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DIARY FOR MARCH.

1. Tues...Co. Ct. sitt. for York begin. Ct. of Appeal sitt. begin.
5. Sat.....Osler J. appointed.
6. Sun. ...Quadragesima Sunday. Name o. York changed to Toronto, 1834.
11. Fri.....First London daily paper, 1702.
13. Sun.....2nd Sunday in Lent.
17. Thurs..St. Patrick's Day.
18. Fri.....Princess Louise born, 1848.
20. Sun.....3rd Sunday in Lent.
23. Wed....Sir George Arthur, Lieut.-Governor U. C., 1838.
27. Sun.....4th Sunday in Lent.
28. Mon...Canada ceded to France, 1632.
30. Wed...B. N. A. Act assented to, 1867.
31. Thurs..Lord Metcalfe, Governor-General, 1843.

TORONTO, MARCH 15th, 1881.

WE understand that the vacancy in the Chief Justiceship of the Court of Appeal has been filled by the appointment of the Chancellor to that position. No other appointments have as yet been made.

George C. V. Buchanan, Esq., Q. C., has been appointed one of the Judges of the Superior Court of the Province of Quebec, in the room of the late Judge Dunkin.

THE new Ontario Judicature Act has now become law and before the 22nd of August next, every member of the profession must have made himself tolerably familiar with an entirely new system of pleading and practice. Any aid, therefore, to the understanding of the voluminous and, for a simplification of practice, complicated code of the new procedure will be welcomed. Of the three or four editions of the Act which have been announced, or about which rumour has whispered during the last few weeks, those which are most looked forward to are undoubtedly those of Mr. James Maclennan, Q. C., and of Mr. T. W. Taylor, Q. C.

MR. TAYLOR is so well known to the profession as an author and annotator that we need not enlarge upon his qualifications for such a work. His book on the Chancery Orders has been simply invaluable to the equity practitioner, and it will be generally felt that few better men could be found to do this work than Mr. Taylor. He has proved himself a painstaking and faithful annotator, and no one of course, is more familiar with the Chancery practice, which has largely entered into the construction of the Rules and Orders under the new Act.

MR. TAYLOR'S work will doubtless have a formidable competitor in Mr. Maclennan's, which is already in an advanced stage of preparation. Our readers will remember that last year, upon the submission of a Judicature bill for the consideration of the Legislative Assembly, an announcement was made by Mr. Maclennan of his intention to publish an edition of the Act in case it became law. While the profession and the public have been a year considering the proposed bill, Mr. Maclennan has, apparently, not been idle. We have had an opportunity for perusing the advance sheets of the work, which promises to be not merely a most lucid and masterly commentary upon the Act, but also a complete and comprehensive compendium of the practice of the Courts.

Mr. Maclennan's qualifications for such a work must be at once recognized by all. His varied and extensive knowledge of the law has raised him to one of the most promi-

nent positions at the Bar, whilst his painstaking accuracy and industrious research are well known to his brethren. To understand any amending Act, a knowledge of the pre-existing law is always essential ; and in order to present to both the Common Law and Chancery practitioner a really clear explanation of many of the clauses of the new Act, a thorough knowledge of the present practice in all the different courts is absolutely necessary. For this reason Mr. Maclennan is eminently well qualified for the task he has undertaken. Although, for some years past, he has been most in the Court of Chancery, the Courts of Common Law were, nevertheless, the arena in which his first honors were won; and few of those who have become eminent as counsel have taken as much care as he has, that their knowledge of mere matters of practice should not become rusty. This knowledge of both systems will be of great help to Mr. Maclennan, and of much benefit to his readers.

THE profession are fortunate in having the benefit of the labors of these gentlemen in assisting them to a knowledge of a procedure entirely new to us. Few of those who have any business to do in the Courts will be without a copy of each work. The long vacation will give us a desirable opportunity of indulging in a little of that pleasant light reading which these gentlemen will provide. If the Attorney-General, who has brought in this Act, and is doubtless familiar with its details, would kindly shut up the legislative shop that has passed it, for a few years, he might save them the task of annotating supplements, and the rest of us of spending a weary existence in trying to keep pace with complicated and never-ending alterations in the practice.

