENDERSHOTT.

Evidence of prisoners before Coroner of other attempts to insure inadmissible on trial for murder—56 Vict., c. 31 (D.).

On a murder trial, the alleged motive being to obtain insurance moneys effected on the life of the deceased in favour of one of the prisoners,

Held, that a Coroner's court is a criminal court, and that being so, 56 Vict., c. 31 (D.), applied to it, and the evidence given there by the prisoners before arrest was rejected when tendered against them on their trial, notwithstanding they had claimed no privilege.

Held, also, that previous attempts to insure other persons for the benefit of the prisoners could not be received in the trial of this case.

Osler, Q.C., *D. J. O'Donohoe*, and *Kenneth Cameron* for the Crown.

Norman Macdonald for the prisoner Welter.

John A. Robinson for the prisoner Hendershott.

MEREDITH, C.J.] June 28.

HENDRIE *v.* TORONTO, HAMILTON & BUFFALO R.W. CO.

Railways—Lands injuriously affected—Right to compensation.

The sections of the Dominion Railway Act, 1888, under the headings, "Plans and Surveys," and "Lands and their Valuations," apply as well to lands "injuriously affected" as to lands taken for the purposes of the railway.

It is no answer to a complaint by a landowner, that the company is proceeding without having taken the necessary steps under these sections, that he has the authority of the Railway Committee of the Privy Council for the execution of the works.

Held, also, that a by-law passed by the municipal council for granting aid to the railway, and the Validating Act, 58 Vict., c. 68 (O.), did not affect this question.

Bruce for the plaintiff.

Osler, Q.C., and *Carscallen* for the Railway Company.

D. Saunders for the contractor.

BOYD, C.] [July 2.

CONSUMERS' GAS CO. *v.* TORONTO.

Taxation—Gas mains—Assessment Act.

The mains of a gas company, laid beneath the surface of the public streets are assessable, such mains, with the underground soil occupied by them, being appurtenances to the central land upon which the manufacture is carried on, and subject to taxation as realty of the company.

McCarthy, Q.C., and *Miller*, Q.C., for the plaintiffs.

Robinson, Q.C., for the defendants.

Chancery Division.

Div'l Court.] [May 27.

FAIRWEATHER *v.* OWEN SOUND STONE QUARRY CO.

Master and servant—Negligence—Fellow servant—Liability at common law—Defective appliances.

S., one of the directors of a quarry company, was appointed foreman of the works, with full powers of management, but subject to the directors' control, and to such duties as might be delegated to him from time to time. The plaintiff, one of the company's labourers, claiming that he had sustained injury by reason of S.'s negligence while acting under his instructions, brought an action at common law against the company.

Held, so far as the action rested upon the liability of the company through S. there was no liability, for that S. was merely a fellow servant of the plaintiff

Held, however, that an action might be sustained on proof of negligence of the company in not furnishing proper appliances for the quarrying operations.

Elgin Myers and *Fish* for the plaintiff.

E. F. B. Johnston, Q.C. and *Geo. Ross* for the defendants.

Div'l Court.] [May 27.

KELLY *v.* BARTON.
KELLY *v.* ARCHIBALD.

Arrest—Notice of action—Malice—Reasonable and probable cause—R.S.O., c. 73.

The object of the R.S.O., c. 73, the "Act to protect justices of the peace and others from vexatious actions," is for the protection of those fulfilling a public duty, even though in the performance thereof they may act irregularly or erroneously, and notice of action in such case must allege that the acts were done maliciously, and without reasonable and probable cause ; but where the officer voluntarily does something not imposed on him in the discharge of any public duty, the notice need not contain these allegations.

A breach of a city by-law for driving an omnibus without the license required thereby does not justify the summary arrest of the offender, even though the officer may have believed that he was acting legally and in the discharge of his official duty.

A resolution of the Executive Committee of the City Council authorizing the City Solicitor to defend actions brought against police officers for their alleged illegal acts does not constitute a ratification thereof by the city.

McCarthy, Q.C., and *C. R. W. Biggar*, Q.C., for the plaintiff.

