THE

MANITOBA LAW JOURNAL.

VOL. I. DECEMBER, 1884. No. 12.

QUEEN'S COUNSEL.

THE Hon. S. C. Biggs, H. M. Howell, J. A. M. Aikins and John S. Ewart have been gazetted Queen's Counsel.

The practice of singling out, from time to time, certain barristers for invidious distinction, should have been abolished together with patents of monopoly—that is some centuries ago. When courtiers were paid for sycophancy by grants of lands, titles or special privileges, it was fitting that the king's favorites at the bar should have precedence over those who withstood his pretensions. And in the England of to-day, with its survival of patents of nobility and of enormous annuities paid to the wealthy inheritors of names, out of the contributions of the poor, the practice is still, if indefensible, at all events kept in countenance. But in Canada it is an anachronism, and (barring the presence of a few knights) is the only part, and the most obnoxious part, of a system wholly foreign to our institutions, manners and feelings.

There are two grounds upon which these patents of precedence are supposed to be granted—political services and professional merit. Of the two, we think the former the less objectionable. Let it be understood that during tory reign the tory lawyers can, on application, obtain their

silk, and when the grits succeed to office that their friends shall succeed at the bar, and, all events, we have an intelligible system. But, if merit is to be the ground, who is to award the prize? It is safe to say that the Governor General and his Council are seldom, if ever, personally aware of the respective abilities of those who are in daily competition at the bar, and yet they are those who decide the question. Ifthe matter were as easy of decision as a horse-race, by all means let there be an annual contest, and let the best man get his reward. But, in so doubtful a matter as legal ability, who can decide? What is the criterion? Is it success? That comes sometimes without learning. Is it learning? That may exist without success. Is it both learning and success? Then what degree of each? Twenty briefs at an assizes, with fifteen wins to five losses? There is no gauge, and from the leaders to the duffers the gradation is so insensible that there must always be great difference of opinion as to the proper order of merit. It will not do to let the judges make the selection—although they are the most competent to do it—for they must keep themselves free from the suspicion of favoritism. It would disturb the harmonious relations of the bar to place the matter in the hands of practitioners, or the Law Society. Practically, those with influence at Ottawa, dispense the patronage, and usually the list is absurd and indefensible.

We object to the system because it gives one barrister a factitious importance and dignity over his fellows. If nature has endowed him with greater ability or industry, that is no reason why the Government should add to his advantages, and, if his inclinations are political rather than professional, he should look for political and not professional rewards.

We object to the system also, because it is carried out at the expense of jealousy, ill-feeling, and heart-burning, and because it subserves no useful purpose. What propriety is there in exalting one man and, in consequence, relatively depressing another? Till nature changes, favored elevation will turn conceit into superciliousness, and slights will discourage and dishearten all but the most indomitable.

Without being, ourselves, invidious, we may perhaps venture to say that, if such men as F. Beverly Robertson, N. F. Hagel, or W. H. Culver do not recognize their inferiority to those above named, and therefore concur in the omission of their names from the present list, they have more than mere self-appreciation wherewith to back their opinion.

But we cannot discuss such a subject. It is one that trenches too closely upon personal feelings and aspirations, and cuts too keenly wherever it touches. We advocate the abolition of the title. Let it be witheld from those who do not require it in order to success, and not granted to those who cannot succeed upon their own merits.

ENTERING RECORDS.

RECORDS must be entered between nine and twelve o'clock of the commission day, and the theory is that all the witnesses and counsel in all the cases are to be on hand at the opening of the court, for no one can tell whether his case is to be tried on that day or three weeks afterwards, and no arrangements can be made until the lists are filled up. If the rest of the world stood still while the assizes progressed there could be no objection to putting the theory in operation. But people insist upon giving as much time as they can to their business, and as little as possible to the assizes. Why should not cases be entered at any time up to the last day for giving notice of trial, and after that, only upon a judge's order? This is the rule in England and Ontario, and in equity cases in this Province, and it works well.

REGISTRY ACT.

THE following is not only a nice point, but a very important one :

The owner of land sells and conveys first to A, and afterwards to B. At the time of B's purchase he had actual notice of the conveyance to A. B sells to X, who had no notice of A's interest, his deed not having at the time of the conveyance been registered. The order of registration is, first, the deed to B; seeond, the deed to A; and third, the deed to X. Quære, Is X entitled to the land as against A ?

For X it may, by hypothesis, be said that at the time when he took his conveyance and paid his purchase money, the registry showed a perfect title in B, his vendor, and that he had no notice of anything not disclosed by the registry. Is he not, then, perfectly safe, and if he refrains from recording his deed, is not his only danger that his vendor may execute another conveyance to some other person who by registering will obtain priority ? The general assumption has been in the affirmative, but it would be well to give careful attention to the provisions of the Registry Act before acting upon this opinion.