A LATE decision in the English Common Pleas Division has added to the Humors of the Law. The Court there set aside the finding of the jury in a compensation case against a Railway Company, on the ground that the claimant had treated the jury to a champagne lunch. The judge took occasion to distinguish between, and differentiate the dangers to be apprehended from divers classes of luncheons, e. g., the luncheon unpremeditated and the luncheon prepared beforehand ; the champagne luncheon and the non-champagne luncheon. The law, in such cases, abhors hospitality, especially where the cup is passed "with beaded bubbles winking at the brim."

THE law relating to sign-boards has been discussed before Chief Judge Bacon in a case involving the ownership of a well-known picture by David Cox which was painted on the sign-board of the old inn at Bettws-y-Coed, called "The Royal Oak." Upon the insolvency of the tenant, it was claimed by the landowner as a fixture which passed with the inheritance, and the County Judge so decided —but was reversed on appeal, the Chief Judge holding that it had been painted by the great artist for the innkeeper in 1847, who was on terms of friendship with him, and that it had been hung up as his picture and had never lost its character as a tenant's fixture. *Ex. p. Shaun ; 29 W. R. 248.*

A CORRESPONDENT in British Columbia has kindly sent us a copy of "The Rules, prepared by Mr. Attorney-General Walkem, to Carry into Effect the Supreme Court Act of that Province." We have not had an opportunity of examining them, but, doubtless, they have been carefully considered by the profession in British Columbia, and the opinion there is set forth in the following resolution, unanimously passed at a large meeting of the Incorporated Law Society, recently held at the Secretary's office :—

"*Resolved*, That the Incorporated Law Society of British Columbia desire to express

their thanks to the Hon. Mr. Walkem, for the very able and satisfactory manner in which he has accomplished the difficult undertaking of compiling a new code of Supreme Court Procedure, and their appreciation of the immense amount of labor which, in spite of the grave and arduous duties of the Attorney-General, has been bestowed upon the Code—a work which will form the basis of all future civil practice in the Province."

JUDGE TOURJEE in his "Fool's Errand" with quiet humor adverts to his hero as having a good home "undistinguished by mortgage or incumbrance of any sort." We fear that this distinction obtains in the case of a great many farms in a great many townships in a great many counties of "this Canada of Ours." Let us trust that the Building Societies and Loan Companies may not ultimately become the proprietors of all this property, and oust the bold yeomanry, "their country's pride."

WE are indebted to Mr. Alpheus Todd, Librarian of Parliament, for an interesting and instructive contribution to the law on the much vexed question of Marriage with a deceased wife's sister, which, however, we are compelled, from want of space, to hold over until next number. All will not agree with Mr. Todd's views, but whatever he writes for publication is well written and worth reading. His argument is, of course, based on the construction to be placed on the greatest of written codes, on which, indeed, all argument on this subject is founded.

LOSS OF BUILDINGS BY FIRE, PENDING CONTRACT OF SALE.

The power of Case-law has been very pointedly illustrated of late by two decisions; one in this Province and one in England. When property is contracted to be sold and the buildings upon it are consumed by fire before the completion of the transaction, upon whom, the vendor or the purchaser, does the loss fall? The law for no particular, or no sufficient reason, that we can see, has settled the matter differently, according as the sale has been by private contract, or by order of Court. In the case of private contracts the equitable rights of the parties are fixed when the agreement is signed. The estate is considered as belonging to the purchaser from the date of the contract, and the price as belonging from that time to the seller. So far back as 1801 Lord Eldon held, in *Paine* v. *Meller*, 6 Ves, 349, that when in such a case the building is burnt, the loss falls upon the purchaser. Last April the point was again presented before the Master of the Rolls, in *Rayner* v. *Preston*, 28 W. R. 808, who said if the matter was *res integra* that he might have found some means of relieving the purchaser. But being concluded by the cases, he held that where premises contracted to be sold was damaged by fire before the completion of the purchase, the purchaser had no right to money received by the vendor from an insurance office, and had no right to require the vendor to lay it out in restoring the premises.