W. R. Riddell for the defendant Barton.

Fullerton, Q.C., for the City of Toronto.

MEREDITH, C.J.] [July 15.

UNION SCHOOLS *v.* LOCKHART.

Public schools—Education—Union school sections—Alteration of—54 Vict., c. 55, ss. 87 (s-ss. 1, 11), 96 (Ont.).

By s-s. 1 of s. 87 of the above Act, it is enacted that, "on the joint petition of five ratepayers from each of the municipalities concerned, to their respective municipal councils, asking for the formation, alteration, or dissolution of a union school section," etc., certain proceedings may be taken.

Held, that a petition, to be valid under this subsection, must be the joint petition of five ratepayers from each municipality, in the case of each petition ; that is to say, in each petition presented to each council five ratepayers from each municipality must join.

An award based upon a petition not conforming to the above requirements is void *ab initio*, and is not within the purview of section 96 of the said Act.

By s-s. 11 of the said s. 87, it is enacted that "no union school section shall be altered or dissolved for a period of five years after the award of the arbitrators has gone into operation," etc. This prohibition does not apply to the case of an award that "no action should be taken in the matter of the said petition," but only to awards effecting some change in the *status quo ante*.

Garrow, Q.C., for the plaintiffs.

Dickenson for the defendant.

Common Pleas Division.

MEREDITH, C.J., ROSE, J. [Jan. 24

REGINA *v.* MCBRIDE.

Criminal law—Forgery—Corroborative evidence—Criminal Code, ss. 684, 743.

This was a case reserved by the police magistrate of Chatham, under s. 743 of the Criminal Code.

There were two charges of forgery against the prisoner. The writings alleged to have been forged were a certificate of death for the purpose of supporting a claim against an insurance company, and an endorsement upon a cheque drawn by the company in settlement of the claim.

It was proved that the writings were forgeries, and it was sought to connect the accused with them by the evidence of a single witness, who testified that they had been written by the accused.

By s. 684 of the Criminal Code, it is enacted that no one shall be convicted of forgery, amongst other enumerated crimes, upon the evidence of one witness unless such witness is corroborated in some material particular by evidence implicating the accused.

The only corroboration in this case was supplied by proof that certain names written in a book, which were sworn by the same witness to be in the handwriting of the accused, were written by the same hand as the forged writings.

Held, that this was not such corroboration as the section requires, and that the convictions upon both charges must be quashed.

Dymond for the Crown.

Lewis for the prisoner.

MEREDITH, C.J., ROSE, J., MACMAHON, J. [Jan. 28.

STEWART *v.* WOOLMAN.

Trial—Jury—Improperly influencing—New trial.

Where the plaintiff was proved to have conversed with members of the jury, after they had been sworn upon the subject of his case, and, either personally or by another in his interest, to have treated them to drink, the verdict was set aside and a new trial ordered.

Lennox for the plaintiff.

Strathy, Q.C., for the defendant.

ROSE, J.] [May 3.

TIERNAN *v.* PEOPLE'S LIFE INSURANCE CO.

Life insurance—Premium—Payment of.

The application for a life insurance policy provided that no policy was to be in force until actual payment and acceptance of the first payment due thereon by an authorized agent, and the delivery to the insured of the necessary receipt signed by the general manager. The policy stated that in consideration of the annual premium being paid in advance to the company at its head office on or before the delivery of the policy, and thereafter annually, the company would pay to the insured's executors the amount of the policy. By the contract between the general managers and the company, they were to receive 85 per cent. of the premiums, and were authorized to employ sub-agents, whom they were to pay out of the commission allowed them, and were to indemnify and save harmless the company against any claims for commission by such sub-agents. One of the company's general managers who had taken the application agreed with the applicant that in consideration of certain work done by the applicant for him the first premium should be considered as paid, and he gave the applicant the company's official receipt, and subsequently the policy. In consequence of no payment having been made on the policy, the company cancelled the policy, but it did not appear that the insured had ever been notified of this. In an action to recover on the policy,

Held, that no valid payment of the premium had ever been made, and that, therefore, the insurance never took effect.