Irrespective of the Act, X would have no chance of success. Then which clause of that Act helps him ?

Section 43 is as follows: "Priority of registration shall in all cases prevail, unless, before such prior registration there shall have been actual notice of the prior instrument to the party claiming under such prior registration." According to Mr. Justice Gwynne, in *Millar* v. *Smith*, 23 U. C. C. P. 57, these words may be transposed as follows: "Priority of registration shall not prevail, if, before such prior registration, the party claiming under the prior registration shall have had actual notice of the prior instrument."

It seems to be pretty clear that the words "the party claiming under such prior registration" refer to the party to the instrument itself, and not to subsequent purchasers claiming through such party; in fact, that the section does not contemplate the position of X, and makes no provision for him. If it were otherwise, it would be immaterial whether subsequent purchasers had notice of the prior instrument or not, so long as they did not know of it before the registration of the subsequent instrument. It would then be perfectly competent for any one to purchase from a person who had already conveyed away his estate, to the knowledge of the purchaser, to register his conveyance, and then, after relating the whole fraud to his sub-purchaser, to conclude a sale to him—that is, provided, of course, the sub-purchaser was not aware of the first sale prior to the registration of the second deed.

Section 40 is the only other section which can have application. It provides that any instrument shall be void as against a subsequent purchaser for value, without notice, "unless such instrument is registered in the manner in this Act directed before the registering of the instrument under which such subsequent purchaser or mortgagee may claim."

Now X is a subsequent purchaser for value, without notice. X therefore is within the section unless the prior deed to A was registered "before the registering of the instrument under which he (X) claims. What deed is referred to? X claims under two deeds—the deed to B and the deed B to X. Is not the competition for priority between the deeds to A and B? And if the deed to B is registered first, and X claims under it, is he not, being a purchaser for value without notice, entitled to assert the priority of the deed. B could not assert it, for he was not a purchaser within the meaning of the clause; but X gave value and had no notice. Cannot he claim the benefit of the prior registration? It will be observed that the statute does not provide that the prior deed is to be void as against the subsequent *deed*, but as against a subsequent *purchaser*.

Let us suppose, for the sake of argument, that the words "the instrument under which he claims" refers to the deed B to X—that is to say, that the subsequent purchaser must have registered his own deed before the registration of the first deed. If this be the meaning, then there is no reason why the deed to B should be registered at all, and if it were not, X would succeed because he was a purchaser for value without notice, and had registered his deed prior to the registration of the deed to A. Again, if this be the meaning of the section the competition for priority is not between the two deeds originally made, but between the first deed and the deed to the person seeking priority over it. And it follows that if B were a purchaser for value, without notice, and registered first, he could not, after registration of A's deed, sell to anybody, for nobody could then register his deed before A. If any one did purchase, he would be told that the deed under which he claimed was not registered before A's conveyance, and he could have no benefit of B's priority of registration. It seems to us that he should be entitled to avail himself of that priority; that the words, "the instrument under which he claims," must therefore mean the one of the two *competing* deeds—the deeds to A and B—through which his title comes; and that if, therefore, at the time when X paid his money and took his conveyance he had no notice of A's interest, he is entitled to priority, even though the deed to himself never was registered.

The opposite rule would not, however, be an unreasonable one to establish—viz.: that if a purchaser intends to rely on the Registry Act, he should put his deed upon record under its provisions; that he should not pay his purchase money until his conveyance is registered; and that he should search the records down to that time. Until the point is determined, this "opposite rule" is the safest for the profession.

HOWELL ON NATURALIZATION.

RECEIVING, as we do, every year large numbers of emigrants from foreign lands, it is important that the principles of the existing law of naturalization should be understood.

"By the common law of England, every person born within the dominions of the crown, no matter whether of *English* or foreign parents, and in the latter case, whether the parents were settled, or merely temporarily sojourning in the country, was an *English* subject, save only the children of foreign ambassadors (who were excepted because their fathers carried their own nationality with them), or a child born to a foreigner during the hostile occupation of any part of the territories of *England*." (*Howell*, pp. 7, 8.) In this and other places the learned writer makes the mistake of using *English* for *British*, and *England* for *Great Britain*—a mistake wholly unpardonable to Scotchmen and Irishmen. His meaning is, however, clear enough, and being Canadians we forgive him.

