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DIARY FOR JUNE.

17. Tues...Burton and Patterson, J. J., C., A., sworn in.
18. Wed...Earl Dalhousie, Governor-General, 1820.
20. Fri.....Accession of Queen Victoria.
21. Sat.....Galt, J., sworn in C. P., 1869.
22. Sun.....*2nd Sunday after Trinity.*
23. Mon....Hudson's Bay Territory transferred to Dominion, 1870.
28. Sat.....Queen Victoria crowned, 1837.
29. Sun.....*3rd Sunday after Trinity.*
30. Mon....John B. Robinson, Lieut.-Governor, Ont., 1880.

TORONTO, JUNE 16, 1884.

MR. W. C. UPPER, Barrister-at-Law, has been appointed Judge of the County Court of the county of Haldimand, and local Judge of the High Court of Justice in the place of His Honour Judge Stevenson resigned.

THE *Canada Gazette* announces the appointment of Mr. Robert Smith, Q.C., of Stratford, as Deputy Judge of the County of Perth. It was stated that he was to be a puisne judge of the Queen's Bench of Manitoba. This appointment would have reflected credit on the Government. He is probably one of the best lawyers west of Toronto, and his character stands very high both in his public and private relations.

MR. J. A. MACDONELL, having, as he supposed, a grievance against Mr. Mulock, M.P., and Mr. Edward Blake, M.P., in that they drew the attention of Parliament to the apparent extravagance of certain bills of costs rendered by him for services as agent of the Minister of Justice, with a curious want of logic and thoughtless haste rushed into print and assailed *not* either of these members of Parliament, but the brother of one of them, making a charge against him of unprofessional conduct. This charge seemed, to most men, to bear absurdity on the face of it, but was immediately seized upon by malicious persons to hold up to contempt the supposed delinquent, who, however, took no notice of this unprovoked attack, but, when the proper time came, met it with a simple explanation, which showed the charge to be "utterly groundless."

Without, so far as appears, asking for one word of explanation, and without making reasonable efforts to ascertain the truth of the charge, Mr. Macdonell published this charge against a brother professional man in a public newspaper, and sent a copy of his letter to the Treasurer of the Law Society, and also applied to the Court of Chancery for a rule to show cause why Mr. S. H. Blake should not be struck off the rolls. The material for this motion was, we understand, very inadequate, but was not discussed, as the Chancellor suggested that as an application had been made to the Law Society the matter should stand over. To this tribunal Mr. Macdonell should, of course, have gone in the first instance.

The complaint was taken before Convocation in the same incomplete manner. The following proceedings there took place:

AT a meeting of Convocation of the Law Society, held 19th May, 1884, it was

Moved by Hector Cameron, Q.C., seconded by Mr. Maclennan, Q.C., and carried

That while Convocation condemns as highly improper the publication in the newspapers by Mr. J. A Macdonell of the charge he has made against Mr. S. H. Blake, which he intended to bring before Convocation, yet as a grave charge is made

by the communication laid before Convocation by the treasurer, Mr. Macdonell be informed that he must submit the charge indicated by him to Convocation in a formal shape in writing, with such verification as he thinks fit, before any action can be taken thereon.

At a meeting of Convocation held 27th May, 1884, it was

Moved by Mr. Murray, seconded by Mr. Mackelcan, and carried—

That Convocation is of the opinion that the charge of Mr. Macdonell against Mr. S. H. Blake is of such a character that it should be and is hereby referred to the Committee on Discipline, to investigate and to report thereon to Convocation.

At a meeting of Convocation, held on 7th of June,

The Committee on Discipline, to whom the complaint of Mr. Macdonell against Mr. Blake was referred for consideration, beg to report to Convocation that they notified these gentlemen to appear before them with their evidence, and that they appeared accordingly. Your committee heard the evidence adduced, considered the matter, and unanimously find that the complaint in question was utterly groundless, and that no case of professional or other misconduct has been made out against Mr. Blake.

The report was adopted.

Moved by Mr. L. W. Smith, seconded by Mr. James Bethune, Q.C., and carried,

That inasmuch as garbled statements of the proceedings before the Discipline Committee in the matter of the charges made against the Honourable S. H. Blake, seriously affecting that gentleman's position and standing, have found their way into the public press, the secretary be authorized to furnish such of the papers as may desire to publish an authentic statement of the facts a copy of the report of the committee as adopted by Convocation.

We do not know whether the Benchers propose to take any further action in the premises, but it certainly seems only reasonable when one member of the Bar is wantonly assailed and publicly libelled as a disgrace to his cloth by another member, and the charge is shown to be false, that the latter should be visited with the same punishment that he has sought to inflict on the former.

If the charge had been made to the governing body of the Law Society in the first instance, and under different circumstances, we would have commended even misconceived and intemperate zeal for the honour of our profession; but it is difficult to believe that this was the motive that prompted the action taken.

The result of this fiasco is not merely that an innocent person has been wronged, but the whole profession has also been more or less brought into disrepute. We can fancy that Mr. S. H. Blake is not much troubled about the matter; it is the Bar that is most concerned.

It is possible that Mr. Macdonell may have been, from improper motives, wrongfully charged with presenting outrageous and excessive bills of costs. There was one simple way of setting himself right in this respect, and of showing to the world that Mr. Mulock and Mr. Edward Blake had wantonly assailed his professional reputation, and that was to have his bills of costs taxed by the proper officer. This does not seem to have occurred to him; but it is not too late even now to take this course; when this has been done the blame will rest on the right shoulders.

COSTS OF SOLICITOR AND COUNSEL ACTING IN PERSON.

The question as to the right of a solicitor suing or defending in person to recover profit costs was recently before the English Queen's Bench Division in the case of *London Scottish Permanent Benefit Society* v. *Chorley*, 12 Q. B. D. 452, 50 L. T. N. S. 265, in which the right was contested, and the Court (composed of Denman, Manisty, and Williams, J.J.) unanimously held that the solicitor had the right to recover such costs. The same point was also up before Hagarty, C.J., not long ago in *King* v. *Moyer* 9 P. R. 514, when the same conclusion was arrived at. Indeed, so long ago as *Smith* v. *Graham*, 2 U. C. R. 268 this

point was decided in favour of an attorney in this Province. While a solicitor acting in person is thus assured of his right to recover profit costs, it seems somewhat anomalous that a barrister acting in person should not also be entitled to recover for professional services rendered in his own behalf, and yet it seems equally settled by the authorities, as they at present stand, that he cannot. In *Smith* v. *Graham*, 2 U. C. R. 268, it was laid down that a counsel acting in person cannot recover any fee for his services from the opposite party, and the same rule was re-affirmed by the Queen's Bench in *Re North Victoria Election*, 39 U. C. R. 147; but in *Henderson* v. *Comer*, 3 U. C. L. J. 29, it was held that this rule did not prevent the recovery of a counsel fee, where the partner of one of the litigants acts as counsel.

In *London Scottish Permanent Benefit Society* v. *Chorley*, it was argued that costs are only allowed by way of indemnity for expenses incurred; that in fact "costs" mean "what it has cost," and a *dictum* of Bramwell, B., to that effect in *Harrold* v. *Smith*, 5 H. N. 381, was relied on. Denman, J., however, was of opinion that "the word 'costs' may well apply and include a fair indemnity for the labour and skill a solicitor has had to bestow upon his own case, and which, if he had not conducted his own case, he would have had to pay another solicitor for. His time is valuable, and he bestows his labour and skill as a solicitor when prosecuting or defending a claim in person. Hence 'costs' may fairly include an indemnity for work done by him which would have had to be done by another solicitor supposing he had not done it himself."

If, for the word "solicitor" in this passage, we substitute the word "barrister," it is plain that the reason upon which the right of a solicitor acting in person to recover profit costs is based, would apply with equal cogency to the claim of a barrister acting in person to recover for his services.