But in the case of sale under judicial proceedings in the Court of Chancery, a diverse conclusion has been reached, by virtue of a decision of the same judge, in 1805,—the "cloud-compelling Lord Eldon," as he has been irreverently called. In *Ex parte Minor*, 11 Ves. 559, he held that a purchase before the Master was not complete until the confirmation of the report of sale. This was at variance with many decisions, among the rest *Saville* v. *Saville*, 1 P. Wms 748, when it was said that the purchase after the report was called a contract between the purchaser and the Court. However, Lord Eldon decided that a loss by fire after the report, but before its confirmation, fell upon the vendor. The same matter came up last

year, before Vice-Chancellor Proudfoot for decision on an appeal from the referee in *Stephenson* v. *Bain*, 8P. R. 258. He held, following *Ex p. Minor*, that when the buildings were burnt the next day after the sale under the decree, and after the usual contract to purchase had been signed, the loss would fall on the purchaser, against whom the report on sale had been confirmed in due course by the lapse of a month.

It will be observed that the question presented in both cases depends upon determining to whom the property belongs between the initiation of the contract of sale and its completion. In cases of sales out of court it is held that the property belongs to the purchaser the moment a binding contract is made, and all that is afterwards done in the way of exhibiting and accepting the title and executing the conveyance relates back to the starting point. If this is a good rule there seems to be no reason for not applying the same considerations to sales by order of Court, and to hold that from the day of sale the purchaser is the owner, and that the confirmation of the report on sale relates back to that time. There is the more reason for this in the case of sales in Ontario because of the difference in practice as to opening biddings which obtains here and in England. Among other differences is the fact that offers of increased price were sufficient to open the sale in England, but such is not the case here, as was remarkably exemplified in *Mitchell* v. *Mitchell*, 6 P. R. 232. There the plaintiff was allowed to bid while retaining the conduct of the sale, and became the purchaser at the price of $3,200. The defendant, who was not at the sale, moved to open the biddings and offered $5,500, while the plaintiff admitted that rather than lose the place he would have given $7,000. Yet in these circumstances the Chancellor declined to disturb the sale.

The weight of United States law is in favour of there being uniformity in all cases, whether the sale is a private or a judicial one, and their courts hold that the rights of the parties are determined at the date of the sale, and that from that time the vendee is the owner of the property.

When the property is insured by the vendor it is inequitable to let him have both the purchase money and the insurance money. In effect, by the decision of the Master of the Rolls, he is twice paid, while the vendee is made to pay for what he does not get. Nor would it seem to be beyond the reach of the Court to deal equitably with this matter as between vendor and vendee under the provisions of Imp. St., 14 Geo. III. c. 78 s. 83, which has been held to be in force in this Province: see *Stinson* v. *Pennock*: 14 Gr. 604. That act provides in substance that upon the request of any person or persons interested in or entitled to any house, etc., which may be burnt, etc., the Company are required to cause the insurance money to be laid out, as far as it will go, towards rebuilding, reinstating, or repairing such house, etc., unless the party claiming the insurance money shall give a sufficient guarantee to the company that the money shall be so laid out. The Master of the Rolls seems to have overlooked this or a similar provision now in force in England, as appears from *Ex parte Goreley*: 4 De G. J. and S. 477, which might have modified his decision, as he intimated his readiness to do, had he not been bound, as he conceived, by the authorities.

NOTES OF CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

COURT OF APPEAL.

Q. B.] [March 2.

FRYER v. SHIELDS.

Insolvent Act of 1875—Privileged claim—Action for wages.

The plaintiff sued for wages as a clerk of the defendants who pleaded their discharge in insolvency. The plaintiff replied that his claim was privileged and relied upon the 63rd section of the Act as entitling him to recover personally against the insolvents, notwithstanding their discharge to which he had not consented.

Held, reversing the judgment of the Court below for the plaintiff in demurrer to the replication, that the privileged claims are not within the class of debts to which a discharge does not apply without the consent of the creditors thereof, and that the remedy of the plaintiff was against the estate of the insolvents either before or after discharge, and not personally against the insolvents.

Mulock, for appellant.

G. Kerr, jr., for respondent.

Q.B.] [March 2.