"Once a British subject, always a British subject," was a maxim of the common law. In *Fitch* v. *Weber*, *6 Hare*, *63*, Vice-Chancellor Shadwell said: "Nothing, I apprehend, can be more certain, than that a natural born subject cannot throw off his allegiance by any such acts,"—referring to naturalization in the United States. And Chief Justice Cockburn, in his work on Nationality (pp. 63, 177), asserts, "as an inflexible rule, that no British subject can put off his country, or the natural allegiance which he owes to the sovereign, even with the assent of the sovereign; in short, that natural allegiance cannot be got rid of by anything less than an Act of the Legislature, of which it is believed no instance has occurred."

This is, however, all changed by recent legislation, and the principle of expatriation is acknowledged by treaty between Britain and foreign countries—and, among others, the United States.

"In the light of the new naturalization laws, English and United States authorities give the following definition :— "Expatriation takes place when a person loses his nationality, and renounces his allegiance to his native country, by becoming the subject of a foreign state. Expatriation by a subject has been made possible in the United Kingdom by the Naturalization Acts of 1870 and 1872, and in the United States by the Act of Congress of July 27, 1868, and in Canada by the Act of 1881." (*Howell, p. 14.*)

These and other matters are well shown in Mr. Howell's book. The various statutes bearing upon the law are given, and forms for practical use provided.

BRITISH COLUMBIA LAW REPORTS.

BRITISH Columbia, although many years older than Manitoba, is a little later in commencing a series of law reports. They are well done, however, and the Columbians are lucky in having secured the services of Mr. Irving, formerly of Hamilton, Ontario, as editor. Judges on the Pacific seem to be as unable as some of their brethren in other places to express an idea in less than a page or two. The reporter cannot help this, however, and perhaps the lengthy appearance of the judgments when in type may induce their lordships to practice brevity.

JUDGES' SALARIES.

WE were in error in saying that nominally the salaries of the Ontario and Manitoba judges are the same. They are not the same. The Ontario salaries are $1,000 more than the Manitoba, which, with the circuit allowance averaging another $1,000, leaves the latter fifty per cent less than the former. This is extremely unfair to our judges, although the bar cannot but be pleased with the arrangement if the result is that the political candidates strive for the Ontario Bench and leave the Manitoba for the hard working and able devotees of the profession. What justice is there in giving Mr. Justice O'Connor $6,000 a year and any of our *puisnes* $4,000? The fact that Mr. Justice Smith was sent here and Mr. Justice O'Connor to Toronto may be a matter for sincere congratulation to our bar, for even *The Canadian Law Times* thinks that politics and not the fitness of things dictated Mr. Justice O'Connor's elevation to the bench at all; but there can be no doubt of the unfairness of the arrangement. The best man should get the best position. We trust that our representatives in Parliament will attend to this matter when it arises for discussion at the next session.

A cognate matter for simultaneous settlement is the equalization of the judges with reference to retiring allowances. No doubt it was by oversight that no provision was made for the Manitoba judges in this respect, but whether intended or not, our judges should have their old age provided for, and all the more so because of the inadequacy of their salaries while at work.

CONVEYANCING.

THE verbose technicalities of legal phraseology are well hit off in the following: "If a man would, according to law, give to another an orange, instead of saying "I give you that orange," which one would think would be what is called, in legal phraseology, "an absolute conveyance of all right and title therein," the phrase would run thus: "I give you all and singular my estate and interest, right, title, claim, and advantage of, and in, that orange, with its rind, skin, juice, pulp, and pips, and all right and advantage therein, with full power to bite, cut, suck and otherwise eat the same, or give the same away as fully and effectually as I, said A. B., am now entitled to bite, cut, suck or otherwise eat the same orange, or give the same away, with or without its rind, juice, pulp and pips, anything heretofore or hereafter, or in any other deed or deeds, instrument or instruments, of what nature or kind so ever, to the contrary notwithstanding."—*Ohio Law Journal.*

BEGUILING THE COURT.

WRITS have recently been issued in an action of a remarkable kind brought against the defendants in a previous action, two Queen's Counsel, three junior counsel, three firms of solicitors, and the Attorney-General. On payment of a hundred thousand pounds and one guinea costs it is in the usual form stated that all proceedings will be stayed. The action professes to be brought under 3 Edw. 1 c. 29 (the Statute of Westminster the First), whereby it is provided that 'if any serjeant, pleader, or other do in any manner of deceit or collusion in the King's Court, or consent unto it in deceit of the Court, or to beguile the Court or the party, and thereof be attainted, he shall be imprisoned for a year and a day, and from thenceforth shall not be heard to plead in that Court for any man, and if the trespass require greater punishment it shall be at the King's pleasure.' This Statute is still unrepealed, so that all concerned should beware how they attempt to 'beguile a Court.'—*Central Law Journal.*