Every suitor may perform for himself, if he is able, the professional work which is ordinarily transacted by solicitors, and he may also, if he is able, perform for himself the duty of an advocate. It is, generally speaking, only because non-professional suitors have not the ability to conduct their own causes that they find it to their interest to entrust them to professional lawyers; but while a non-professional suitor may act for himself, he cannot act either as attorney, or counsel, for any other person. In this respect there is no distinction whatever between the two branches of the profession.

In one point of view it might be said that attorneys' and solicitors' fees are based upon the principle that they are intended as a recompense for services rendered as an attorney, and that as no man can act as attorney, except for somebody else than himself, the fees of an attorney cannot be said to be earned when he is not acting as an attorney, but in his own person, and on his own behalf. But Mr. Justice Manisty, we think, very properly laid down the rule that a solicitor acting in person is entitled to recover profit costs because he is a solicitor.

A non-professional person acting in person is not entitled to recover solicitor's fees, even though he discharge duties ordinarily discharged by a solicitor, because he is not a solicitor. The right to recover those fees depends, not merely on the performance of the particular services for which they are provided as a remuneration, but on the person by whom they are performed; the person discharging them, whether acting in person or for another, must be a practising solicitor.

The same line of argument, it seems to us, may properly be adopted with regard to counsel fees. A counsel conducting his

own case in person should be allowed for his services so rendered, because he is a practising barrister.

What can be said in favour of a solicitor's right to profit costs which cannot be as equally strongly urged in favour of counsel's?

The fees of both solicitors and counsel are, in this Province, regulated by tariff, and it has been held that counsel may apply against their clients for an order for taxation of their fees, with a view to enforcing payment thereof in the same manner as a solicitor, *Re C. K. & C.*, 6 P. R. 227. In the old case of *Baldwin* v. *Montgomery*, 1 U. C. R. 283, it was even held that counsel might sue his client for the recovery of fees taxed under the tariff (and see *McDougall* v. *Campbell*, 41 U. C. Q. B. 337, affirmed 14 L. J. N. S. 213). But in the latter case the Court held that when the counsel was retained by the attorney he could not sue the client. The English cases are, however, opposed to any action lying for counsel fees, see *Kennedy* v. *Broun*, 13 C. B. N. S. 677, *Mostyn* v. *Mostyn*, L. R. 5 Chy. 457, because in England they persist in clinging to the theory that a counsel fee is in the nature of an honorarium, and that its payment is merely of moral and not legal obligation. In this Province there are indications that this somewhat poetical notion is out of date, and yet some traces of it still linger in the air. The sooner it is done away with altogether the sooner we shall have reached the region of common sense in this matter. In the present day, in this Province, a barrister's fee is not an honorarium, it is the taxable price of certain professional services. What is the use therefore of pretending it is something which everyone knows it is not. The only merit the theory appears to possess is that it affords counsel a convenient protection from liability for negligence in conducting cases. Whether this immunity from liability, even for gross negligence, is altogether reasonable, or can in the present day be maintained, at all events in this Province, we will not at present stop to discuss. (See *per* Adam Wilson, J., *Leslie* v. *Ball*, 23 U. C. Q. B. 512.)

In Re C. K. & C. 6 P. R. 227, Blake, V. C., said, "I am not at all prepared to perpetuate the old idea, that the fees payable to counsel are a mere honorarium, and therefore cannot be recovered by suit or other proceedings;" and Harrison, C. J., rather dolefully remarked in *Re North Victoria Election* case, that if the old rule which affirmed that the fee paid to counsel was a mere honorarium he was sorry to admit "little, if anything, remains except the shell." Considering the "old rule" has thus so nearly disappeared it is a pity that its "shell" should not be also consigned to the limbo towards which the poor old rule has made such progress. We should hope that if the question should ever come before an Appellate Court for consideration that the Court may find itself able to lay down the same rule regarding counsel acting in person, as has been established regarding solicitors so acting.

OUR ENGLISH LETTER.

(From our own Correspondent.)

LEGAL business is still at a low ebb. The great men of the profession such as Messieurs Charles Russell, Horace Davey and Webster are doing well and so are some of the Junior Bar who are specialists. Mr. Moulton, for instance, has reaped such a harvest of scientific cases out of the Patents Act and Electric Lighting Act that he has deemed it advisable to apply for the honour of a silk gown. But the great mass of the Junior Bar and a considerable number of Queen's Counsel suffer grievously from lack of occupation.

One source of this is, undoubtedly, to be traced to the prevailing depression in trade, but there are other causes at work. The public, and especially the shop-owning public, is showing a marked preference for arbitrations as compared with legal proceedings, and a large proportion of these arbitrations are conducted without professional advice or assistance. One cannot blame them even from a professional point of view, for it is merely futile to expect men to enter into actions at law when the expense of keeping the witnesses waiting for trial alone is often greater than the amount of the subject of dispute. This view is not original but comes from the lips of a practical ship-owner who is a member Parliament, and a man who has considerable experience in litigation. Another cause is to be found in the unrighteous severity of the taxing masters who seize every possible opportunity of disallowing the costs of two counsel. The result is that solicitors naturally incline to employ but one barrister wherever it is possible, and the consequence of that is that business is not righteously distributed. There is another effect produced, which Pearson J., animadverted upon yesterday in discussing the case of *Llanover* v. *Homfray*. The effect is that leading counsel cannot do their work honestly or properly, and junior counsel cannot learn their business in a practical manner. It is not too strong to say that in every solicitor's office there is a strong and proper feeling of indignation at the parsimonious spirit in which the rules are administered. Besides this, it is only fair to add that both the New Rules and the Bankruptcy Act have combined to render litigation an indulgence visited with heavy penalties which especially fall upon the shoulders of practitioners. It is not long since a solicitor was heard to remark that, if he had only had no business, he would have been a rich instead of a poor man.

Mrs Weldon and Mr. Bradlaugh have set an example to suitors which is being largely followed. Of the former, mention has been made before; she has considerably impared her reputation both as an advocate and a sane women by certain actions which she has appeared in of late, and by her public conduct. There is nothing absolutely disreputable in appearing at a music hall as a performer, but it is not the sort of conduct that commends itself to the judgment of society as indicative of prudent and ladylike taste. Mr. Bradlaugh has another action coming on soon. Whether he will be represented by counsel or no is unknown, but it a notorious saying that upon points of law he prefers to use his own judgment, but when a vast array of facts is to be marshalled he likes to make use of a trained legal intellect. This is not complimentary to the English Bar, but it must be admitted that the litigious member for Northampton has been very successful of late. The worst and latest example of the practice of appearing in person is a gentleman of the name of Stanbury who wears his hair long, tied with a ribbon, or passed through a gold ring, and is reported to have brought an unsuccesful action against his father for slander in describing him as a hopeless lunatic. He babbles in the Divisional Court periodically, but no one has yet been able to recognize his present aim, unless it be to suffer the martyrdom of a committal for contempt. As to the original cause of action, most people are of opinion that, apart from all questions of privilege, a father is more likely than any one else to form a correct estimate of the intellectual capacities of a son. Moreover, there is every evidence to show that the judgment was justly formed as well as tersely expressed.

Two important cases have been decided of late. In *Bird* v. *Lord Greville* Mr. Justice Field applied the old established

principle that, in a contract for the letting of a furnished house there is an implied warranty that the house is let for human habitation. The concrete example which called forth the law from its home amongst the reports was that of a landlord who deliberately concealed the fact that the house he attempted to let was infected with measles. In these days of sanitary science, we may expect to see a wide application of the principle. *Johnson* v. *Mudford* is a wonderful instance of the perversity which British Juries will sometimes show. The coroner for Canterbury misbehaved himself grossly, and the *Kentish Observer* ventures to comment upon this august official in severe terms. The result was an action for libel in which the Lord Chief Justice virtually directed a verdict for the defendant by summing up strongly in his favour; but the British reverence for authority was too strong and twelve good men and true returned a verdict for the paintiff. In this finding there was a deplorable absence of common sense, and new trial may be regarded as a moral certainty.