THE AGRICULTURAL SAVINGS AND INVESTMENT SOCIETY v. THE FEDERAL BANK.

Cheque — Signed endorsement — Liability of Bank paying same.

One S. by forging an application for a loan and a mortgage in the names of J. T. B. and J. B., and representing certain facts as to the land to the plaintiff's agent who contented himself with the representations of S., and certified a valuation to the plaintiff, procured the completion of a supposed loan. Cheques payable to the order of the supposed borrowers were obtained by S. who forged the names of the payees to the cheques, endorsed his own name and procured payment of the cheques from the defendants upon whom they were drawn. The fraud was not discovered for some time, during which the cheques were returned to the plaintiffs at the end of the month as paid, whose officers signed the usual acknowledgment of the correctness of the account.

Held, affirming the judgment of the Queen's Bench that the defendants having undertaken the responsibility of paying cheques payable to order were bound to pay the proper parties, and that they could not charge the plaintiffs with moneys wrongly paid.

Held also, that the acknowledgment of plaintiffs of the correctness of the account at the end of the month, was at most an acknowledgment of the correctness of the balance on the assumption that the cheques had been paid to the proper parties.

Held also that the plaintiffs were not estopped from recovering by their agent's negligence, as it did not occur in the transaction itself and was not the proximate cause of the loss to the defendants.

Robinson, Q. C., and *Kerr*, Q. C., for appellants.

Bayly, for respondents.

C. P.] [March 2.

PIPER v. SIMPSON & LOWRY.

Lease—non-execution of by one lessee—Action on covenant for rent.

The defendants and one C. being in possession of premises under a covenant from the plaintiff for a lease, the plaintiff caused a lease to the three to be drawn which was executed by the defendants on the representation that C., the manager of the business, had executed a counterpart thereof. As a fact C. had refused to execute the lease and had not executed any lease. The defendants and C. continued to occupy the premises and paid some rent.

Held, affirming the judgment of the Common Pleas, that upon the evidence there was no intention by either the plaintiff or the defendants that the latter should be dealt with apart from C.; that there was no delivery of the deed, and that therefore the plaintiff could not recover rent on an action upon the covenant.

Bethune, Q.C., for appellant.

MacKelcan, Q.C., for respondent.

C. C.] [March 2.

OCKLEY v. MASSON.

Agency—Evidence—Statute of Frauds, sec. 17.

Held, upon the evidence, that one K., who had made a sale for the defendants to the plaintiff, had been held out as the agent of the defendants for making sales. K. entered the plaintiff's order in a book, and reported the sale to the defendants by letter which was not produced at the trial, though called for. The defendants wrote the plaintiffs that "K. reports a sale that we cannot approve in full but will accept for" a certain number of articles. On the plaintiffs insisting on the whole order, the defendants cancelled it.

Held, that the letter of K. to the defendants was a sufficient memorandum to satisfy the 17th section of the Statute of Frauds, which requires it for evidence only, and that it made no difference that it had passed between the defendants' agent and themselves; and at any rate the letter of the defendants to the plaintiff was a sufficient memorandum of their agent's sale, and its effect was not impaired by the partial disapproval expressed in it.

Reversing the judgment of the County Court.

C. Robinson, Q.C., for appellant.

T. Ferguson, Q.C., for respondent.

Ch'y.] [March 2.

KEEFER v. MERRILL.

Mortgage of freehold—Unattached machinery—Fixtures.

A mortgagee of vacant lands adjacent to his stone factory erected thereon a frame building as a lean-to to the factory, and placed in it, for the purposes of carrying on his manufacturing business, three lathes, an iron planer, two drills, a crane, and a shaper, all of which were kept in position by their own weight without being fastened to any part of the building, with the exception of one drill which was bolted to the framework, the latter being bolted to the girders. The land was vacant when the mortgage was given, and not worth the money, but building was contemplated, and there was the statutory covenant in the mortgage to insure for $4,000.

Held, reversing the decision of the Chancellor, that the machines were not put into the building with the intention of improving the freehold, and that they did not become fixtures.