Osler, Q.C., and *Jackson* for the plaintiff.

Hunter for the defendants.

BOYD, C.] [May 27.

SYLVESTER *v.* MURRAY.

Contract for sale of land—Conditional promise—Effect of.

After negotiations had taken place for the sale of a farm at $9,500, the following written contract was signed by the purchasers: "We agree to take your farm and pay you $9,000, and, if we get along fairly well, we will give you the other $500 as soon as we are able."

Held, that the provisions as to the $500 was a conditional promise, which might be recovered on proof that the purchasers were of ability to pay, which the evidence in this case failed to show.

A. M. Macdonell for the plaintiff.

G. H. Watson, Q.C., for the defendants.

BOYD, C.] [June 8.

HOBSON *v.* SHANNON.

Garnishment—Proceedings in Division Court—Application for prohibition—Prohibition refused.

Garnishment is a proceeding extraordinary in its nature, and not to be regulated strictly by the analogy of ordinary litigation.

Held, that a garnishee against whom judgment has been given, the money not having been paid, may apply for relief, either by payment into court, or for

a new trial, in the event of a new claim being made known to him, and is not bound by s. 145 of the Division Court Act, R.S.O., c. 51, which limits the time within which an application for a new trial may be made to fourteen days.

A Division Court judge has jurisdiction, upon such application, and the appearance of a new claimant, to open up the matter again, even after judgment.

Raney for the primary creditor.

W. C. Chisholm for the garnishee.

FERGUSON, J.] [June 8.

RE GARBUTT AND ROUNTREE.

Vendors and Purchasers' Act—Will.

A testator devised certain land to his son, W., during his lifetime, and, in the event of his death, leaving his wife surviving him, he devised the rents, issues and profits to her during her lifetime or widowhood; but, in the event of both dying within thirty years from his death, in such case he devised the rents and profits thereof, until the expiration of such thirty years, to W.'s children equally, share and share alike; and after W.'s death, and after the death or remarriage of his said wife, and provided that the thirty years should have elapsed, to all of W.'s children by his said wife, share and share alike, to have and to hold the same, after the specified periods, to them, their heirs and assigns forever. By the last clause of the will, the testator gave all the residue of his estate, real, personal, and mixed, of whatever nature or kind soever, and not otherwise disposed of by his will, to W., to have and to hold the same to him, his heirs and assigns forever.

The testator died on the 9th of January, 1876. W. and his wife both survived the testator and enjoyed their life estates, but were since dead, leaving eight children, of whom one died unmarried and without issue, and the others are now living. On a petition, under the Vendors and Purchasers' Act,

Held, that, under the will, the fee in the land, subject to the estate devised to the children until the expiration of the thirty years, vested in W. and his heirs, and, in the absence of any evidence showing whether or not W. had disposed of the land, the children could not impart a good title in fee.

St. John for the petitioner.

W. Ross for the respondent.

MEREDITH, C.J.\
ROSE, J. / [June 29.

THE QUEEN *v.* PATTERSON.

Criminal law—Variance between indictment and charge—False pretences—Criminal Code, 1892, s. 641.

Case reserved. The Criminal Code, 1892, section 641, provides that "any one who is bound over to prosecute any person, whether committed for trial or not, may prefer a bill of indictment for the charge on which the accused has been committed . . . . or for any charge founded upon the facts or evidence disclosed on the depositions taken before the justice."

The prisoner was committed for trial by the magistrate on a charge of stealing 2,200 bushels of beans. An indictment was preferred against him at the assizes, however, for obtaining by false pretences two cheques, the false pretences being "that there was then a large quantity of beans, to wit, 2,680 bushels," in the prisoner's warehouse. As a matter of fact, what the evidence taken before the magistrate disclosed was that he obtained the cheques on the false pretence that "there were 2,680 bushels of beans" in his warehouse.

Held, that there was no such variation here as prevented the indictment being for a charge "founded upon the facts or evidence disclosed" within the meaning of the above section.