A good deal of preliminary nonsense was written and talked concerning the case of Lord St. Leonards who was tried yesterday at the Central Criminal Court for the vulgar offence of an indecent assault. It was said, even by competent lawyers, that he might have claimed to be tried before his peers. But the journals, in general, seem to have been visited with a torrent of letters informing them that they had made a mistake and they very soon changed front. The trial itself was supremely interesting from the name of the accused and the misfortune of his position. If there is one class of cases which more than any other cries aloud for the passing of a law to enable prisoners to be examined as witnesses, it was to be found here. There could be but two witnesses to a disgusting transaction; the mouth of one was closed and that of the other was open. Beyond this it was proved that the prosecutrix was, or had been, unchaste; yet, to the profound amazement of the whole court, her evidence was believed and the prisoner was found guilty. Now the evidence of a chaste woman is always believed, and it is the obvious conclusion that, if all juries were like the puritanical twelve men who sat at the Old Bailey yesterday, no man would be safe against an accusation of this kind. In fact, M. Max O'Rell, in his inimical book *John Bull et Son Ile*, reckons the chances of such an accusation as the chief danger of British society.

Canadian lawyers are not free from the danger of foreign invasions, though they have no reason to fear competition. A correspondent of the *Law Times* writes to ask what formalities must be gone through by a *Docteur en Droit Francaise* who has practised as an advocate in Paris, before he can appear in the courts of Quebec and Montreal. Unless this good gentleman has domestic reasons for wishing to leave France and to go to Canada he will be well-advised if he remains at home and measures his talents against those of his own countrymen.

PROVINCIAL STATUTES OF LAST SESSION.

We propose to call our readers' attention to such of the enactments of last session as are of special importance to the practising lawyer. In this view chapter 4 being an Act for the amendment of the Election Law, and for the better prevention of corrupt and illegal practices at elections to the Legislative Assembly, first requires a brief mention. This act is to be read as part of the Election Act, R. S. O. c. 10, and the Controverted Election Act, R. S. O. c. 11, It commences by further defining what shall constitute corrupt practices, and amongst other things pro-

vides in section 3, that any candidate or other person who for the purpose of influencing an election, makes a bet or wager on the result thereof, in the electoral district or any part thereof, or on any event or contingency relating thereto, shall be guilty of corrupt practice. It also contains a great number of amendments of, and substitutions for, several specified sections of the principal acts, and in section 39 enacts that where an election court reports that any persons named therein have been guilty of corrupt or illegal practices it shall be the duty of the County Attorney to prosecute such persons for the offences mentioned; and lastly, in section 48, declares that it has been, and is the policy of the Election Law, and the intention and meaning of the several statutes in that behalf, that no election was, or is, void for any irregularity on the part of the returning officer, unless it appears to the tribunal having cognizance of the question that the irregularity affected the result of the election; and that no candidate or other person is disqualified or subject to any disability or penalty for any corrupt practice, without the concurrent judgment to that effect of the two judges by whom the election petition is tried; and that, in case of an election being set aside and a new election had, to the same Legislative Assembly or otherwise, the new election cannot be avoided by setting up corrupt practices by the candidate in or during the former election, or affecting the same, which were not set up and proved at the former trial, and so adjudged by the two judges at the former trial, or by the Court of Appeal before the subsequent election, as by law to involve such disqualification, disability or penalty.

Chapter 9 makes certain amendments in the Division Courts Act, R. S. O. c. 47, in relation to garnishee proceedings, where the garnishees are a body corporate, providing for the issue of the garnishing summons, and for the service thereof on an agent of the corporate body in question.

Chapter 10 is intituled an Act for further improving the administration of the law, and may be cited as "The Administration of Justice Act, 1884," and is to be construed as part of the Ontario Judicature Act, 1881. Sec. 2 repeals sec. 29 of the Creditors Relief Act, 1880, 43 Vict. c. 10, which provided that that Act should not come into force until a day to be named by proclamation, and provides for its coming into force forthwith. Sec. 3, adds certain words to R. S. O. c. 118, sec. 2, relating to fraudulent preferences, producing apparently this result:—that a gift, conveyance, etc., made by an insolvent debtor with intent to defeat or delay his creditors, or give one or more of them a preference over the others, will not be null and void under that section, unless thereby "such one or more of the creditors of such persons *would* obtain a preference over his other creditors, or over any one or more of such creditors." Secs. 9, 10, relate principally to interpleader in the Division Courts. Sec. 9 gives an appeal to the Court of Appeal from the decision of a Division Court Judge upon an application for a new trial, where the value of the goods and chattels interpleaded about or the proceeds thereof exceed $100; *and in all actions in which the parties consent to the appeal*, subject to the regulations as to appeals to the Court of Appeal contained in the Division Court Act, 1880, 43 Vict., c. 8. Sec. 10 provides that either party to an interpleader issue in a Division Court may require a jury to be summoned to try it. Sec. 11 brings us to the Judicature Act, providing that the Board of County Judges appointed under R. S. O. c. 47, sec. 238, may frame a County Court tariff of costs, which shall be certified to the Judges authorized to make rules under secs. 54 or 55 of the Judicature Act, who may approve, disallow, or amend any such

tariff. Sec. 12 provides that any Judge of the High Court of Justice or any County Court Judge may order witnesses to be examined in relation to any matter pending before a foreign tribunal, where it appears that a commission for the taking of such testimony has been duly issued by order of any court or tribunal of competent jurisdiction in such foreign country. This portion of the Act would appear to be *in eadem materia* with the Dominion Statute, 31 Vict. c. 76, and may have been suggested by the doubts cast upon the constitutionality of the latter Act in *re Wetherell & Jones*, 4 O. R. 713. Lastly, secs. 13 and 14 makes certain alterations in the tariff of Sheriff's fees.

Chapter 11 is an Act respecting the distribution of estates of which the Attorney-General is administrator or trustee, under R. S. O. c. 60, and provides that the provisions of R. S. O. c. 107, s. 34, as amended by 46 Vict. c. 9, s. 1, relating to the notice to claimants required to be given by executors and administrators, and assignees for creditors, in order to exonerate the latter from liability in administering the assets, or proceeds of the trust estate, shall apply to the Attorney-General where he is such administrator as aforesaid; and after such notice the Attorney-General may forthwith pay any money remaining in his hands unclaimed into the consolidated revenue fund of Ontario, notwithstanding the ten years' limit provided for in R. S. O. c. 60, s. 8, or may pay the same over under direction of the Lieutenant-Governor in Council, pursuant to s. 6 of the last mentioned Act, and no claim can afterwards be made against the Province in respect of moneys so paid over under s. 6.

We have next to notice chapter 16, being an Act respecting proceedings on Mortgages, on which there has already been a decision in *Perry* v. *Perry*, noted in the last number of this Journal at p. 210, where it is decided that it is not necessary in order to come within the statute, that the notice of sale should be served prior to the other proceedings being commenced. In that case a notice of sale and a writ in an action on the covenant were served the same day. The object of the Act is stated to be to prevent the making of unnecessary and vexatious costs in respect of mortgages. It then provides that, where a demand for payment or a notice of sale under the powers in a mortgage, has been made or given, "no further proceedings at law or in equity, and no suit or action either to enforce such mortgage, or with respect to any clause, covenant, or provision, therein contained, or the lands or any part thereof, thereby mortgaged shall, until after the lapse of the time at or after which, according to such demand or notice, payment of said money is to be made, or said power of sale is to be exercised or proceeded under, be commenced or taken, unless or until an order permitting the same, shall first be had and obtained, either from the Judge or any County Court or from any Judge of the High Court." This is not to apply to proceedings to stay waste or other injury to the mortgaged premises. It would seem, however, that to enable a mortgagee to commence proceedings in ejectment concurrently with the exercise of the power of sale, an order will have to be obtained under this Act. Sec. 3 enacts that "when any such demand or notice requires payment of all moneys secured to be paid by or under a mortgage, the party making such demand or giving such notice, shall accept and receive payment of the same, if made, as required by the terms of such notice or demand," thus apparently preventing any such question as arose in *Cruso* v. *Bond*, 1 O. R. 384.