Per BURTON, J. A. The question of intention is mainly to be looked at in all cases, the distinctions between them being as to what is sufficient evidence of the intention. The mere fact that machines are brought upon the land by the owner of the freehold raises no presumption that he intends to make them part of the realty, though annexation thereto would raise such presumption.

Per PATTERSON J. A. The weight of authority is against construing as fixtures anything which is not annexed in fact to the realty, except where the articles form part of the fabric, as an integral portion of the architectural design.

Cassels and *Walker*, for appellant.

Delamere and *Black*, for respondent.

Ch'y.] [March 2.

EARLS v. MCALPINE.

Devise—Restriction upon alienation—Forfeiture.

A testator willed that his wife should have the use and control of all his property, real and personal, until his two sons should become twenty-one, or until the said property should be disposed of as thereinafter mentioned. Then followed a devise to his son W. of half his farm, "to be possessed by him when twenty-one," subject to legacies; and a devise to his son H. of the other half of his farm, "to be possessed by him when twenty-one," subject to legacies. The testator then says, "My two sons, H. and W., give to my wife a comfortable support, or the sum of £10 each, annually, during her natural life. * * * I also will that my sons H. and W. do not sell or transfer the said property without the written consent of my said wife during her life." The will was duly registered after the testator's death. H., after attaining twenty-one, mortgaged his share, without the knowledge and consent of the widow, to the defendants, C. and M., who sold, on default in the mortgage, to O., who bought with notice of the condition as trustee for M. The heirs-at-law then filed their bill for partition, claiming that H. had forfeited his estate under the will by violation of the condition.

Held, affirming the decree of Blake, V. C., that the restriction upon alienation was valid; and that there was a charge created upon the land for the benefit of the widow; that the mortgage was a breach of the condition annexed to the devise, not to sell or transfer without consent, upon which the heirs at law were entitled to enter.

Blake, Q. C., and *Bethune*, Q. C., for appellant.
O'Leary, for respondent.

Ch'y.] [March 2.

KILBOURN v. ARNOLD.

Foreclosure—Fiduciary relation between mortgagor and mortgagee—Evidence.

In a foreclosure suit the defendant set up, that the plaintiff, a solicitor, had been employed by him to procure a loan of $1,400, to pay off a mortgage, on which there was due some $2,000, and that the plaintiff had taken advantage of this to purchase the mortgage at that price.

It appeared that the plaintiff had been applied to by the defendant to procure a small loan, but had been unable to do so; and that he had also acted for B., the mortgagee, in trying to sell the mortgage to a Loaning Company, but had failed, sometime after which he bought the mortgage himself for $1,625.

Held, reversing the judgment of the Court below upon the evidence that there was no confidential or fiduciary relationship established between the parties, and that the defendant should pay the whole amount of the mortgage or, in default, foreclosure.

C. Robinson, Q. C., for appellant.
Bethune, Q. C., and *McIntyre*, for respondent.

Ch'y.] [March 2.

MCGRADY v. COLLINS.

Title by possession—Evidence.

The plaintiff relied on acts of ownership by another and himself successively, but not in privity with each other, which consisted in driving cattle across a small piece of ground and across a stream, in order to sustain a bill to restrain the cutting of ice upon a portion of the stream.

Held, affirming the judgment of the Court below, upon the evidence, that it was not included in the plaintiff's conveyance, nor was in his exclusive control; that the facts were plainly insufficient to support the bill, which was properly dismissed.

Street, for appellant.
Meredith, Q. C., for respondent.

Ch'y] [March 2.

HARVEY v. STUART *et al.*

Partnership—Evidence.

The plaintiffs filed their bill against the defendants, T. and S., and three others, charging that a partnership existed amongst them, and alleging that all parties had formed a plan for building an elevator; that it was intended to form a joint stock company, but in order to secure business at once that the plaintiffs had been authorized to borrow money on anticipation for the purpose of carrying out the scheme. This they did upon their own responsibility, and the elevator was built and worked, but the efforts to form a joint stock company failed, and they now asked that the alleged partnership be wound up. Various meetings of the parties took place, but they were informal, and certain minutes produced were set up by the plaintiffs as correct minutes of the meetings by which they sought to implicate the defendants. The minutes, besides bearing evidence of incorrectness on their face, were proved to be unreliable and to have been made some time after the meetings. The defendants set up that the plaintiff had not been authorized by them to raise money, but that while there was every prospect of success that the plaintiffs were anxious to take the risk upon themselves and secure the expected benefits, and that it was only after the venture proved a loss, and that they had to disburse largely, that they sought to make the defendants contribute. The bill was dismissed at the hearing as against all the defendants except S. and T., and a decree was made declaring that the plaintiffs and S. and T. were as between themselves jointly and severally liable for the money expended and liabilities incurred in and about erecting the elevator, &c. The defendants, S. and T., appealed from this decree. The whole question was one of fact.

