Canada Law Journal.

VOL. XIX. MARCH 1, 1883. No. 5.

DIARY FOR MARCH.

1. Thurs.. St. David's Day.
4. Sun.... *4th Sunday in Lent.*
5. Mon.... Osler, J., appointed 1879
6. Tues.... Co. Ct. for York, sitt. begin. Ct. of Appeal sitt. begin. Name of York changed to Toronto, 1834.
11. Sun.... *5th Sunday in Lent.*

TORONTO, MARCH 1, 1883.

It has been recently settled by the Queen's Bench Division in England, that if an ox become unmanageable on a public highway, and through no negligence or want of skill on the part of the driver, rushes into an adjoining tenement, and does damages, the owner of the animal is not liable. *Tillett* v. *Ward*, 44 L. T. 546, therefore decides an interesting question as to who foots the bill for the eccentricities of a "bull in a china shop."

WE read in the *Times* of the final retirement of Mr. Benjamin, Q.C., from practice. Mr. Benjamin has for many years been almost the leader of the English Bar in all heavy appeal cases. His career has been very remarkable. He was born in 1811, on the island of St. Croix. His parents were English, but of Jewish persuasion. He spent three years at Yale, and was called to the Bar at New Orleans as long ago as 1832. He soon acquired a large practice in the courts of the United States, and sat for some time as Senator for Louisiana. When war broke out between the Northern and Southern States Mr. Benjamin gave his undivided and most active adherence to the Confederate cause. He was Attorney-General, Minister at war, and ultimately chief Secretary of State to Jefferson Davis; and when General Lee had to surrender his sword at Appotomax, Mr. Benjamin, whose personal safety was in danger, had to escape as best he could. He had been in reality the soul of the rebellion. His entire property was confiscated, and it is an interesting fact that his law library was bought in by public subscription and presented to him. It is now in his chambers in the Temple. He came to England, and through the personal influence of Lord Cairns was called to the Bar after keeping his terms for one year only. He at once acquired a large practice at Liverpool, where the principal firms of solicitors have intimate relations with the leading legal houses of New Orleans. Within six years he was given silk, and since then has been engaged in almost every case of importance. He has never taken any part in English politics, and has always lead an extremely retired life.

THE SUPREME COURT AND ITS CRITIC.

COMPLAINTS have been made of late years that the liberty of the press has degenerated into license. When the lay press attacks the Bench (and it is pleasant to know that it has not often so offended), it is in general charitably attributed to ignorance, or to the spleen of some disappointed suitor. It is reserved for a legal journal to use language towards a Judge of the Supreme Court quite as outrageous and unjustifiable as any that has yet appeared in the colums of the most reckless partizan sheet.

It was decided by the Superior Court of the Province of Quebec, that the notice of action in *Grant* v. *Beaudry*, was insufficient, and the suit was therefore dismissed. Our readers will remember that this suit was brought by the Orange Grand Master against the Mayor of Montreal for false arrest.

The plaintiff appealed against the ruling, but the Court of Queen's Bench in Quebec upheld it. This judgment disposed of the only point before the Court, which, as an appellate Court, was then *functus officio*, and had no jurisdiction to decide as to the legality or illegality of the Orange Association. The judges, however, took upon themselves to state their opinion that the association was an illegal one. The Court of first instance had not passed upon this question, and it was not, therefore, and could not have been, a subject of adjudication for the Appellate Court. The plaintiff again appealed, and brought the case before the Supreme Court of Canada when the insufficiency of the notice was affirmed. The Judges, however, declined to discuss the legality or illegality of the Orange Order; one of the Judges, at least, Hon. Mr. Justice Gwynne, very properly remarking that the Provincial Court of Appeal unnecessarily and voluntarily took the functions of a Court of first instance, and that its opinion as to the legality or otherwise of the Orange Order was extra judicial and unwarranted.

A writer in the editorial columns of the *Legal News* of Feb. 10, over the signature R., says: —that "it is difficult to conceive expressions more offensive."

The difficulty is rather in conceiving it possible for any lawyer to take the ground advanced by this writer. If he had read the English Reports he would have noticed language much more severe and caustic by appellate judges in reference to the judgments of learned judges in courts below in matters of far less consequence. A moment's reflection will show that the language of the Supreme Court is exactly correct, and that this final Court of Appeal would have been derelict in its duty if it had failed to remark upon the unwarrantable and unheard-of action on the part of the Court of Queen's Bench, in giving an opinion on a subject which was not before the Court as a Court of Appeal, and had not even been discussed in the Court below, and of the existence of which the Queen's Bench had no judicial notice. The voice of the profession, we venture to say, will even go beyond the language of Mr. Justice Gwynne, and say that his remarks were more moderate than the occasion warranted.

The person who writes the article from which we have quoted not only shows that he is incompetent to speak of the law of the case, but exhibits a spleen and disregard of the decencies of journalism, when commenting on the judgments of the judges of the land, not only remarkable in itself, but especially so in view of the allegation to which we shall presently refer. The article goes on to say: "The effect of such denunciation will probably, however, be less striking than Mr. Justice Gwynne expected. It will not hurt the reputation of that Court, and it cannot well hurt his. It suggests, however, two reflections. The first is, why so much passion? * * * The second reflection is that in declaring that the decision of the Court of Queen's Bench as to the merits of *Grant* v. *Beaudry* was extra judicial and unwarranted, Mr. Justice Gwynne blundered in his law, as is his wont." We perfectly agree with R. that the judgment of the Supreme Court will hurt neither the reputation of that Court nor that of Mr. Justice Gwynne, one of its brightest ornaments. As to the Bar and the public of Ontario, the last remarks of R. above quoted will only excite contempt as to his capacity to judge of such matters, and pity for his ignorance. As to the readers of the *Legal News* in Quebec we can tell them, without fear of contradiction, that Mr. Justice Gwynne enjoys the confidence of the profession in Ontario to a very marked extent, and that when advising on appeals to the Supreme Court they are not uninfluenced by the fact that there is on the Bench of the Supreme Court a man of such high personal standing, of such an acute mind, and such deep research and learning as Mr. Justice Gwynne.

And now as to the person who undertakes to enlighten the readers of the *Legal News*. On 31st March, 1882, the following letter was addressed and appeared in the columns of the Montreal *Herald*:—

"An article headed 'Proposed Legislation,' and signed 'R.', in the last number of the *Legal News*, abusing Mr. McCarthy and the whole House of Commons, is evidently from the same pen and from the same diseased mind as those which appear periodically in the same paper, under the same signature, against the Supreme Court of Canada. Now, it is currently reported that these articles have been written by one of the Judges of the Court of Appeal. Such, I hope, is not the case. The members of the House of Commons and the Judges of the Supreme Court can, of course, well afford to despise such inoffensive, though vituperative scribbler, and treat them with contempt, but the public of this Province has the greatest interest to ask a contradiction of the rumour which assigns the authorship of them to one of our judges, and I hope that the editor of the *Legal News* will be able to give such a contradiction in its next number."

We understand that no such contradiction was ever given, and it is said that R. in the above letter, and R. in the *Legal News*, of the 10th Feb., are one and the same person, and that such person is one of the Judges of the Court of Queen's Bench for Quebec. This may be entirely incorrect, and we shall be glad to know through the columns of the *Legal News*, that it is so. If it be true it would seem to throw a little daylight on the true inwardness of the remarks of Mr. R. Some judges are apt to be sore when they are overruled, and some apparently have a very "extra judicial and unwarranted" way of showing their feelings. We trust, however, for the credit of the Canadian Bench that it may be shown that the remarks to which we take exception were not those of any one in such a responsible position as that of a judge.

HUMOROUS PHASES OF THE LAW.

(Continued.)