Chapter 17 is our old friend, the Act for protecting the public interest in Rivers, Streams and Creeks, with an important alteration as to the fixing of tolls. Sec. 4 takes away the function of fixing the

amount of tolls which persons entitled to tolls under the Act shall be allowed to charge, from the Lieutenant-Governor in Council, and places it in the hands of the County Judge, or the Stipendiary Magistrate of the Judicial District, subject to a right of appeal under sec. 6 to a judge of the Court of Appeal, which right is to be exercised within fifteen days from the judgment or order of the judge or stipendiary magistrate.

Chapter 18 makes certain amendments in the Mechanics' Lien Acts. Sec. 1 amends R. S. O. c. 120, s. 3, by providing that the "express agreement" which shall exclude a mechanics' lien, must be an express agreement "signed by" the mechanic. Sec. 2 provides that among the particulars required to be stated in the registered statement of claim for a mechanic's lien, must be "the date of the expiry of the period of credit agreed to by the lien-holder for payment for his work, materials or machinery, when credit has been given," otherwise the lien shall cease to exist after 90 days, unless proceedings have been instituted, notwithstanding such period of credit. Sec. 3 would appear to have been suggested by the case of *Grant* v. *Dunn*, 3 O. R. 876, where it was held, that where one claimed a mechanic's lien in respect of materials furnished, by virtue of an assignment from the original furnisher thereof, the affidavit of verification required by R. S. O. c. 120, sec. 4, subs. 2, must be made by the assignor. This decision seems modified by the section now under consideration, which provides that the affidavit of verification may be made by "any agent or assignee of the person entitled to the lien, having full knowledge of the facts required to be verified." Sec. 6 confines the benefits of a suit brought by a lien-holder to all lien-holders of the same class, "who shall have registered their liens before or within 30 days after the commencement of such suit, or who shall, within the said 30 days, file in the office from which the writ issued a statement of their respective claims."

Chapter 19 is the most important Act of last session, being An Act respecting the property of Married Women, which may be said to be a verbatim adoption of the English Married Women's Property Act, 1882, though, strange to say, our legislature has not thought fit to acknowledge in any way on the face of the act, the source from which it is derived. In respect to this act, we cannot do better than refer our readers to an interesting article published from the *Times* in this journal, vol. xviii, p. 330. Sec. 2, subs. 1, provides that "a married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing, by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee. Sec. 2, subs. 3, alters a leading presumption of law, by enacting that "every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shewn." Secs. 3 and 5 provide that every woman married after the commencement of the Act, July 1st, 1884, shall hold her property, howsoever derived, as her separate property which she can dispose of in manner aforesaid. Sec. 17 saves existing and future settlements from the provisions of this Act. Sec. 11 provides that every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same remedies for the protection and security of her own separate property, as if such property belonged to her as a *feme sole*, but, except as aforesaid, no husband or wife shall be entitled to sue

the other for a tort. Sec. 13 provides that a husband shall be liable for the debts of his wife contracted, and for all contracts entered into and wrongs committed by her, before marriage, and for wrongs committed by her after marriage, to the extent of all property whatsoever belonging to his wife, which he shall have acquired or become entitled to from or through his wife, after deducting therefrom any payments made by him, and any sums for which judgment may have been *bona fide* recovered against him in any proceedings at law in respect of any such debts, interests, or wrongs, for or in respect of which his wife is liable. One important difference, however, there appears to be between our and the English Act in respect to criminal proceedings, as between husband and wife. The English Act goes so far as to allow to the wife criminal remedies against the husband, and conversely to allow to the husband criminal remedies against the wife, in regard to acts done by the one against the property of the other, though it excepts the case where husband and wife are living together. (See Imp. 45-46 Vict. c. 75, secs. 12 and 16.) Our legislature appears to have left criminal remedies alone, nor does it appear to give the husband reciprocal remedies against the wife for wrongs committed by her against his property. Sec. 22 repeals the Married Woman's Property Act, R. S. O. c. 125, save as to rights already acquired thereunder. In conclusion, we can scarcely do better than reproduce the concluding remarks from the article in the *Times* already alluded to: "The Act probably portends indirect social effects, much greater than the disposition of property, and it may in the end pulverize some ideas which have been the basis of English life. Measures which affect the family economy are apt to be 'epoch making'; and probably when the most talked of bills of the session are clean forgotten, this measure may be bearing fruit."

Chapter 20 is an Act to secure to wives and children the benefit of life insurance, the most important section being sec. 5, which provides that in case a policy of insurance effected by a married man on his life, is expressed upon the face of it to be for the benefit of his wife, or of his wife and children, or any of them, or in case he has heretofore endorsed, or may hereafter endorse, or by any writing identifying the policy by its number or otherwise, has made, or may hereafter make, a declaration that the policy is for the benefit of his wife, or of his wife and children, or any of them, such policy shall enure, and be deemed a trust for the benefit of his wife for her separate use, and of his children or any of them, according to the intent so expressed or declared, and so long as any object of the trust remains the money payable under the policy shall not be subject to the control of the husband or his creditors, or form part of his estate when the sum secured by the policy becomes payable; but this shall not be held to interfere with any pledge of the policy to any person prior to such declaration.

Chapter 21 extends the time within which proceedings may be taken under the Masters and Servants Act, R. S. O. c. 133, to one month after the last instalment of wages under the agreement of hiring has become due, though this may be more than one month after the engagement or employment has ceased.

Chapter 29 is an Act respecting Building Societies, and is important in that connection though its provisions do not admit of mention here.

Chapter 30 is intituled, "The Railway Amendment Act, 1884," and deals with rights and liabilities of railway companies in connection with mines. Sec. 2 would seem, perhaps, to have been suggested by

the recent cases of *Jenkins* v. *The Central Ontario*, 4 O. R. 593, wherein it was held that the expropriation clauses of the General Railway Act, enabled railway companies to acquire the fee of the land, in this country, and not merely the right of way, as may be the case in England. Sec. 2 now provides that "The Company shall not be entitled to any mines of iron, slate, or other minerals under any land purchased by them except only such parts thereof as shall be necessary to be dug or carried away, or used in the construction of the works, unless the same shall have been expressly purchased; and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands, unless named therein and conveyed thereby." The remainder of the act is taken up with provisions relating to the working of the mines.

Chapter 32 is the Municipal Amendment Act, 1884, but its enactments do not require to be specially called attention to here. Sec. 13 may, however, be referred to as containing several alterations in the provisions of the Consolidated Municipal Act, 1883, 46 Vic. c. 18, s. 496, relating to the matters in respect to which by-laws may be passed.

Chapter 39, an Act for the protection of persons employed in factories is a matter of philanthropic rather than legal interest.

SELECTIONS.

WARRANTIES BY AGENTS IN SALES.

The subject of implied powers of agents is always an interesting one. The late English decision in *Brooks* v. *Hassall*,* to the effect that a servant entrusted with the sale of a horse at a fair is authorized to warrant his soundness, re-opens the much agitated question as to the authority of agents to warrant their principle's goods. The leading case upon the subject of horse sales is *Brady* v. *Todd*,† in which a distinction is attempted to be drawn between sales in which the power to warrant is implied, and those where it can not exist without express authority. It was held that the agent of a private owner entrusted to sell and deliver a horse on one particular occasion, is not by law authorized to bind his master by a warranty; and that the buyer who takes a warranty from such an agent takes it at the risk of being able to prove that he had the principal's authority. It had been held in *Howard* v. *Sheard*,‡ that the agent of a horse-dealer has implied authority to make a warranty; and the purchaser's right to sue is not affected by the fact that the servant was expressly forbidden to warrant the horse.

The distinction is based upon the theory that when one engages in trade, and commissions another to act for him, he thereby clothes such general agent with power to act as he himself would probably act in the like case; and since it is customary to warrant property sold in the ordinary course of trade to be sound, when a sound price is paid, the purchaser may assume that the agent has authority to so warrant. But where the servant is authorized to act in one particular instance for one who is seeking to dispose of a horse theretofore employed by him for his private purposes,

* Reported in 49 L. T. (N. S.) 569; 18 Cent. L. J. 118. See Alexander *v.* Gibson, 2 Camp. 555, in which the same doctrine is maintained by Lord Ellenborough. See also Helyear *v.* Hawke, 5 Esp. 72; Fenn *v.* Harrison, 3 T. R. 760, 761.