The court was equally divided BURTON and

MORRISON, J.J. A., being of opinion that the bill was not sustained by the evidence, and that the appeal should be allowed; while PATTERSON, J. A., (ARMOUR, J., concurring with him) was not able to say upon the whole evidence that the learned Vice-Chancellor was wrong in making the decree. The appeal was therefore dismissed.

MacKelcan, Q. C., and *Bethune*, Q. C., for Turner.

Ferguson, Q.C., *McCarthy*, Q.C., and *Bruce* for Stuart.

Blake, Q. C., and *E. Martin* Q.C., for the respondents.

Ch'y.] [March 2.

PETERKIN v. MACFARLANE.

Practice—Vacation of decree as against one defendant—Effect as to remaining defendants.

A decree had been made against several defendants, one of them being administrator *ad litem* of an original defendant who died before answering. B., a defendant, appealed from the decree which was vacated as to time, and he was allowed to file a supplemental answer and have a new hearing of the cause. The administrator died after decree, and another administrator *ad litem* was appointed, *pro forma*, to represent the estate of the deceased. He was served with no proceedings, and it was stated on this argument that the plaintiff asked no further relief against the estate. The latter obtained from the referee an order allowing him to file a supplemental answer setting up defences which his predecessor had omitted, which was reversed on appeal to Proudfoot, V.C.

Held, affirming the order of the Vice-Chancellor, that the vacation of the decree as against B. did not necessarily open the case as against the deceased's estate, and that the referee had therefore no power to allow the administrator to answer while the decree stood as against him.

C. Robinson, Q.C., and *T. Langton* for appellant.

W. Cassels, contra.

C. C. York.] [March 2.

BLAND v. EATON.

Contract to procure lease—Statute of frauds—Memorandum—Sufficiency of.

The defendant desiring to enlarge his warehouse by occupying the premises adjoining those in his possession, offered the plaintiff, whose lease of the desired premises was about to expire, $300 to procure from the owners thereof a lease which should be assigned to the defendant, with liberty to open a door-way between the houses. The terms and conditions of the desired lease were left to the plaintiff who was to make the best terms he could. At the request of the plaintiff that the offer should be put into writing the defendant wrote to him the following letter:—

To MR. JOHN BLAND:

DEAR SIR,—In reply to yours of to-day, I propose to give you $300, provided you can give me a transfer lease with privilege to make an opening between your premises and my own, cash to be paid on completion of transfer lease. This is as I understand it.

Yours most truly,

T. EATON.

The plaintiff procured a lease and tendered an assignment of it to defendant who refused it, whereupon the plaintiff sued for the $300.

Held, reversing the judgment of the County Court, that the letter of the defendant was a sufficient memorandum to satisfy the requirements of the 4th section of the Statute of Frauds within which the agreement fell, as being a contract by which the defendant was to receive an interest in land from the plaintiff.

Bigelow, for appellant.

Rose, for respondent.

C. C. York.] [March 2.

FISKEN v. O'NEILL.

Insolvent Act of 1875—Sale of debts over $100 en bloc—Validity of.

Held, affirming the judgment of the County Court, that section 67 of the Insolvent Act of 1875, giving power to sell the uncollected debts of the insolvent, expressly limits the power to selling in the manner prescribed thereby; that the assignee had no power to sell any debt of more than $100 except by itself, unless in case

of a sale of the whole estate; and therefore that the sale *en bloc* to the plaintiff of the uncollected debts of the insolvent did not pass to him any title to a debt of $324 due the insolvent by the defendants.