Negligence is an extensive theme. Here we have the case of the boy in the apple-tree, who was shot by a volunteer firing at a mark, and we are told that the court in considering it a case of manslaughter did not consider the question whether the apples would not have killed the boy even if the rifle had not: (*Regina* v. *Salmon*, 62 Q. B. D. 79). A humorous gentleman in Iowa undertook to frighten a lady neighbour with a revolver; the weapon somehow went off, and the lady died of the fright. The court thought this was manslaughter, and sent the joker to prison for a year to give him an opportunity for reflection: (*State* v. *Hardie*, 47 Iowa, 647). If one in setting off Roman candles, even from his own house, injures another, he must pay for it: (*Fisk* v. *Wait*, 104 Mass. 71). The owner of a horse knew that his animal had a good ear for music and did not like street organs; nevertheless, he drove where one was grinding out doleful tunes; the horse ran over and smashed the organ and the organist; the court gave the grinder £25, and told the owner of the steed to pay. Icy sidewalks are a fruitful source of litigation. Coke, we are told, had no trouble with such cases, nor with many another class which now puzzles judge and jury.

While all good Boston people were honoring the Grand Duke Alexis, and the audience in the hall where the reception took place were singing the "Old Hundred," the bust of Benjamin Franklin fell from aloft, and hit Mrs. Kendall, injuring her. But the law would not give her any pecuniary consideration. She had to bear her woes unmitigated by the touch of money, like many another who has been hit by "Poor Richard": (*Kendall* v. *Boston*, 118 Mass. 234). In Montreal it was held that if a servant girl let a shutter fall upon a passer by, the master is liable.

Apropos of the question, Is it negligence not to call a physician for a sick child? we

are told of some of the doings of the Peculiar People in England, and of a Pennsylvanian who practised the Baunscheidt system in his family. The case of the horse killed by eating clippings of a yew tree, was, we find, decided upon the doctrine of "sick yew-tree chew oh!": (*Crowshurst* v. *Amersham Burial Ground*). From the decision where a cow was killed by eating a fragment of a decayed iron fence, our author says, *semble*: "if the wife of the occupant of a house should moult her old hoop-skirt, and throw it into her next door neighbour's yard, and the neighbour's cow should feed on it, and die in consequence, the husband would be liable": *Frith* v. *Bowling Iron Works Co*). But long since it was decided that an action will not lie for carelessly leaving maple syrup in one's uninclosed wood, whereof the plaintiff's cow drank too much and died: (*Bush* v. *Brainard*, 1 Cow. 78).

In the "Nuisance" chapter, we have several interesting cases of disturbing public worship. We learn that undue haste in getting to church is not punishable: Brown, not our author, and some friends, gallopped up to within fifty yards of the sacred edifice; on their way, one caught a cow by her tail, causing her to jump and ring her bell; another, when in church lay upon a rickety bench, which creaked every time he moved. These good young men all escaped punishment on the ground that there was nothing wilful in their conduct. A youth cannot insist upon sitting among the ladies at a camp meeting, if it is against the rule, even though he be an infant. Sometimes disturbing religious people in their sleep after they come from service, is not punishable: but a wicked young man at a camp meeting was punished for purloining the preacher's tin horn, and making night hideous by acting Gabriel: (*Brown* v. *State*, 46 Ala. 175; *McLean* v. *Justtock*, 7 Ind. 625; *State* v. *Edwards*, 32 Mo. 550; *Fenning's case*, 3 Gratt. 624).

It is a misdemeanor to curse in the private ear of a Methodist at a camp meeting: but the disturbed brother has no action for damages: Hunt and his friends had to pay $25 each, for cracking and eating peanuts in church: (*Cockreham* v. *State*, 7 Humph. 11; *Owen* v. *Herman*, 1 W. & S. 448; *Hunt* v. *State*, 3 Tex. Ch. App. 116). We rejoice to find that the morals of North Carolina are improving. Forty years ago the law did not deem it a nuisance for one to curse and swear publicly for the space of two hours; now to swear for five minutes is too much: (*State* v. *Jones*, 9 Ired. 38; *State* v. *Chusp*, 85 N. C. 528).

Noise is often a decided nuisance. "But if the rocking of a cradle, the wheeling of a carriage, the whirling of a sewing machine, or the discord of ill-played music, disturb the inmates of an apartment house, no relief by injunction can be obtained, unless the proof be clear that the noise is unreasonable and made without due regard to the rights and comforts of other occupants." A poor boarding-house keeper failed to enjoin the midnight performance of negro minstrels in an adjoining saloon. In *State* v. *Brown*, 69 Ind. 95, the court said, "the defendants were probably engaged in giving a newly wedded pair that kind of concert or serenade which is usually called a charivari. Such a concert is usually much more entertaining to the performers than it is to the audience, and when it is engaged in by three or more performers, with zeal and earnestness, it may often be denominated as a riot, and the performers therein may be subjected to the punishment prescribed for such offence." In *Harrison* v. *St. Mark's Church*, Philadelphia, 15 Alb. L. J. 248, we have a case very similar to the well-known one of *Soltau* v. *De Held*. In the former case the bells of the church were rung four times on Sundays, and twice on every week-day, and on festivals and saints' days from ten minutes to half an hour at a time, averaging from seventy-five to ninety-four strokes a minute. This was deemed too much of a good thing, and was enjoined.

Grouped under "Trade Marks" we find many amusing instances of names, descriptions and devices which have been deemed likely to deceive the careless public from their similarity to other names, descriptions and devices which have gained a reputation.

Under the title of "Newspaper Law," Mr. Browne briefly treats, not of the law which the newspapers lay down, which (he says) is sometimes very bad, but rather of the law which is supposed to apply to them in regard to their utterances and to their contracts with subscribers. In theory the newspapers are responsible in damages for what they publish when they exceed the limits of reasonable free speech; but in practice, through the favor of the jury, which they are so accustomed to decry and abuse, their privilege frequently degenerates into unrestrained license. Courts on the other side of the line have held that the fact that the plaintiff is a candidate for office is no mitigation in an action for libel: (*Sanderson* v. *Caldwell*, 45 N. Y. 398); and we have here a number of expressions, more strong than elegant, which juries have shown editors that they should not use concerning public men. Some of our Canadian editors should study these. Irony is not always safe, even when used by one newspaper man about another. It may be libelous to falsely accuse one of poverty: (*Moffat* v. *Caldwell*, 3 Hun. 26).

Mr Browne tells editors and publishers how far they may let their spleen, or their imagination, or their desire to turn a penny by sensational articles, carry them with theoretical safety, and how much further the favor of modern juries will suffer them to strain their utterances. It is not a libel if a writer, in consequence of his caligraphy, is made to say nonsense.

Under "Practical Tests in Evidence," we have the case of a dispute as to the goodness of some beer, for the price of which an action was brought. The court adjourned to taste the beer; if it was good the defendant was to pay, otherwise not. The clerk never recorded the verdict! Photographs are often used to establish personal identity, or to show the appearance of persons or places, and on questions of hand-writing. In the case of Cowley the clerical superintendent of the "Shepherd's Fold," convicted of starving one of the lambs, photographs were held admissable showing the appearance of the lamb when received from the gentle shepherd's hands, and his appearance, in the normal condition of avoirdupois, before entering the fold: (*Cowley* v. *People*, 83, N. Y. 464). A living likeness has sometimes been used in evidence. In *State* v. *Smith*, 54 Ia. 104, in a prosecution for bastardy, it was held allowable to exhibit the alleged bastard child, two years old or more, to the jury, and permit them to determine as to the family resemblance between such child and the alleged putative father. But where the child was only three months old this was not allowed, because of the peculiar immaturity of the features of an infant of that age: (*State* v. *Damforth*, 48 Ia. 43).

Sergeant Ballantyne, in his "Experiences," tells a story quite *apropos* of such cases of an occurrence at the Marylebone Police Court. The Sergeant was appearing for a client who was suggested to be the father of an infant; he says: "Mr. Broaderip (the magistrate) very patiently heard the evidence, and notwithstanding my endeavours, determined the case against my client. Afterwards, calling me to him, he was pleased to say, 'You made a very good speech, and I was inclined to decide in your favour, but you know I am a bit of a naturalist, and while you were speaking I was comparing the child with your client, and there could be no mistake, the likeness was most striking.' 'Why, good heavens,' said I, 'my client was not in court. The person you saw was the attorney's clerk.' And such truly was the case."