† 9 C. B. (N. S.) 592.

‡ L. R. 2 C. P. 148.

there can be no such implication; the very fact that a private owner is making such disposition should put him on his guard.

The Supreme Court of Vermont in *Deming* v. *Chase*,* qualifies the doctrines of *Brady* v. *Todd*, and recognizes it only when the servant has been expressly forbidden to warrant the horse, and if the principal has said nothing in regard thereto, the servant has the same authority, as in general sales. We seriously question the logic of this decision. If the agent has authority to sell when nothing is said to him, the law permits the purchaser to presume that he has such authority, but if he has secretly forbidden him, the purchaser buys at his peril. It is the well settled rule of law that secret instructions to agents having apparently full authority are ineffectual, and, if the servant has this implied authority, the protection of the purchaser should not be subject to the absence or existance of private instructions. The court should have followed *Brady* v. *Todd*, as an entirety, or repudiated it. We fail to see any consistency in its position.†

But *Brady* v. *Todd* has been followed as an entirety in New Jersey.‡ "A sale of a chattle," said Dixon, J., "is a transfer of its title for a price. A direction to sell, therefore, nothing more appearing, would confer upon a special agent no authority beyond that of agreeing with the purchaser in regards to the component particulars. Under certain circumstances a sale imports more than these particulars; . . . but in the sale of a horse subject to the buyer's inspection, no warranty of quality is implied, and it seems a clear deduction that, in an authority to sell, no authority so to warrant is implied. The warranty is outside of the sale, and he who is empowered to make the warranty must have some other power than that to sell."

There are four fundamental principles of the law of agency, underlying this subject. (1) One who deals with an agent is bound, at his peril, to ascertain the extent of his authority.* (2) The law implies in favour of agents whether the the agency is limited to one or more objects, the right to use the usual and appropriate means to accomplish the objects of the agency; but not unlimited power to use such means as they deem proper.† (3) The implied authority of an agent is limited by the usual course of dealing as respects that particular agency, or agencies, of that character in general.‡ (4) Where such implied authority is defined by law, no secret instructions to the agent, not brought home to the knowledge of the party contracting with the agent can affect his rights.

With those principles governing them many courts have betrayed no hesitation in declaring that "authority without restriction, to an agent to sell, carries with it authority to warrant."§ But the tendency of the latest authorities is to restrict the power to warrant to those cases where it is customary to warrant,‖ and the burden of proof is upon the purchaser to show that such warranty is usual.¶

Under this doctrine, a sale of a safe does not imply a power to warrant that

* 48 Vt. 382.

† See Milburn *v.* Belloni, 34 Barb. 607; Tice *v.* Gallup, 2 Hun. 46; s. c., 5. S. C. 51. This distinction seems to be followed in Gaines *v.* McKinley, 1 Ala. 446, citing Story's Agency, 59, 97, 122. Also in Skinner *v.* Gunn, 9 Porter's Rep. 305; Bradford *v.* Bush, 10 Ala. 390; Cocke *v*, Campbell, 13 Ala 286.

‡ Cooley *v.* Perrine, 41 N. J. L. 322; Scott *v.* McGrath, 7 Barb. 53, also supports Brady *v.* Todd.

* Gullett *v.* Lewis, 3 Stew. 23; Fisher *v.* Campbell, 9 Port. 210; Van Eppes *v.* Smith, 21 Ala. 317; Powell *v.* Henry, 27 Ala. 612; Smith *v.* Carr, 16 Conn. 455; White *v.* Langdon, 30 Vt. 599; Sprague *v.* Train, 34 Vt. 150; Goodrich *v.* Tracy, 43 Vt. 314.

† The Thames Steamboat Co. *v.* Housatonic R. Co., 24 Conn. 51; Benjamin, *v.* Benjamin, 15 Conn. 356.

‡ Jones *v.* Warner, 11 Conn. 48; U. S. Life Insurance Co. *v.* Advance Co., 80 Ill. 549.

§ Schuchardt *v.* Allens, 1 Wall, 359, 369; Nelson *v.* Cowing, 6, Hill, 336; Boothley *v.* Scales, 27 Wis 626, 635; Cocke *v.* Campbell, 13 Ala, 286. See Taggart *v.* Stanberry, 2 McLean R. 543; Peters *v.* Fransworth, 15 Vt. 155; Cornfoote *v.* Fowks, 6 M. & W. 358. But see, Lipscomb *v.* Kittrell, 11 Hump. 256, 260. *Cf.* Woodford *v.* Glenahan, 4 Gilman, (Ill,) 85; Blackman *v.* Charlestown, 42 N. H. 132; Williamson *v.* Canaday, 3 Ired. 349; Franklin *v.* Ezell, 1 Sneed. (Tenn.) 497; Ezell *v.* Franklin, 2 Id. 236; Dayton *v.* Hooglin, S. C. Ohio, Feb. 5, 1884; 5 Ohio L. J. 142.

‖ Herring *v.* Skaggs, 62 Ala 180; citing McCreary *v.* Slaughter, 57 Ala; Smith *v.* Tracy, 36 N. Y. 79, 82; Lansing *v.* Coleman, 58 Barb. 611: Lossie *v.* Williams, 6 Lans. 228; Scott *v.* McGrath, 7 Barb. 53. See Murray *v.* Smith, 4 Daly, 277; Gibson *v.* Colt, 7 Johns. 390.

¶ Herring *v.* Skaggs, 62 Ala, 180.

it is fire or burgalar proof;* nor has a broker implied authority to warrant bank stocks sold by him;† nor has a servant in a sale of liquors, the power to warrant that they are not subject to seizure for prior violation of the revenue laws.‡ Nor can a commission merchant warrant that flour shall remain sweet during a sea voyage; his power, at the most, is to warrant its sweetness at the time of sale.§ Nor has an agent to sell a note authority to warrant that it shall be paid at maturity.‖

But an agent employed to sell a note may warrant it to be business paper.¶ So, an agent engaged in selling harvesters has authority to warrant them.** And it is safe to state that a manufacturer of machines is bound by the warranties of his selling agents, even though he forbade them to warrant them. And when an agent is entrusted with a sample, no other inference can be drawn except that he has authority to warrant the bulk to be equal to the sample.†† So one having authority to sell and convey land to another may warrant against the lawful claims of all persons claiming under his principal.‡‡ But an agent with a mere power to sell land can bind his principal by no representations as to the quality or quantity of the land.§§

Where there is such implied authority, it makes no difference that there was a custom for agents not to warrant goods of the same character unless knowledge of the custom is brought home to the purchaser.‖‖ And *vice versa* it has been held that a broker of merchandise has no authority to warrant and that a general custom of brokers to warrant all their sales cannot be recognized.* But custom may regulate the character of the warranty. Thus, in *Dingle* v. *Hare*,† a warranty in a sale of guano, that it contained 30 per cent. of phosphate of best quality was binding upon the principal, it being found by the jury that it was customary to make such a warranty in the sale of these manures.