Per MEREDITH, C.J.: It was enough that the facts or evidence disclosed on the depositions were sufficient to found a charge of false pretences in respect of the same subject-matter which was the foundation of the charge of stealing upon which the accused was committed for trial.

Clute, Q.C., for the prisoner.

Cartwright, Q.C., for the Crown.

MEREDITH, C.J.]
MACMAHON, J.] [July 13.

CRANE *v.* HUNT AND WAYPER.

R.S.O. (1887), c. 194, s. 122.

Held, where intoxicating liquor had been supplied to the deceased at two taverns, and to excess in each, so that an action might have been maintained successfully against either of the tavern-keepers, the latter could not be jointly sued, the section in question not admitting of that.

The jury having assessed the damages, at the trial, at different sums against the two defendants,

Held, on application to have the verdict set aside on the ground that the statute would not support a joint action, that the plaintiff could elect to keep his judgment against either defendant, undertaking to enter a *nolle prosequi* against the other.

Nesbitt for the plaintiff.

Haverson for the defendant Wayper.

Kilmer for the defendant Hunt.

MANITOBA.

COURT OF QUEEN'S BENCH.

TAYLOR, C.J.] [August 2.

RE SCOTT AND CITY OF BRANDON.

Time—Notice of appeal—Sunday last day—Interpretation Act—R.S.M., c. 78, s. 8, clause (s).

This was an application for a writ of mandamus to compel the judge of the County Court of Brandon to hear an appeal from the Court of Revision, under clause 79 of the Assessment Act, R.S.M., c. 101, against the assessment of a certain property in Brandon.

The County Court judge decided that he had no jurisdiction to hear the appeal, because notice of the appeal had not been given within ten days after the decision as required by the statute. The tenth day after the decision fell on a Sunday, and the notice was given next day.

The applicant's counsel contended that such notice was in sufficient time, and relied upon clause (s), s. 8, of the Interpretation Act, R.S.M., c. 78, which is worded as follows :

"When anything required to be done by any Act of the Legislature of Manitoba falls on a holiday, it shall be done on the next day not a holiday."

Held, that this provision does not apply in a case like the present, and that the notice was too late, and the mandamus was refused.

C. H. Campbell, Q.C., for the applicant.

H. M. Howell, Q.C., for the plaintiff.

TAYLOR, C.J.] [Aug. 8

RE HAMILTON TRUSTS.

Costs—Payment into court by trustee—Petition for payment out.

A loan company, having executed a power of sale in their mortgage, paid into court, under the Trustee Relief Act, a surplus over what was due them, there being rival claimants to the fund. One of the claimants then presented a petition praying that inquiries might be made and accounts taken to ascertain who were entitled to the fund, and for payment to him of the amount of his claim and costs, and asking that the other claimant, one Drewry, might be ordered to pay the costs of the petition.

Drewry had claimed a larger sum than he was ultimately found to be entitled to by the decision of the full court.

On the matter coming before the court for the determination of the question of costs,

Held, that, both parties being entitled to share in the fund, each should bear his own costs, except in so far as they were increased by Drewry claiming more than he was entitled to, and that any increased costs occasioned by such unfounded claim should be paid by him to the petitioner.

Monkman for the petitioner.

Perdue for Drewry.

TAYLOR, C.J.] [Aug. 17.

COLQUHOUN *v.* SEAGRAM.

Husband and wife—Assignment of debt by husband to wife—Garnishee—Interpleader.

This was an appeal from the decision of the judge of the County Court of Winnipeg, in an interpleader issue to decide upon the claim of the plaintiff to certain moneys paid into court by a garnishee under an order issued by the

defendant, a judgment creditor of the plaintiff's husband. The plaintiff claimed the debt due by the garnishee under an assignment from her husband made prior to the garnishee order.

The defendant contended that as there had been a marriage settlement between plaintiff and her husband, the plaintiff could not under s. 2 of the Married Women's Act, R.S.M., c. 95, take from her husband an assignment of debts due to him, but the plaintiff argued that s. 35 of the Act would apply.