In this chapter on "Practical Tests," Mr. Browne might have referred to the case mentioned by Mr. Ballantyne, where a tailor sued Sir Edwin Landseer for the price of a coat

for which the painter refused to pay, as the garment was so badly made, violating "every principle of high art." The judge suggested that Sir Edwin should try on the coat in court. This he did, amidst roars of laughter from all parts of the room, though much to his own disgust; yet the trial gained him a verdict. The recent case of *Belt* v. *Lewes*, tried before Mr. Baron Huddleston, where plaster casts and marble statutes were brought into court *ad nauseam*, is also in point.

With "*De minimis non curat lex*," this interesting little book is closed. Here we have proved that the law does not mind bad grammar, nor yet bad spelling. The California Supreme Court says it is of frequent occurrence that men of clear and vigorous minds, and who think, speak and write clearly, spell badly, and quotes Saxe, Marlborough, and Napoleon. The phonetic style of writing does not necessarily detract from a clearness of a composition. We have two or three pages of amusing instances of mis-spelling: "gilty," "confindendment," "defendances guilty as charged in inditesement." A mistake of a letter saved a man's property from confiscation, in the brave old days of old: (*Rex* v. *Parker*).

In respect to names, the law disregards bad spelling if they sound alike; and after this proposition, follows a long list of names, held to be *idem sonans*, and another of those held not to be *idem sonans*. The importance of a comma, a semi-colon, and a period, have been considered: (*Areson* v. *Areson*, 3 Denis, 438; *Lambert* v. *People*, 76 N. Y. 220; *Osborne* v. *Farwell*, 87 Ill. 89). In Areson's case, one of the members of the court says: "Punctualisne determines nothing." But just here a full stop must determine this review.

RECENT ENGLISH DECISIONS.

Continuing to review the *Law Reports* of January, the next case to be noticed in the Ch. Div. number, is *Loosemore* v. *Tiverton & North Devon Railway Co.*, p. 25.

RAILWAYS—COMPULSORY POWERS—EXPIRATION OF CHARTER.

This case raised a curious question on which apparently no authority precisely in point could be found. The special Act of the defendant railway incorporated the Lands Clauses Consolidation Acts, and by its sect. 39 it was provided that "the powers of the company for the compulsory purchase of land for the purposes of this Act shall not be exercised after the expiration of three years from the passing of this Act." Sec. 40 provided that "if the railways are not completed within five years from the passing of this Act, then, on the expiration of that period, the powers by this Act granted to the company for making and completing the railways, or otherwise in relation thereto, shall cease to be exercised, except as to so much thereof as is then completed;" with which latter section may be compared the clauses to be found in special railway Acts in this country, enacting that if the railway be not completed within a time specified, the charter shall be forfeited. In the present case, the defendant railway served a landowner with a notice to treat for part of his property before the period of three years limited for the exercise of its compulsory powers had expired. The landowner served a counter-notice requiring the company to take the whole property, and nothing further was done towards ascertaining the compensation. Thirteen days before the expiration of the period of five years allowed for the completion of the works, the company entered upon the land under sec. 85 of the Lands Clauses Consolidation Act of 1845, relating to the compolsory taking of land, having previously made a deposit, and given the bond required by that section. After the five years had expired without the railway

having been made on the land, the landowner brought this action for an injunction to restrain the company from executing works on the land, and from continuing in possession of it. The Court of Appeal held, reversing Fry, J., that the entry of the company was wrongful, and that the plaintiff was entitled to the relief asked. The Lord Chancellor says, p. 53:—"For a company to enter under sec. 85, on the eve of the expiration of all its general powers applicable to the land on which it so enters, not for the purpose of making any statutory works under the statutory powers, but for that of acquiring a possessory title to the land against the landowner, and then making a railway over it not under the Act, but as under an ordinary landowner's title, is, in my opinion, an abuse of the Act, which can confer no right upon the company after the expiration of their powers, which they would not otherwise have possessed. The M. R. uses very similar language, p. 55, and then goes on to consider a further question, though unnecessary for the decision of the case, he says:—"But there is a point to which the Lord Chancellor did not refer, and as to which I desire to express my opinion, namely: supposing the entry had been rightfully made, what would have happened after the thirteen days? It appears to me, that then the right of retaining possession of the land would have came to an end. There is no right to enter, and use, except for the purposes of the Act. It is not merely entering that is authorized, it is entering and using. If the company cannot use, it seems to me that it cannot retain possession against the landowner. . . . When the time limited for making the line has expired, he (the landowner) says:—'You cannot do that for which alone you had a right to take my land, and for which alone you had a right to deprive me of the possession of my land, and your right to retain possession has therefore ceased.' It seems to me that both at law and in equity that would be an answer to any claim set up by the company to retain possession of the land after the powers had ceased." Cotton, L.J., also, p. 57, expresses a similar view on this latter point, and he also observes:—"I do not say that where they (the railway) are owners of land, and can complete their railway upon it, without interfering with public rights, or with the rights of individuals, anybody, except perhaps the shareholders, or the Attorney-General could stop them from going on, and as landowners, completing their works on the land which they have already acquired under the powers of their Act."

COMPANY—BORROWING POWERS—OVER-DRAWING.

In the next case, a certain benefit building society, whose rules neither expressly authorized, nor expressly forbade the borrowing of money, were permitted by their bankers to overdraw their account to a large amount. In 1876, the directors of the society agreed that certain deeds of borrowing members which had been deposited with the bankers, were deposited not only for safe custody, but as a security for the balance from time to time due. The Court of Appeal now held that the over-drawing of the bankers' account was *ultra vires*, being a borrowing unauthorized either by the rules or the objects of the society, and no borrowing can be permitted without express authority, unless it be properly incident to the course and conduct of the business for its proper purposes." Therefore, they held that the bankers had no lien on the deeds, either under the agreement or by the course of dealing with the society; nevertheless, they held that as far as it could be made out that the moneys which were advanced by the bankers, simply went to pay the legitimate debt and liabilities of the society, the bankers ought to have the benefit of their security. They refer to the "general principle of equity, that those who pay legitimate demands which they are bound in some way or other to meet, and have had the benefit of other people's money advanced to them for that purpose, shall not retain that benefit, so as, in substance, to make

those other people pay their debts," and declare that if the facts of the case gave the bankers the benefit of that equitable principle, it was consistent with justice and with authority to say that irregularity of either the form or the substance of their course of dealing, should not stand in the way of the justice due to them. The consistency between the said equitable principle so applied, and the general rule of law that persons who have no borrowing powers cannot, by borrowing, contract debts to the lenders, may, they say, be shown in this way:—"The test is: has the transaction really added to the liabilities of the company? If the amount of the company's liabilities remains in substance unchanged, but there is merely for the convenience of payment a change of the creditor there is no substantial borrowing in the result so far as relates to the position of the company."

ADMISSIONS OF SOLICITORS.

In the above case no evidence was given as to the application of the money which was advanced by the bankers; but the solicitors on both sides signed an admission that some part was applied in payment of members withdrawing from the society, and the remainder in payment of salaries, legal expenses and expenses of mortgaged property. This court held that the admission by the solicitors of the society that some part of the money had been applied in payment of lawful expenses was sufficient to entitle the bankers to a declaration and an enquiry as to the amount so applied. They say on this point, "What is the meaning of admissions of that kind? Surely the natural interpretation of them is, that the parties intended to save the expense of going into formal evidence to lay the foundation for an inquiry or an account; and when they admit that the items, if they were looked into, would be found to divide themselves into particular classes, we think that is a sufficient foundation for directing an account."

FRAUDULENT SETTLEMENT OF LEASEHOLD—13 ELIZ. C. 5—27 ELIZ. C. 4.