Auctioneers cannot warrant the quality of goods sold by them without special authority.‡ They are only special agents and have only authority to sell. Auction sales in the usual mode are never understood to be accompanied by a warranty and, therefore, they have no power to give any unless specially instructed to do so.§ And it is well to remember that a warranty by an agent is never binding upon his principal, unless it be made at the time of the sale as an inducement thereto. Therefore if the servant after the sale gives the purchaser a receipt for the price and therein the first mention is made of the warranty, the principal can not be held thereon. ‖

Whether if a principal receiving the proceeds of a sale without knowledge of the warranty, thereby ratifies the warranty, and, if he does not return the proceeds upon becoming cognizant of the fact, does thereby assume the same liability as if authority had been originally given, has been a question much controverted. On the one hand, it is asserted that the agent having no authority by law to make the warranty, it was the purchaser's duty to inquire of the principal, and having failed to do that he must retain what the law gives him; that if he believed that the agent had authority to warrant, it was either a mistake of law, or a mistake of fact, brought about by his own neglect, from the effects of either of which the law can not relieve him; that he has received all that the principal contemplated, and what he should have known was all the law guaranteed him; and that he cannot

* Herring *v.* Skaggs, 62 Ala. 180.
† Smith *v.* Tracy, 36 N. Y. 79. 82.
‡ Palmer *v.* Hatch, 46 Mo. 585.
§ Upton *v.* Suffolk County Mills, 11 Cush. 586. The latter part of this proposition is maintained in Randall *v.* Kehlor, 60 Me. 47.
‖ Graul *v.* Strutzel, 53 Iowa, 712. Examine Anderson *v.* Bruner, 112 Mass. 14.
¶ Ahern *v.* Goodspeed, 72 N. Y. 108, 114.
** McCormick *v.* Kelly, 28 Minn. 135; Murray *v.* Brooks, 41 Iowa, 45.
†† Boothby *v.* Scales, 27 Wis. 626.
‡‡ Schuchardt *v.* Allens, 1 Wall. 359, 369; Andrews *v.* Kneeland, 6 Conn. 355; Monte Allegro, 9 Wheat. 616, 644; Murray *v.* Smith, 4 Daly, 277.
§§ Ward *v.* Bartholemew, 6 Pick. 409; Backman *v.* Charlestown, 42 N. H. 131, 132.
‖‖ National Iron Co. *v.* Baxter, 4 C. E. Green (N. J.) 331.

* Murray *v.* Brooks, 41 Iowa, 45 in which there was a sale of a reaping machine, and such a custom existed.
† Dodd *v.* Farlow, 11 Allen, 426.
‡ 7 C. B. N. S. 145; 29 L. J. C. P. 223.
§ Monte Allegro, 9 Wheat. 616, 647. Blood *v.* French, 9 Gray, 197.
‖ See Skrine *v.* Elmore, 2 Camp. 407; Woodin *v.* Burford, 2 C. & M. 391.

demand that the principal shall undo what he himself has done, or require him to answer for the unauthorized act of his agent.*

On the other hand, it is urged that if he adopts the act of the agent in part, he must adopt it *in toto*, and by electing to retain the proceeds he ratifies every means by which those proceeds were secured; that he has enabled his agent to perpetrate a fraud upon an innocent person, and he must, therefore, place the latter in *statu quo*, or become accountable to him for the methods, by which he was relieved of his money. We see more reasoning in the former arguments than in the latter, while an impulsive conclusion would recognize the greater justice of the latter position.† —*Central Law Journal.*

REPORTS.

ONTARIO.

(Reported for the CANADA LAW JOURNAL.)

COUNTY COURT OF SIMCOE.

MOSES V. SIMPSON.

Right to trial by jury.

In Common Law cases, the parties to the suit are entitled to have a jury, and they should not be deprived of this right under the powers given by R. S. O., cap. 50, sec. 255, except strong grounds are shewn.

[Barrie.

The plaintiff's claim was on a note, and the defendant resisted payment on the ground that he gave the note to the plaintiff with the understanding that his wife was to join in it, otherwise the money would not be advanced to him and the note would be returned; that his wife refused to sign the note, and consequently he could not obtain the money on it, yet the plaintiff retained the note and insisted on payment.

The defendant gave notice for a jury, and the plaintiff now moved to strike out the notice on the following grounds:—

1st.—The plaintiff is a foreigner not well acquainted with the English language, and he fears from this cause his conduct in the box as a witness, on his own behalf, will appear to the jury as unwillingness on his part to tell the truth.

2nd.—That the plaintiff is a Jew, and he fears the jury will be prejudiced againt him on this account.

3rd.—That the note bears fifteen per cent. interest, and the jury may consider the rate extortionate and be prejudiced against him on this ground also.

Strathy, for plaintiff.

Pepler, for defendant.

BOYS, J. J.—The action may be called a purely Common Law one, and consequently following the decisions in *re Martin*, L. R. 20 Chy. D. 365; *Wedderburn* v. *Pickering*, L. R. 13 Chy. D. 771, and *Bank of British North America* v. *Eddy*, 9 P. R., 468, either party is entitled to have a jury; as Jessel, M. R. calls it, it is a Common Law right and ought not to be taken away without good cause, the *onus* being on the party asking to have the jury notice struck out. If there are special grounds rendering it desirable to try the action before a judge without a jury, then, and then only, should an application such as this be granted. Are there such special grounds shewn in this case? It seems to me there are not. I do not think there is any prejudice in this country against foreigners, nor can I believe that if the plaintiff hesitates in the witness box owing to his imperfect knowledge of the English language, that this will set the jury against him. Happily, in this country, his being a Jew will not be against him, and I fear the rate of fifteen per cent. interest on an unsecured note is too common an occurrence to attract much attention. All these grounds are too slight to call for the exercise of that discretion which judges have, under cap. 50, sec. 255, R. S. O., in this connection.

When actions are brought against corporations this discretion has been often exercised, owing to the well-known inclinations of juries to give such bodies scant justice: See *McGunninghal* v. *G. T. R. Co.*, 6 Pr. R. 209; *Nelles* v. *G. T. R. Co.*, 13 L. J. N. S. 199; *Morris* v. *City of Ottawa*, 13 L. J. N. S. 200; but in the face of the English cases cited and the decision of Boyd, C., in *Bank of British North America* v. *Eddy*, following them, I do not feel that, in the present case, I should exercise my discretion in the manner asked for. If after a fair trial there is reason to believe the plaintiff's fears have been realized, a new trial will probably be granted and without a jury.

The summons must be dismissed with costs in the cause to the defendant in any event.

* Croom *v.* Swan, 1 Fla. 211; Graul *v.* Strutzel, 53 Iowa, 712; See Cooley *v.* Perrine, 41 N. J. Law, 322, 331; Coombs *v.* Scott, 12 Allen, 493; Smith *v.* Tracy, 36 N. Y. 79; Gulick *v.* Gover, 33 N. J. L. 463.

† Lane *v.* Dudley, 2 Murphey, 119; Coleman *v.* Riches, 29 Eng. L. & Eq. 326; See Helyear *v.* Hawke, 5 Esp. 72; Eadie *v.* Ashborough, 44 Iowa. 519.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

QUEEN'S BENCH DIVISION.

IN BANCO.

WALMSLEY v. MITCHELL.

Seduction—Verdict for defendant—No costs.

Where in seduction it is shewn that the injury in question is to some extent due to the plaintiff's wrongful conduct, and the jury find in favour of defendant, with the expression of a wish, however, that he should have no costs, the Court held that there was good ground under Rule 428, for withholding costs.

Osler, Q.C., for application.

HYMAN v. BROWN.

Chattel mortgage—Omission to register—Assignment for creditors—Adding third party.

W. gave chattel mortgage to plaintiff, and then assigned to defendant for creditors. The mortgage was not registered, and plaintiff, on refusal by defendant to deliver the goods to them, sued defendant, who then applied to have one M., a creditor of W., made a defendant, so as to question the mortgage. This was done, but the Court held the order bad, for when plaintiff demanded the goods, creditors had no right, and they could not by a subsequent assent make good their claim under the assignment.

H. J. Scott, for appeal.

Gibbons and *Aylesworth*, contra.

CHANCERY DIVISION.

Boyd, C.] [April 2.

CARNEGIE v. FEDERAL BANK.

Pleading—Admissions—Master's office—Pledge of stock—Ear-mark—Identification of pledged stock.

By his statement of claim in this action the plaintiff set forth that during April and May, 1878, the Federal Bank lent money to him, and on April 23rd, 1878, he gave the bank, as security, assignments of Ontario Bank stock, and of Bank of Commerce stock; that soon after the making of this loan the defendants sold the Bank of Commerce stock and credited the proceeds; that the defendants did not hold the Ontario Bank's share during the currency of the loan, but soon after the making of it, disposed of that stock without notice to the plaintiff, and by such sales received more than enough to pay off the balance, and the plaintiff asked for an account.