Held, without deciding this latter point, that even if the wife did not acquire a good title at law under the assignment, the husband would in equity be treated as trustee for the wife of the money, and that the wife became equitably entitled thereto, and therefore took in priority to the garnishee order.

The husband was indebted to the wife under a judgment and no attempt was made at the trial to show that such judgment was fraudulent, or that the assignment in question was a fraudulent preference.

Appeal allowed with costs, and verdict entered in favour of the plaintiff on the issue.

Hough, Q.C., for the plaintiff.

Crawford, Q.C., for the defendant.

Flotsam and Jetsam.

THE following advertisement, copied from an evening journal published in the metropolis of the Dominion, would seem to indicate a want of enterprise on the part of the profession in that city :

"Wanted, a lawyer who can, without prejudice, conduct a lawsuit on its merits against the O. E. Ry. Co., G. McNeill, 61 Sussex street."

We understand that the advertiser and a trolley car had a fracas on the street the other day, and that the advertiser's head, though apparently that of one of Scotia's sons, was not quite hard enough to down the other fellow.

LONG-EARED IMPUDENCE.—That other less fortunate counties may be spared a pang of natural jealousy, we forbear to say wherein is located the most brilliant conveyancing star we have as yet observed in Ontario's orbit. His modesty is equal to his endowments. The record of this remarkable man appears in his advertisement : "Considering that for over forty years I have been unremittingly engaged in a most extensive conveyancing practice, and that to my own personal experience I have spared no expense by an extensive library and consultations with the best legal talent of Ontario, it will hardly be egotism on my part to say that I can offer to my patrons a service unsurpassed, if not unrivalled, in this county. I am prepared to execute work in every branch of the profession, and will always study the interest of my patrons as if they were my own." If the public knew how much the legal profession is indebted to the ignorance of such impudent quacks as these, they would not be so likely to waste their money on them.

MANY are the pitfalls that lie in the path of the young lawyer. He may have his LL.B. degree, and may have spent many years in diligently cramming, only to find when he starts in practice that a document that has been the subject of his consideration has involved his trusting client in litigation. This has been the experience of more than one since the decisions of our courts on chattel mortgages that have been tried and found wanting. A story is told of a young lawyer in a town of Nova Scotia, who knew that a chattel mortgage that would stand fire was not such a simple document to draw as some of our learned magistrates would have us believe. He was called upon to write one of these documents for preventing creditors from collecting their debts. It was to be a chattel mortgage of four pigs. He knew that in describing the "chattels" it was necessary to identify them beyond doubt. How could this be done? The honest client seemed unable to help him. The embryo Blackstone asked for further particulars. Eureka! He had it, and the document triumphantly described the sows as "four female pigs, *supposed* to be *enceinte*."

COUNTRY lawyers have, perhaps, themselves to blame for being looked upon as jacks-of-all-trades. But a letter received by a member of a firm of solicitors not one hundred miles from a county town in western Canada opens up a vista of future business entirely novel, as well as easy and interesting, which will be welcomed in these dull times. The writer says:

"I have heard that you and your partners, in addition to running a law business, have become professional groomsmen for the town and township—your partner performing the duties in the town, while you act in the country. I am about to become married, and would like you to assist me, as I have no one on whom I can depend to stand up with me. Kindly let me know your terms, etc. The date is fixed for February 1st. If that will not suit your convenience, it can be changed."

Place—Chatham, Ont.

Dramatis personæ—The Police Magistrate and an old offender, "drunk and disorderly," by name Senix B., a coloured gemman.

Upon arraignment, the prisoner, having lengthened his visage, and put on his most piteous and persuasive smile, pleaded guilty. He was thereupon addressed by the Police Magistrate as follows: "Well, Senix, here you are again, drunk as usual; what *am* I to do with you, Senix? *What am I to do?*" Prisoner, meekly: "I dunno, y'oh Wo'ship, I dunno; reckon I'se a pretty hard case; but I hope y'oh Wo'ship won't hold me 'sponsible for y'oh Wo'ship's ignorance." We think it was rather unkind, under the circumstances, to give the usual sentence of one dollar and costs.