The next case, *In re Ridler, Ridler* v. *Ridler*, p. 74, is an interesting one. It deals with the position of a man, under 13 Eliz. c. 5, who makes a voluntary settlement, while liable under a guarantee to answer the debt of another. In 1832 R. R. gave to the W. Bank a guarantee to secure the balance due from his son R. H. R. on his banking account, to the extent of £1000. On May 25, 1877, R. H. R's account was overdrawn by £1,515. On that day R. R. made a voluntary settlement of a *leasehold* property, worth £200 a year, which he held at a rent of £3, 10s. His only other property was furniture worth less than £200, and a debt of £1,500 due to him from R. H. R. There was some general evidence that R. H. R. was solvent at the date of the settlement. The question was whether the settlement was void as against creditors of R. R., under 13 Eliz. c. 5. The Court of Appeal now held that it was. The Lord Chancellor delivered the principal judgment, in which Jessel, M. R., and Cotton, L. J., concurred. He said: "To hold that a guarantor can make a voluntary settlement of the whole of his property, and support it by shewing that when he made it the person guaranteed had assets enough to pay the amount guaranteed, would go far to defeat the contract of suretyship. We must look at the matter as if the event had already happened, the possibility of which the parties must have had in contemplation when the guarantee was given, of the debtor being unable to pay. I do not think that any close inquiry as to the supposed capacity of the person guaranteed to pay the debt ought to be entered into." Turning then to consider the state of R. R.'s own assets at the time the settlement was made, the L. C. says: "The debt due from the son cannot be looked upon as an available asset for meeting the liability on a guarantee given for the son." He held, therefore, the settlement could not

be supported: "The father, when he made the settlement, must have known that if the son could not pay the balance to the bank, he himself, if the settlement was sustained, would have substantially nothing available to meet the liability under the guarantee but such dividend as he could get from the son's estate;" the son had gone into insolvency. The M. R. and Cotton, L. J., in their judgments, discussed *Price* v. *Jenkins*, L. R. 5 Ch. D. 619, cited on the argument. It had been decided under 27 Eliz. c. 4, that a voluntary conveyance, though honestly and fairly made, was fraudulent as against a subsequent purchaser from the settler. *Price* v. *Jenkins* qualified that doctrine, and decided that the grantor's undertaking the liability for rent was sufficient to support a settlement which was open to no objection but that of being voluntary. But in the present case, the M. R. and Cotton, L.J., held, that whatever may be held under 27 Eliz. c. 4, the undertaking the liability to rent is not a good consideration within 13 Eliz. c. 5. In the language of the latter learned Judge:—"A man who makes a settlement without leaving himself enough property to pay his creditors, must be considered to do it with an intent to defeat or delay them, and a conveyance of leaseholds made for no consideration, cannot be brought within the exception in the statute by the mere fact that the grantee becomes liable for the rent"

MORTGAGE—MERGER IN JUDGMENT.

Passing by some cases on points of practice, which will be found noted among our Recent English Practice Cases, the next case to be mentioned is *Popple* v. *Sylvester*, p. 98. Here by a mortgage deed, securing a debt of £3000, the mortgagor covenanted to pay the £3000, with interest at seven per cent. on the day provided for payment; and, by a separate covenant, that in case the £3000 should not be paid on the day named, the defendant could, "so long as the sum of £3000, or any part thereof, should *remain due on the security of the said indenture*," pay interest for the £3000, or for so much as should for the time being remain unpaid, at the rate aforesaid. On September 23, 1869, the mortgagee obtained judgment for £3145, the amount then due for principal and interest. In October, 1869, he issued a sequestration under the judgment against the defendant's property. On March 1, 1882, the sequestrator paid the plaintiff the £3145, with interest at four per cent. (the legal rate). The plaintiff now sought to recover the difference between interest on the £3000, at the rate of seven per cent., as secured by the mortgage deed, and the interest at the rate of four per cent. paid to the plaintiff by the sequestrator. The mortgagor argued that the plaintiff could not recover, because the mortgage debt was merged in the judgment. Fry, J., however, gave judgment for the plaintiff, for that although the personal covenant to pay the £3000 was extinguished by the judgment, the charge remained notwithstanding, and, therefore, the express covenant "so long as the £3000 should remain due on the security of the indenture," continued in force. "The only ambiguity," he says, "arises from the fact that part of the security is extinguished by the judgment, and part remains."

COSTS—ADMINISTRATION.

The next case, *Croggan* v. *Allen*, p. 101, is on the same subject as the recent case in our Chancery Division, of *Re Woodhall*, before the Divisional Court, noted 18 C. L. J. 282. Though decided before *Re Woodhall*, it was not probably reported at that time; at all events, it does not appear to have been cited on that occasion. In both cases the ruling of Lord Westbury in *Bartlett* v. *Wood*, 9 W. R. 817, is cited, and followed by the Court, namely, that no costs should be given out of the estate in administration proceedings, unless it appears that the litigation has been in its origin directed with some show of reason, and a proper foundation for the benefit of the estate, or has in its result conduced to that benefit. In *Re Woodhall*, however, the proceed-

ings being held unnecessary, and Proudfoot, J., having directed that the plaintiff should be deprived of her share of the costs, and should pay the rest of the costs, the Divisional Court upheld this order on appeal. In *Croggan* v. *Allen*, the proceedings for administration were also held to be unnecessary. Fry, J., says:—"I disallow the plaintiff's costs of the action. I have felt strongly inclined to go further, and to require the plaintiff to pay the whole costs of the action, but I think if I were to do so, I should be going beyond what is the ordinary practice of the Court; but with regard to the costs occasioned by the most idle proceeding insisted upon by the plaintiff, namely, the rendering the income account, I direct that all costs with respect to the income account, be paid by the plaintiff."

VENDOR AND PURCHASER—DEFECT IN TITLE.

The next case, *Brewer* v. *Broadwood*, p. 105, may be briefly noted. A vendor contracted to sell, and a purchaser to purchase an agreement for a lease. The purchase afterwards repudiated the contract. At the date of the agreement and of the repudiation, the agreement to leave was voidable at the will of a third party, but the third party took no steps to avoid the agreement, but was willing to confirm it on certain conditions. Fry, J., held that the purchaser was entitled to repudiate. He says:—"The first inquiry is, what is the obligation of a person who agrees to sell an agreement to lease? It may be shown, either from the surrounding circumstances, or by direct evidence, that the intention of the agreement is to sell only such interest, if any, as the vendor may have; and in such a case as that, the purchaser has no right to require a title to be shewn by the vendor; but in the absence of such evidence, the view which I take of such an agreement is, that it requires the vendor to show that he has a title to a valid agreement. . . . I hold that the vendor is bound to show that there is a subsisting valid agreement to lease."

WILLS.

The next case, *Re Featherstone's Trusts*, p. 111, shows the care that should be taken with regard to the grammatical construction of the language used in wills. W. Featherstone. by his will in 1869, gave all his real estate in the County of York to trustees upon trusts to sell, the proceeds to be subject to the disposition of his residuary personal estate, and he gave the residue of his personal estate to the same trustees upon trust to pay certain legacies, and subject thereto "rents and equally amongst all the children of J. D. and the said R. A., and I direct that the same shall be vested legacies at the time of my decease." Kay, J., held (i), citing authorities that, on the grammatical construction of the above words, and in the absence of anything in the will overruling the construction, they meant that R. A. was to take with the children of J. D., and hence, R. A. having died, leaving children, in the testator's lifetime, his children took nothing; for, as he pointed out, on the proper grammatical construction of the words used, it would be necessary, in order to enable the children of R. A. to take, to insert the word "of," so that it should read "of J. D. and of the said R. A."; (ii) that the concluding words of the above residuary gift must be taken to mean that the whole residue should be divided amongst such only of the residuary legatee as should survive the testator.

SETTLED ESTATE—EFFECTUATING LIFE TENANT'S CONTRACT FOR LEASE.

The last case in this number of the *Law Reports* is *Davis* v. *Harford*, p. 128. Here a point arose which Chitty, J., pronounced to be a simple one, though not covered by direct authority. By a will devising real estate in strict settlement, powers of granting building leases were given to any tenant for life and to trustees during the minority of any tenant in tail. The tenant for life, in pursuance of his power, entered into a contract to grant a building lease, but died without having executed a lease, and was succeeded by an infant tenant in tail. Chitty, J., held that the trus-

tees had power to effectuate the contract of the tenant for life by executiug a lease. He said: "Supposing the agreement had not been for a lease in accordance with the power it would have been otherwise; but since all parties under the settlement are bound by the equitable contract so as to pass to the lessee the equitable interest, I am of opinion that the persons who have a power sufficient to vest the legal estate are authorized by the power to execute a deed necessary for that purpose."