Upon this pleading the parties went to trial upon admissions, shewing that the Ontario Bank stock in question was in the hands of the defendants at the date of the loan, April 23rd, 1878.

In the Master's Office it was discovered, and for the first time brought to the recollection of both parties, that the Ontario Bank shares in question had been pledged by the plaintiff with the bank some months previously on another loan, and had been carried forward to the loan of April 23rd, and, on this state of facts, an issue was raised in the Master's Office as to whether the bank actually did hold the shares on that day, the plaintiff contending that it had previously parted with them and was therefore liable to be charged with their market value as of that day. The master held that the pleadings precluded him from going behind April 23rd.

Held, on appeal, that the master had rightly decided, for the admissions, which were evidence for all purposes in the Master's Office, could not be inferentially or argumentatively countervailed by detached parts of contradictory evidence going to shew that the defendants had previously disposed of 160 shares of the Ontario Bank stock, and were in default at the date of the loan—April 23rd. What the plaintiff was now seeking was to place the parties in this position: the plaintiff was induced to accept a loan from the bank on the representation that the bank had stock security for that loan in their hands, whereas, in fact, that security had been already sold, and the bank was indebted to the plaintiff for the proceeds of that stock, and should account on that footing. This was a very different state of facts from what was spread on the record, and disclosed a different cause of action.

Held, also, that inasmuch as it appeared in the evidence that the defendants had at all times at least 160 shares of Ontario Bank stock credited to their account in the books of the Ontario Bank, and inasmuch as the Ontario Bank shares from time to time transferred by the defendants were not identified or earmarked in such a way as necessarily to lead to the conclusion that only the *residuum* after deducting these could be treated as the plaintiff's share, it could not be considered proved that the defendants had not 160 shares applicable to the plaintiff's loan on April 23rd, 1878.

J. B. Roaf, for appeal.

Cattanach, contra.

Cameron, J.] [May 1.

NIXON v. ASHBENHURST.

Dower—Will—Election—Express provisions in will in lieu of dower.

Although where the question to be tried in an action for dower is whether the plaintiff has elected to take the provisions made for her by her husband's will in preference to dower, the evidence adduced might not have been sufficient to establish such election in the absence of a distinct declaration in the will that the provisions thereof are in lieu of dower; yet, where a will in express terms makes provision for the testator's wife in lieu of dower, thus bringing directly to her mind that she cannot have dower and the provision of the will also, the same evidence might suffice to establish such election. Much less dealing with what is left her, will evidence an election on the widow's part in such a case, than would be sufficient where the sole question was whether she had elected to take the provisions made for her by the will, where such provisions according to the principles of equity would be inconsistent with an intention on the part of the testator to let her have such provisions and dower also.

Coleman v. *Glanville*, 18 Q. R. 42; *Cooper* v. *Watson*, 23 U. C. R. 345; *Baker* v. *Baker*, 25 U. C. R. 448, distinguished.

PRACTICE.

Rose, J.] [April 29.

RE FRIENDLY v. NEEDLER.

Division Court—Prohibition—Discretion.

A. entered a notice disputing plaintiff's claim in a Division Court suit, and objecting to the jurisdiction of the Court, but did not appear at the trial when the junior judge of the county of York, upon proof of the plaintiff's claim, and such facts as in the absence of proof to the contrary, established a *prima facie* case of jurisdiction, entered a judgment in favour of the plaintiff for $44.75. On motion for prohibition on the ground of want of jurisdiction,

Held, following *Archibald* v. *Bushey* 7 P. R. 304, that the granting of prohibition under the circumstances was discretionary, that it would be unfair to place upon the judge trying the case the burden of cross-examining the witnesses to ascertain jurisdiction, that if a *prima facie* case of jurisdiction is made out the defendant is himself to blame if it is not displaced, and as neither a good defence on the merits was shewn, nor despatch used in making the application, the motion was refused with costs.

Walter Read, for the motion.

Hands, contra.

Rose, J.] [May 30.

RE YOUNG v. MORDEN.

Division Court—Prohibition—Increased jurisdiction.

In an action in the 9th Division Court of the county of Hastings, on a promissory note for $200 and interest, the learned judge who tried the case (the junior judge of the county) entered judgment for $200—the amount of the note—$7.17 accrued interest, and costs.

Held, on a motion for prohibition, that the wording of the statute is clear, viz., all claims for the recovery of debt or money demand the amount or balance of which does not exceed $200, and the motion was granted.

McCracken v. *Creswick* 8 P. R. 501, and *Widemeyer* v. *McMahon* 32 U. C. C. P. 187, referred to and distinguished,

Held, also, That as the learned judge who tried the case does not allow County Court

costs in similar cases, and as the plaintiff was obliged to sue in the Division Court at the risk of prohibition, or in the County Court, and lose his costs, that the defendant should get no costs of this motion, unless he successfully resists the suit to be subsequently brought to recover the amount of the note.

Shepley, for the motion.

Aylesworth, contra.

Rose, J.] [June 3.

HILLIER v. ARTHUR.

Setting aside judgment at trial—Rule 270, O.J.A.

The plaintiff, not appearing at the trial which took place at the Picton Assizes before PATTERSON, J.A., judgment was directed to be entered for the defendant with costs.

Application was subsequently made to the learned judge at the same assizes to set aside the judgment, and reinstate the case on the list. This was refused, the plaintiff not being then ready to go on. Application was then made by the plaintiff to the Master in Chambers under Rule 270, O. J. A., to set aside the judgment entered at the trial. This motion was enlarged before ROSE, J. in Chambers, who

Held that Rule 270, O. J. A., does not give jurisdiction to the Master or a Judge in Chambers.

Clement, for the motion.

Aylesworth, contra.

The Master in Chambers.] [June 3.

RE FITZGERALD, A SOLICITOR.

Bills of costs—Delivery and taxation—Præcipe order.

Upon a motion in chambers for an order for the delivery and taxation of a solicitor's bills of costs, relating to certain proceedings under mortgage,

Held, that the Chancery practice of obtaining such orders on *præcipe* is the more convenient one, and should prevail in all divisions of the High Court of Justice.

Order made with costs as of a *præcipe* order.

Holman, for the motion.

Clement, contra.

OBITUARY.

HON. JOHN GODFREY SPRAGGE.

On the 1st of May last we recorded the death of the late Chief Justice of the Court of Appeal, and now fulfil our promise of a brief sketch of the prominent phases in the life of this distinguished judge.

John Godfrey Spragge was born in England on the 16th September, 1806, at Newcross, in the county of Surrey, and came to Canada with his father's family in 1820. He attended the school of the late Bishop Strachan, until he began the study of law in the office of the late Sir James B. Macaulay. He was also for a short period in the office of the late Hon. Robert Baldwin. After having been called to the bar he soon enjoyed a large practice as a special pleader, and as the business of the office of Master in Chancery was small, and did not interfere with his general business, he accepted that office in 1837. He was also a Bencher, and for several years Treasurer of the Law Society.

In December, 1850, he was appointed Vice Chancellor of Upper Canada, and in December, 1869, Chancellor of Ontario, and retained that position until the 25th April, 1881, when he was promoted to the position he occupied at the time of his death, and which he attained owing to the lamented death in comparative youthfulness of Chief Justice Thomas Moss, one of the most brilliant and promising judges that ever adorned the Bench in this or any other country.

Chief Justice Spragge at the time of his death, on the 20th April last, had held judicial rank for thirty-three years and upwards. For his work and qualities as a judge reference is made to the reports of the respective courts over which he presided. It would be superfluous to attempt to add anything to what has already been recorded in these pages with respect to the late Chief Justice Spragge, by the Law Society, at a meeting of the members which took place on the 22nd of April last, nor to the touching allusion to him by his eminent brother, Chief Justice Hagarty, in his address to the grand jury, in the April court, on the previous day. But we may say that whilst his learning was great, his keen discernment of facts in cases before him was a remarkable feature of his judicial usefulness. To the Bar he was a model of courtesy, and his relations with those who came in contact with him in the many years

he was in public life were of the most pleasant character.