A. H. F. L.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

COURT OF APPEAL.

From C. P.] [Feb. 6.

MCMASTER v. GARLAND.

Equitable assignment of goods—Seizure by sheriff.

The judgment in this case, as reported 31 C. P. 320, affirmed, ARMOUR, J., dissenting, who thought that although the transactions as set forth had effected good equitable assignments of the *proceeds* of the goods when sold by S. S. & Co. the *legal* right thereto, subject to the liens on the sum to be realized by the sale, still remained in Brennan, and therefore were exigible under a *fi. fa.* against him in the hands of the sheriff, who would hold the moneys arising from a sale thereof for the benefit of the execution creditors, after first paying off the orders given by Brennan on S. S. & Co.

McCarthy, Q.C., and *Clements*, for appellent.
J. K. Kerr, Q.C., and *Allan Cassels*, for respondent.

From Chy.] [Feb. 6.

BADENACH v. SLATER.

Deed of Assignment—Payment of trustee.

By a deed of assignment made avowedly for the benefit of creditors, it was provided that the trustee should be paid for his services, and that he should be liable for "wilful default or neglect" only, but made no provision for the payment of privileged liens in full or any equitable valuation of securities held by creditors on the estate of the assignors, and authorized the trustee to sell the real and personal property assigned by auction or private sale, or in portions, for cash or on credit, and generally on such terms and in such manner as he shall deem best or suitable, having regard to the object of the deed.

Held [affirming the judgment of the Court below,] that the deed could not be impeached as a fraudulent preference of creditors within the Act, R. S. O. ch. 118.

Gibbons, for appellant.
Foster, for respondent.

From C. P.] [Feb. 6.

HEDSTROM v. THE TORONTO CAR WHEEL CO.

Contract for particular brand of iron.

The judgment in the case, reported 31 C. P. 475, affirmed on appeal with costs.

Bigelow, for appellant.
G. Kerr and *Akers*, for respondent.

From Q. B.] [Feb. 6.

CRATHERN v. BELL.

Promissory notes, undertaking to pay part of.

The judgment of the Court of Queen's Bench, reported 46 U. C. R. 365, affirmed on appeal.

Bethune, Q.C., for the appeal.
Delamere, contra.

From Blake, V.C.] [Feb. 6.

STAMMERS v. O'DONOHOE.

Specific performance—Contract evidenced by letters.

The decree of BLAKE, V.C., reported 28 Gr. 207, affirmed on appeal.

O'Donohoe, Q.C., for appeal.
J. Bain, contra.

From Proudfoot, V.C.] [Feb. 6.

GOODERHAM v. TORONTO AND NIPISSING RAILWAY CO.

Receiver, payments by—Accounts.

A receiver of a railway having been appointed, who after paying the working expenses of the road was directed to pay any balance remaining in his hands periodically into Court, and an account having been directed of all liens, charges and incumbrances existing on the undertaking, and the moneys so paid into Court having been ordered to be applied in payment of such liens, etc., according to priority.

Held, [affirming the ruling of PROUDFOOT, V.C.] that in taking such account the receiver should have been allowed for all payments made on account of working expenses, which were not payable until after his appointment, but not those past due at that time; these being payable out of the moneys directed to be paid into Court.

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

R. M. Wells, and *W. Cassels*, for respondents.

From Proudfoot, V.C.] [Feb. 6.

CANADA LANDED CREDIT CO. v. THOMPSON.

New trial—Conflict of evidence—Erroneous view of law.

Where there was a conflict of evidence, and the learned judge who tried the case attributed greater weight to the evidence of some witnesses than to that of others, but in the opinion of this Court took an erroneous view of the law, this Court refused to make a decree upon the mere perusal of the evidence, and remitted the case to the Court below for a new trial.

McCarthy and *Creelman*, for the appellant.

W. Cassels, for the respondents.

From Div. Ct. Leeds and Grenville.] [Feb. 6.

WILTSIE v. WARD.

Claim ascertained by signature—Division Courts Act, 1880.

By the Division Courts Act, 1880, the Division Courts have jurisdiction in actions for debt where the same does not exceed $200, and the amount or original amount is ascertained by the signature of the defendant. In this case the claim was upon the following document: "Received from R. W. an order for C. B., ordering me to pay him the sum of $140, which is accepted on the following conditions, providing he carries out his agreement with me as cheese-maker. (Signed), M. W."

Held, that the Division Court had no jurisdiction, because the writing did not ascertain the amount, inasmuch as it depended upon the happening of certain events with respect to which evidence had to be adduced.

George Macdonald, for the appellant.

Falconbridge, for the respondent.

From C. P.] Feb. 6.

DEVANNEY v. BROWNLEE.

Promissory note—Accommodation maker—Principal and surety—Renewal—Discharge of surety.

A married woman signed a note in blank, and gave it to her son "to be used as he liked." He filled it up for $1200, signed it, and transferred it to the plaintiff, who was not made aware of the circumstances under which it had been signed. It was renewed twice without the married woman's name, the original note remaining in the plaintiff's hands.

Held, [reversing the judgment of the Court below], that the married woman was a surety in respect of the note for her son, and that the authority to the son as to using the note, did not extend to keeping it afloat after maturity without her knowledge, and that she had been discharged by the extension of the time for payment.

McClive, for the appellant.

Bethune, Q.C., for the respondent.

From Spragge, C.] [Feb. 9.

SMITH v. THE MERCHANTS' BANK.

Warehouse receipts—Banks.

Held, on appeal, [reversing the decree as reported, 28 Gr. 629,] that to bring a transaction within section 46 of the Dominion Banking Act of 1871 (34 Vict. ch. 5) there must be three persons concerned therein—the owner of the goods, some person filling the position of a keeper of a wharf, yard or other place, and the

bank; and it is from the holder of the warehouse receipt therein referred to that the bank is allowed to acquire the document in security on certain conditions for advances.

Maclennan, Q.C., and *Kingsford*, for the appellant.

Robinson, Q.C., and *J. F. Smith*, for the respondents.

From C.P.] [Feb. 19.

QUINLAN v. THE UNION FIRE INS. CO.

Fire Insurance—Diagram and report by agent.

By an addition to the second statutory condition on the policies of the defendant company it was provided that "such application or any survey or description of the property to be referred to herein shall be considered a part of this policy, and every part of it a warranty by the assured; but this company will not dispute the correctness of any diagram or plan prepared by its agent, from a personal inspection," and by a variation of another condition it was provided that if any agent of the company took "part in the preparation of this insurance he shall, with the exception above provided for of a diagram or plan, be regarded in that work as the agent of the applicant." In the application prepared and signed by the agent the existence of a small building, used tor storing coal oil, had not been mentioned as required by the company, neither was any reference made to it in the diagram prepared by the agent, who passed the premises daily and was quite familiar with the state of the property, and which was prepared by him from inspections made on previous applications.

Held, [reversing the judgment of the Common Pleas, 31 C. P. 618,] that the company was not at liberty to set this up as a defence, and judgment was ordered to be entered up for the full amount of the policies; and, per ARMOUR, J., interest should be allowed thereon to be computed from the date of the verdict being rendered.

Bethune, Q.C., and *Dixon*, for the appellant.

McCarthy, Q.C., and *A. Galt*, for respondent.

QUEEN'S BENCH DIVISION.

IN BANCO.

REG. EX REL. NASMITH v. TORONTO.

By-law—A seizure of bread—Stamping loaf.

A by-law enacting that bread shall be of a given weight, which shall be stamped on the loaves sold, and that all bread sold not complying with such by-law shall be seized and forfeited, is good.

Rose, Q.C., for relator.

McWilliams, contra.

VOGEL v. G. T. RAILWAY CO.

Railway Act, 1879—Live stock—Special conditions—Owner's risk—Loss by negligence.

Plaintiff shipped cattle on defendant's railway, subject to the conditions of a bill of lading, which specified that live stock were at owner's risk of loss, etc., in loading or unloading, or otherwise. . . Live stock carried by special contract only. The cattle having been lost by defendants' negligence,

Held, that defendants were liable, notwithstanding their conditions, for by 42 Vict. ch. 9, sec. 25, sub-sec. 4, their liability was expressly provided for.

Dickson, Q.C., for plaintiff.

Bethune, Q.C., contra.

MILLOR v. HAMILTON AND WIFE.

Mortgagor and Mortgagee—Statutes of Limitations—Acknowledgement—Insolvent Act of 1864—Trustee and c. q. t.—Possession of husband and wife.

A being seized of land subject to a mortgage to L. dated 14th October, 1863, and to one to M. dated 12th January, 1864, made an assignment to W. on 22nd November, 1866, under the Insolvent Act of 1864. On 28th January, 1868, he obtained his discharge. On 27th January, 1869, he obtained from M. an assignment of M.'s mortgage; and on 3rd May, 1869, he made a conveyance under the power of sale in this mortgage to F. H. to the use of his (the grantor's) wife, his co-defendant, the consideration mentioned being $250, which was credited on the mortgage.

On 12th April, 1869, L. assigned his mortgage to M. B., who, on 25th March, 1873, as-

signed it to W. In 1879, H. having procured assignments to himself of most of the claims against his insolvent estate, presented a petition, signed by himself, to compel W. to wind it up. He alleged that M. B. held the L. mortgage in trust for the estate, and asked to have the estate realized and distributed among the creditors. A sale was accordingly had on 20th April, 1880, of all the right, title and interest of the insolvent in the land, and the advertisement further stated that the purchaser would acquire only such title as the vendor had as assignee. A. attended at the sale, and objected to the sale of the land, and bid for the same, but the plaintiff became the purchaser, and took a conveyance from W. on 4th February, 1881. Most of the purchase money went to H. as assignee to the claims against the estate. H. and his wife had remained in undisturbed possession since his discharge in insolvency.

Held, [reversing the decision of OSLER, J.], that upon the evidence set out below, the possession of H. and his wife must be considered to have been the possession of H. That the title of the first mortgagee was not extinguished, and that defendants were estopped by their conduct from disputing the plaintiff's title.

Bethune, Q.C., for plaintiff.

Beaty, Q.C., and *Allan Cassels*, contra.

IN RE WILSON V. MCGUIRE.

Constitutional Law—Local Courts Act—County Court Districts—Validity of Act respecting—Jurisdiction of Division Court Judge without his own county—Prohibition.

Pursuant to the Local Courts Act, R. S. O. cap. 42, ss. 16 *et seq.*, the Counties of Middlesex and Lambton were proclaimed by the Lieutenant-Governor as a County Court District. By section 17, in such a district the several County Courts, Division Courts, etc., shall be held by the Judges in the district in rotation. By the Division Courts Act, R. S. O. cap. 47, sec. 19, the Division Courts shall be presided over by the County Court Judges in their respective Counties. An order for the committal of the defendant was made by the Judge of the County Court of the County of Lambton, sitting in a Division Court in the County of Middlesex, under the provisions of the Local Courts Act. A motion for a prohibition was made on the ground that that enactment was *ultra vires*.

Held, [ARMOUR, J., dissenting], that the Legislature of Ontario having complete power over the Division Courts as to their existence and constitution, had the right, also, to appoint officers to preside over them: and, therefore, that the Local Courts Act, R. S. O. ch. 42, sec. 16, *et seq.*, by which several counties may be grouped, and the Division Courts in each group be held by the Judges of the different counties forming such group in rotation, were not *ultra vires* as regarded such courts.

Where the County Judge of the County of Lambton, holding a Division Court in the County of Middlesex under this Act, made an order to commit a defendant for not attending to be examined,

Held, that such order was authorized, and a prohibition was refused.

Per ARMOUR, J.—The effect of the statute is to appoint the County Court Judge of one County to be a County Court Judge of another County, which is beyond the power of the Legislature; and *semble*, that they have no power to appoint Division Court Judges either.

Bethune, Q.C., for application.

Irving, Q.C., contra.

LETT (ADMINISTRATOR) V. ST. LAWRENCE AND OTTAWA RAILWAY CO.

HINTON V. ST. LAWRENCE AND OTTAWA RAILWAY CO.

Lord Campbell's Act—Death of wife—Husband's right of action—Pecuniary damages—Collision at crossing—Proof of negligence.

The plaintiff sued under Lord Campbell's Act, on behalf of himself and children, for the death of his wife occasioned by the defendants. The wife had some separate estate from which she derived an income, but the jury allowed no damages in respect thereof. It was not shown that the wife afforded any pecuniary assistance either to the husband or her children. The jury found for the plaintiff, and apportioned the damages amongst the plaintiff and some of his children.

Held, [ARMOUR, J., dissenting], that the verdict was wrong; for the plaintiff was not entitled either for himself or the children, to recover compensation for anything but pecuniary loss,

or the loss of a reasonable probability of pecuniary benefit.

Per ARMOUR, J.—The loss to be compensated is the loss of some benefit or advantage capable of being estimated in money, so distinguished from a *solatium* for wounded feelings and loss of companionship, and the loss to the husband of the wife's performance of her household duties, and to the children of a mother's education, and both are losses which can be estimated by a jury.

Per ARMOUR, J.—The jury were rightly directed under the facts stated below, that the defendants had laid down the track on which the accident happened, in the City of Ottawa, without authority, it being a third track or switch for use in connection with their railway, for purposes of shunting, etc. And if illegally laid down, no acquiescence, except by by-law, would make it rightful as against the public.

Per HAGARTY, C. J.—Having been there for many years with the knowledge and acquiescence of the Corporation, its existence could not alone make defendants liable; but it was very properly brought as a circumstance to be considered by the jury.

A judge is not bound, under the Judicature Act, to submit questions in writing to the jury.

The train was backing at the time.

Per ARMOUR, J.—The jury were rightly directed that defendants were bound to sound the whistle or ring the bell, when the nearest part of the train was eighty rods from the crossing, and having regard to the fact that they had without authority increased the number of tracks there, it was also right to tell them that it was for them to say whether, considering the nature of the crossing, they should not have stationed a man there, or taken some other than the statutory precaution.

McCarthy, Q.C., for plaintiff.

Bethune, Q.C., contra.

Referred up re Kirkpatrick, 10 Dec. 14.

CHANCERY DIVISION.

Boyd, C.] [Feb. 14.

RE KIRKPATRICK; KIRKPATRICK v. STEVENSON.

Executors—Statute of Limitations.

Appeal from the Master. John Kirkpatrick died June 18th, 1860. This was a claim by one of two residuary legatees under his will, who were also his executors, against his co-executor, for half the residue of the estate of the said John Kirkpatrick. It appeared that the residue was ascertained, or could have been ascertained, within a year from the testator's death. By arrangement between the executors, the one now in default got in all the outstanding assets, under an agreement, as it was said, by which he was to divide with the other, and remit a moiety when the sums collected amounted to a certain aggregate.

Held, for what was so collected antecedent to ten years before the presentation of the claim, the bar of the Statute (R. S. O., c. 108, sect. 23) applied; but as to all sums got in by the acting executor, within ten years from the making of the present claim, the claimant was entitled to recover. And the objection that the residue was not precisely, and for all purposes ascertained, because the fund in the hands of the acting executor had been from time to time drawn upon to make good deficiencies in the general legacies, did not operate to exempt the claimant from the bar of the Statute; neither was it correct to say that the acting executor was a trustee of the moiety of the moneys collected by him, and that the Statute was no bar in such a case. *Quoad* the money collected the acting executor had no duty to perform as trustee for the other executor, neither had he any such duty as owner in common of the residuary estate. His receipt of the whole made him a debtor to the other, and the alleged arrangement between them did not carry the matter any higher. *Crawford* v. *Crawford*, 16 W.R., 412, per Christian, L.J., approved of and followed. *Burdick* v. *Garrick*, L. R. 5, Ch. 233, distinguished.