It may not here be inappropriate in recognition of the deserts of those judges who have survived his late Lordship, and with whom he so faithfully and harmoniously served his Sovereign, and of others yet to occupy a seat on our solid and unsullied Bench, to add to this communication the closing words of the speech of Lord Dufferin, uttered on the occasion of a dinner given by him to the judges of the Supreme Court of Canada, at Government House, at Ottawa, on the 18th Nov,, 1875, as follows:—

"That, inasmuch as pure, efficient, and authoritative courts of justice are the most precious possessions a people can enjoy, the very founts and sources of a healthy national existence, there is no duty more incumbent on a great and generous community than to take care that all and every one of those who administer justice in the land are accorded a social, moral, and, I will venture to add, a material recognition proportionate to their arduous labours, weighty responsibility, and august position."

CORRESPONDENCE.

EWART ON COSTS.

To the Editor of the LAW JOURNAL.

DEAR SIR,—I have to thank you for calling my attention to an advertisement of the existence of which I was unaware.

I refer to that which asserts that Mr. J. H. Thom had consented to revise the "Manual of Costs" lately issued. Shortly after the work was commenced, I asked Mr. Thom if he would be kind enough to look over the proof sheets for me, and he at once assented. I offered to pay him a fee for his work, but he declined it, deeming it better while in office not to receive money for such matters. When sending the MSS. to Mr. Cassells, I told him of this arrangement and received a reply that Mr. Thom had no recollection of having entered into it. The advertisement had at this time been running for some months, and I had never had any intimation from Mr. Thom of the existence of any misunderstanding. I cannot imagine how it occurred. I now offer all the recompense in my power. I have instructed the publishers to return his money to any purchaser who has been misled and desires to cancel his purchase.

Your obedient servant,

JOHN S. EWART.

FLOTSAM AND JETSAM.

CLERK of the Court: "Owen Doherty! are you Owen Doherty?" Prisoner with a merry twinkle in his eye: "Yes, begorra, i'm owin' everybody!"

A CORRESPONDENT of the *Pall Mall Gazette*, sends to that paper the following account of what happened the other day in Queensland: "A Chinaman had to give his evidence, and was asked how he would be sworn. His reply was, 'me no care; clack 'im saucer, kill 'im cock, blow out 'im machee, smell 'im book, allee samee.' He was allowed to 'smell 'im book.'"

A STORY illustrative of the craze in Chicago for entering the plea of self-defence: Three men quarrelled in a room above a saloon, when one of them fell dead from heart disease. The others were fearful that they would be charged with murder, so one went to the saloon and enticed the bartender out, while the other carried the corpse down and placed it in a chair with its head on a table as if sleeping off a drunk. When the bartender returned, the two men took a drink, saying the drunken man in the chair would pay for it, and went away. The bartender soon shook his customer and demanded his pay. The corpse fell over on the floor, and, as the bartender stood trembling with fear, the two men returned with an officer. The bartender anticipating his arrest, quickly said; "He struck me first."

Curious comments by a judge, even in the presence of a prisoner, though extremely rare, are not unprecedented. Mr. Justice Maule once addressed a phenomenon of innocence in a smock frock in the following words: "Prisoner at the bar, your counsel thinks you innocent; the counsel for the prosecution thinks you innocent: I think you innocent. But a jury of your countrymen, in the exercise of such common sense as they possess, which does not seem to be much, have found you 'guilty,' and it remains that I should pass upon you the sentence of the law. That sentence is that you be kept in imprisonment for one day, and, as that day was yesterday, you may go about your business." The unfortunate rustic, rather scared, went about his business, but thought that law was an uncommonly puzzling business.

Law Society of Upper Canada.

OSGOODE HALL.

HILARY TERM, 47 Vict., 1884.

During this term the following gentlemen were called to the bar, namely:—

Messrs. James Bicknell, gold medalist and with honours; George Walker Marsh; Donald Cliff Ross, John Young Cruikshank, Edward James Hearn, Wilmott Churchill Livingston, Robert Walter Witherspoon, George Frederick Cairns, Francis Stewart Wallbridge, Moses McFadden, Frederick Augustus Munson, Daniel Urquhart, Edward Guss Porter, James Burdett, Alexander Monro Grier, Edmund Campion, John James Maclaren. The last three being under Rules in special Cases.

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

Matriculants — John Frederick Gregory, William Edward Kelly, William Wesley Dingman, John Hind Hegler.

Junior Class — Michael H. Ludwig, Franklin Smoke, John B. McColl, Robert Wilson Gladstone Dalton, James Joseph McPhillips, Frederick Rohleder, Patrick Kernan Halpin, John Wesley Coe.

BOOKS AND SUBJECTS FOR EXAMINATIONS.

Articled Clerks.

1884 and 1885.
- Arithmetic.
- Euclid, Bb. I., II., and III.
- English Grammar and Composition.
- English History—Queen Anne to George III.
- Modern Geography—North America and Europe.
- Elements of Book-Keeping.

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

Students-at-Law.

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

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

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

Translation from English into Latin Prose.

MATHEMATICS.

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

ENGLISH.

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

HISTORY AND GEOGRAPHY.

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

Optional subjects instead of Greek:

FRENCH.

A paper on Grammar,
Translation from English into French prose.
1884—Souvestre, Un Philosophe sous le toits.
1885—Emile de Bonnechose, Lazare Hoche.

or NATURAL PHILOSOPHY.

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

FIRST INTERMEDIATE.

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

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

SECOND INTERMEDIATE.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Gov-

ernment in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

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

FOR CERTIFICATE OF FITNESS.

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

FOR CALL.

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

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

1. A graduate in the Faculty of Arts, in any university in Her Majesty's dominions empowered to grant such degrees, shall be entitled to admission on the books of the society as a Student-at-Law, upon conforming with clause four of this curriculum, and presenting (in person) to Convocation his diploma or proper certificate of his having received his degree, without further examination by the Society.

2. A student of any university in the Province of Ontario, who shall present (in person) a certificate of having passed, within four years of his application, an examination in the subjects prescribed in this curriculum for the Student-at-Law Examination, shall be entitled to admission on the books of the Socity as a Student-at-Law, or passed as an Articled Clerk (as the case may be) on conforming with clause four of this curriculum, without any further examination by the Society.

3. Every other candidate for admission to the Society as a Student-at-Law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this curriculum.

4. Every candidate for admission as a Student-at-Law, or Articled Clerk, shall file with the secretary, six weeks before the term in which he intends to come up, a notice (on prescribed form), signed by a Bencher, and pay $1 fee; and, on or before the day of presentation or examination, file with the secretary a petition and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The primary examinations for Students-at-Law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity and Michaelmas Terms.

7. Graduates and matriculants of universities will present their diplomas and certificates on the third Thursday before each term at 11 a.m.

8 The First Intermediate examination will begin on the second Tuesday before each term at 9 a.m. Oral on the Wednesday at 2 p.m.

9. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

10. The Solicitors' examination will begin on the Tuesday next before each term at 9 a.m. Oral on the Thursday at 2:30 p.m.

11. The Barristers' examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2:30 p.m.

12. Articles and assignments must be filed with either the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

13. Full term of five years, or, in the case of graduates of three years, under articles must be served before certificates of fitness can be granted.

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

15. A Student-at-Law is required to pass the First Intermediate examination in his third year, and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second year, and his Second in the first six months of his third year. One year must elapse between First and Second Intermediates. See further, R.S.O., ch. 140, sec. 6, sub-secs. 2 and 3.

16. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive certificates of fitness, examinations passed before or during Term shall be construed as passed at the actual date of the examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

17. Candidates for call to the Bar must give notice, signed by a Bencher, during the preceding Term.

18. Candidates for call or certificate of fitness are required to file with the secretary their papers and pay their fees on or before the third Saturday before Term. Any candidate failing to do so will be required to put in a special petition, and pay an additional fee of $2.

FEES.

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

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