The authorities show, notwithstanding a contrary opinion expressed by Romilly, M.R., in *Reed* v. *Fen*, 35 L.J., Ch., N.S., 464, that the Statute applies, not only to assets distributed by the personal representative, but also to assets retained by him.

D. McCarthy, Q.C., and *T. S. Plumb*, for the claimant, (appellant).

J. Maclennan, Q.C., contra.

Divisional Court.] [Feb. 15.

BLACK v. STRICKLAND.

Bills of exchange—Special endorsement—Negotiability.

The possession of bills by the endorser, after he has specially endorsed them, is *prima facie* evidence that he is the owner of them, and that they have been returned to him, and taken up in due course of time upon their dishonour, although there be no re-indorsement; so that by the possession he is remitted to his original rights.

On July 25th, 1877, W. drew a bill of exchange on the defendants, payable to his own order at sixty days, which they accepted. This note was first endorsed "pay to the order of the Bank of Ottawa"; the Bank of Ottawa specially endorsed it for collection to the Bank of Commerce. The bill was dishonoured and protested, and came again into the hands of the Bank of Ottawa, who returned it to W. on or before December. 1877. It afterwards, how did not clearly appear, got back into the hands of the Bank of Ottawa, In 1881, the plaintiff, who was W.'s agent, got it from the Bank of Ottawa, along with other papers of W. W. then endorsed it to the plaintiff, in Nov. 1881. The plaintiff now sued the acceptors of the bill.

When produced the bill appeared with the special endorsements all struck out, and leaving only the signature of W. to the first special endorsements, and with the last special endorsement to the order of the plaintiff. There was no re-endorsement from the Bank of Ottawa to W. or the plaintiff.

Held, [reversing FERGUSON, J., who had nonsuited the plaintiff,] in the absence of other evidence, it was to be inferred that W. satisfied any claim of the Bank of Ottawa, "took up" the bill, and thereby procured or had the right to make the cancellation of the previous special endorsements. Thus the objects for which the bill had been endorsed to the Bank were satisfied, and the special endorsements became inoperative upon the return of the instrument. The mere handing it back was enough, in these circumstances, to make W. the legal holder with the right to re-endorse to the plaintiff, for the authorities show that, whether the Bank of Ottawa returned the bill to W. because their claim on it, as discounters, was satisfied, or whether it was not discounted by the Bank, but merely left with them by W. for collection; in either case, when it came back to W., he was remitted to his original rights against the acceptor.

Callow v. *Lawrence*,, 3 M. and S. 95, cited and followed.

Wells, for the plaintiff.

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

Divisional Court.] [Feb. 15.

DOVEY v. IRWIN.

Pleadings—Admissions in answer.

Where a defendant admits any of the allegations in the plaintiff's bill, the whole of the admission should be looked at according to the rule in *Reade* v. *Whitchurch*, 3 Sim. 562; that the sense and not merely the grammatical construction or form is to be regarded as the criterion of the extent and scope of the admission.

When A. sued for a wrongful conversion of certain timber by the defendant, setting out an agreement made by him and B. with the defendants, under which they agreed to deliver certain timber to the defendants, and alleged that B. was only a surety in respect of the said agreement, and that no timber had been delivered under the said agreement, but the defendants wrongfully made a seizure of some of the plaintiffs' timber; and the defendants admitted in their answer that they took possession temporarily of certain timber, the joint property of the plaintiff and B. (who was a defendant), and that before they took permanent possession of such joint property, they agreed with B. for a reduction of the price by an agreement which he had the power to make, and uuder which they acted.

Held, not such an admission as entitled the plaintiff to a decree, for the onus still rested on the plaintiff to prove himself the sole owner of the timber, and that he had a cause of action in thus suing alone, after which the onus would shift to the defendants to prove their defence.

Hector Cameron, Q.C., for the appeal.

S. H. Blake, Q.C., contra.

Divisional Court.] [Feb. 15.

CHURCH v. FULLER.

Costs—Jurisdiction.

Whatever may be the rule in England, this Court has maintained the jurisdiction to make a defendant pay costs in a suit for specific per-

formance, though the bill be dismissed, if the circumstances be such as to warrant doing this.

Hence, in this suit brought for specific performance of an alleged agreement for the sale of lands by the purchaser against the vendors and a subsequent purchaser, where the judge of first instance had dismissed the bill without costs, but gave the defendant purchaser his costs against defendants, the vendors,

Held, the judge had jurisdiction to make such order, and, he having such jurisdiction, the making of it was within his discretion, and he having exercised it, the Court ought not to interfere.

McMahon v. *Barnes* (1858, Order Book No. 9, fol. 730), not reported, followed.

J. Maclennan, Q.C., for defendant Gebbie.

Proudfoot, J.] [Feb. 20.

FLANDERS v. D'EVELYN.

Infants—Foreign guardian.

In this action a guardian appointed by one of the Probate Courts of Minnesota, sought to recover legacies bequeathed to three infant children.

Held, on analogy of rule laid down in *Blake* v. *Blake*, 2 Sch. and Lef. 25, and *Mitchell* v. *Richey*, 13 Gr. 446, with reference to testamentary guardians, and guardians appointed by our Surrogate Court respectively, (than whom a guardian under the statutes of Minnesota, appeared on the evidence to have no greater powers or duties), that the money must be paid into Court, and could not be ordered to be paid to the foreign guardian.

Semble, the rule might be modified if the sum were small, and the whole, or nearly the whole were required for the infants' education and maintenance, or other immediate care.

PRACTICE CASES.

Mr. Dalton.] [Dec. 8, 1882.

POUCHER v. DONOVAN.

Attachment—Reference.

The plaintiff in an action under the Mechanics' Lien Act, obtained a reference to ascertain the amount of his claim.

Pending the reference, one Withrow, an execution creditor of the plaintiff's, for a deficiency after sale of lands in a mortgage suit, applied for an order to attach such sum as might be found due on the reference.

The plaintiff alleged fraud in the mortgage sale and proceedings, and sought relief by way of cross motion under the O. J. A.

The Master in Chambers made an order attaching the amount, if any, that should be found due on the reference.

Moffatt, for the application.

Rae, for the plaintiff.

Caddick, for the defendant.

Mr. Dalton.] [Feb. 14.

LEONARD v. KEONAND.

Alimony—Costs.

The plaintiff in a suit for alimony, returned to her husband pending a motion for interim alimony.

Held, that her solicitor was entitled to costs between solicitor and client against the husband

J. Macgregor, for plaintiff.

Badgerow, for defendant.

HOLMESTED v. VANDERBOGART.

Action by accountant—Mortgage suit—Proof of claim.

In an action for sale or foreclosure brought by the Accountant of the Supreme Court to enforce payment of a mortgage vested in him as such accountant, where no defence has been put in, it is not necessary for the accountant to make affidavit in proof of the claim in the Master's Office, but the Master is justified in proceeding on the certificate of the accountant certifying the amount appearing to be in arrear according to his books, and that he has not been in possession of the mortgaged premises.

REPORTS

ONTARIO.

(Reported for the LAW JOURNAL.)

CHANCERY DIVISION.

MASTER'S OFFICE. — COUNTY OF ONTARIO.

ENGLISH v. GLEN.

Postponement of sale—Application for—Practice.

An application to postpone a sale must be made promptly and on notice, and such application must be made to the Court or a Judge, and not to the Master who settled the advertisements.

[Whitby.—DARTNELL, J.J.

The solicitor for the owner of the equity of redemption, two days before the day appointed for sale, applied to the Master at Whitby for a postponement. No affidavits were filed, but the vendor's solicitor appeared and did not object; but the solicitors for a mesne incumbnancer strongly objected.

THE MASTER AT WHITBY.—I do not think I have any authority to grant this application. I think it should be made to a Judge in Chambers, and should have been made on notice promptly, aud on affidavits or papers previously filed. A very weighty case indeed must be made for postponement. The policy of the Court is to give every confidence to intending purchasers at a sale conducted under its auspices. In this case it is alleged that it is probable that bidders, or parties interested, living in the United States will be present, and it would be impossible, in the time, for any notification to reach them, much less the general public. The vendors, after opening the sale, might postpone it for sufficient reasons; for example, should there be no bidders, but (particularly where a mesne creditor objects) a vendor's solicitor should be cautious in withdrawing the property from sale. He is an officer of the Court, amenable to its discipline, and, to a certain extent, is a trustee and guardian, not only of the plaintiff's interests, but those of other parties to the suit. On both grounds I decline to direct any postponement, and the sale must go on.

RECENT ENGLISH PRACTICE CASES.

D'HORMUS-GEE & CO. v. GREY.

Imp. O. 16, r. 1—Ont. Rule 89—Security for costs—Joint and separate claim.

[L. R. 10 Q. B. D. 13.

The above rule makes no alteration in the practice as regards security for costs, so as to alter the law, as it existed before the Judicature Acts, that where one of two joint plaintiffs is a foreigner out of the jurisdiction, yet if the other resides within the jurisdiction there can be no order for security for costs.

Per MANISTY, J., *Umfreville* v. *Jackson*, L. R. 10 Ch. 580, seems precisely in point.

[NOTE.—*The Imperial and Ontario rules are virtually identical.*]

RE EAGER, EAGER v. JOHNSTONE.

Imp. O. 11, r. 1—Ont. rule 45—Service of writ out of jurisdiction.

[L. R. 22 Ch. D. 86.

No leave to serve a defendant out of the jurisdiction can be given except in the cases specified in the above rule.

Per JESSEL, M.R., "The new rule is exhaustive; the old practice is no longer applicable. This case is admitted not to be within the rule, therefore we cannot order service."

[NOTE.—*The Imperial and Ontario rules are virtually identical.*]

EATON v. STORER.

Imp. O. 24, r. 1, O. 57, r. 6—Ont. rules 173, 462—Leave to deliver reply after time.

[L. R. 2 Ch. D. 91.

The time for delivering a reply, which would have expired on July 25th, was extended to August 22nd, and then to September 19th. On September 26th no reply having been delivered the defendant served notice of motion for judgment. On the same day the plaintiff, by leave of the judge, served notice of motion for the following day for leave to deliver a reply, and on the 27th the judge refused the plaintiff's motion on the ground of unexplained delay.

Held, on appeal, the application ought to have been granted on the terms of the plaintiff's paying the costs of it.

Per JESSEL, M. R., According to the usual practice of the Court the plaintiff's application ought to have been granted. The plaintiff was out of time, and in that case if a motion is made for judgment on admissions in the pleadings, or if the analogous step is taken of a motion to dismiss for want of prosecution, the usual course is to give the plaintiff time to take the next step upon his paying costs, which is a sufficient punishment and will prevent the rules from becoming a dead letter. This course will not be departed from unless there is some special circumstance such as excessive delay. In the present case there was no extraordinary delay, the original time for delivering reply not having expired till July 25th.

[NOTE.—*The Imperial and Ontario rules are identical.*]

IN RE MILAN TRAMWAYS COMPANY.

Imp. O. 19, r. 3 — Ont. rule 128 — Set off — Counter-claim.

L. R. 22 Ch. D. 121.

Per KAY, J., "In my opinion this rule was not intended to give rights against third persons which did not exist before, but it is a rule of procedure designed to prevent the necessity of bringing a cross-action in all cases where the counter-claim may conveniently be tried in the original action."

[NOTE.—*The Imperial and Ontario rules are identical.*]

CORRESPONDENCE.

Signing Judgments in Div. Courts under O. J. A.

To the Editor of the LAW JOURNAL.

SIR,—In the number of your valuable journal of the 15th instant, you published a report of Judge Clarke in the case of *Burk* v. *Brittain*, where he holds that he may, by virtue of section 244 of the Division Court's Act and rule 80 O. J. A., grant an order empowering the plaintiff to sign judgment without a formal trial of the action in cases commenced in the Division Court by special summons. In an editorial notice of the judgment, you refer to the case of *Willing* v. *Elliott*, which you will find fully reported in 37 U. C. Q. B. 320. I acted for the plaintiff in this case of *Burk* v. *Brittain*, and on the strength of my success applied to the Judge of the County Court at Lindsay, for a summons calling on the defendant to show cause why the plaintiff should not have leave to sign final judgment in a case of *Conan* v. *McQuade* on the same material as in the former case, by a certified copy of all the proceedings in the cause, and an affidavit as provided by Rule 80, O. J. A. made by the plaintiff; but the Judge refused the summons. In this latter case the action was on a note made by the defendant, and commenced by special summons. The learned Judge, in refusing the summons, did not deliver a written judgment, but said that while he considered that under the authority of *Fletcher* v. *Noble*, *ante* vol. 18, p. 371, he had the power by virtue of sec. 244 of the Division Court Act, to grant this summons, still it was a matter of discretion, and he did not think it a proper case to call forth the exercise of that discretion. He thought that in many cases it might work injustice to a defendant who could successfully oppose such an application, as he would be put to costs in employing a solicitor to prepare affidavits, &c., which could not be given back to him in any way that he was aware of. Witness fees and expenses might be allowed him in case he defended in person and came to the county town to oppose; but the usual way of defending such a motion, namely, by affidavits and counsel, would be entirely lost. For the purpose then of laying down a principle to apply to all cases which might result in many ways, he deemed it not expedient to grant the summons.

Yours truly,

D. BURKE SIMPSON.

Bowmanville, Feb. 19th, 1883.

Where it is expressed in terms upon a railway ticket that it is not good unless "used" on or before a certain day, a presentation of the ticket and its acceptance by the conductor before midnight of that day, although the journey is not completed until the next morning, will be held to be a compliance with the condition.

Where a railway ticket binds a passenger to a continuous journey, he is not bound to commence his journey at the starting point named in the ticket, but may enter the train at any intermediate station on the route.—*Auerbach* v. *New York Central, R. Co.*, (*Am. Law Reg.*, Dec. 1882.)

Law Society of Upper Canada.

OSGOODE HALL.

HILARY TERM, 1883.

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

William Renwick Riddell, Gold Medalist, with honours ; Louis Franklin Heyd, William Burgess (the younger), John Joseph O'Meara, Charles Coursolles McCaul, James Henry, Frederick William Gearing, James Albert Keyes, James Gamble Wallace, Harry Dallas Helmcken, Albert John Wedd McMichael, Hugh D. Sinclair, Christopher William Thompson, Walter Allan Geddes, James Thompson, John William Binkley, Richard Scougall Cassels.

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

Graduates—Joseph Nason, Henry Wissler, Robert Kimball Orr, Henry James Wright.

Matriculant—William H. Wallbridge.

Juniors—Joseph Turndale Kirkland, William James Sinclair, Francis P. Henry, Michael Francis Harrington, Thomas Browne, Charles Albert Blanchet, John Hood, Jaffery Ellery Hansford, Albert Edward Trow, Ralph Robb Bruce, Edwin Henry Jackes, William Herbert Bentley, Arthur Edward Watts.

Articled Clerk—William Sutherland Turnbull passed his examination as an articled clerk.

RULES

As to Books and Subjects for Examination.

PRIMARY EXAMINATIONS FOR STUDENTS AND ARTICLED CLERKS.

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

Articled Clerks.

From 1882 to 1885.
- Arithmetic.
- Euclid, bb. I., II., and III.
- English Grammar and Composition.
- English History Queen Anne to George III.
- Modern Geography, N. America and Europe.
- Elements of Book-keeping.

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

Students-at-Law.

CLASSICS.

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

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

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

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

Translation from English into Latin Prose.

MATHEMATICS.

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

ENGLISH

A paper on English Grammar.
Composition.
Critical Analysis of a selected Poem :—

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

1884—Elegy in a Country Churchyard.
The Traveller.