Rose, for appellant.

Murdoch, for respondent.

C. C. York.] [March 2.

CARROLL v. FITZGERALD.

Feme covert—Separate estate—Wife's earnings—C. S. U. C. Cap. 73.

The plaintiff, a married woman, who had separated from her husband, earned a sum of money by her own exertions, which she lent to the defendant. The husband had never made any claim to the money or to any of the plaintiff's earnings.

Held, affirming the judgment of the County Court, that the money was the separate property of the plaintiff by the acquiescence of the husband in her receiving it which amounted to a settlement; and that the C. S. U. C. cap. 73, which was in force when the money was lent, gave the husband no rights which he did not before possess, and did not abridge his power so to settle her earnings upon her, but that it operates only as between husband and wife to disable her from insisting that the earnings were not his.

Eddis, for appellant.

McMichael, Q. C., for respondent.

C. C. Wentworth.] [March 2.

MILLER v. HARVEY.

Insolvent Act of 1875, sec. 134—Note discounted by holder—Payment by insolvent to bank.

A. gave a note to the defendants on the 23rd November, 1878, which fell due on the 29th January, 1879. The defendants endorsed it to the Bank of Montreal and obtained its discount value. It was paid at maturity by one R. out of A's. moneys, and within 30 days thereafter A. became insolvent.

Held, reversing the judgment of the County Court that the defendants stood in a different position from that in which they would have been had they merely endorsed the note to the Bank as their agents for collection; for having endorsed the note to the Bank for value, the payment at maturity was a payment made to the Bank who were then the actual creditors of the insolvents.

C. C. Carleton.] [March 2.

CRAIG v. DILLON.

Liquidated damages.

The defendant agreed to pay to the plaintiff $200 as liquidated damages if certain loose stones and a partially constructed stone fence were not removed from the plaintiff's land at the times mentioned in the agreement.

Held, affirming the judgment of the County Court that the sum mentioned was not a penalty and that the plaintiff was entitled to receive the sum as liquidated damages on default.

Richards, Q. C., for appellant.

Bethune, Q. C., for respondent.

C. C. Oxford.] [March 2.

WILLSON v. BROWN *et al.*

Joint and several promissors—Principal and surety inter se—Notice of dishonor.

The defendants became parties to a joint and several promissory note made by one H. and themselves as the sureties of H.

Held, affirming the judgment of the County Court, that they came under a direct primary liability to pay at maturity; that in default of payment themselves their liability as sureties became absolute and they could not avail themselves of want of notice that their own note was not paid.

C. Robinson, Q. C., for appellant.

T. Ferguson, Q. C., for respondent.

C. C. York.] [March 2

IN RE WALKER, AN INSOLVENT.

Joint and separate creditors—Rights as to ranking.

In this case the evidence as to whether the assets were the joint assets of W. and M., or the separate assets only of W., being insufficient upon which to make an order as to how joint or separate creditors should rank, it was

Held, generally, on appeal from the County Court, that under section 88 of the Insolvent Act of 1875, if the dividend is derived wholly out of joint estate, the joint creditors alone can share until fully paid ; if wholly out of separate estate it belongs wholly to separate creditors till they are paid ; if partly out of each class of assets, it should go *pro rata* to each class of debts. The assignee being in a position to ascertain the character of the assets, it was left to him to adjust the dividends ; and under the circumstances costs were allowed to all parties out of the estate.

M. Clark for appellant.

W. R. Mulock for respondent.

QUEEN'S BENCH.

IN BANCO—HILARY TERM.

NEILL, ADMINISTRATRIX v. THE UNION MUTUAL LIFE INSURANCE COMPANY.

Life policy—Overdue premium—Payment.

J. N. was insured with the defendants by a policy dated 8th May, 1877, on which quarterly payments were due on the 10th days of February, May, August, and November, in each year. The policy among others contained the following conditions :—"If any premium, etc., shall not be paid when due the consideration of this contract shall be deemed to have failed, and the company shall be released from liability, and the only evidence of payment shall be the receipt of the company, signed by the President or Secretary." "If for any reason the premium is received after it becomes due it is upon the express condition that the party is in good health, and of correct, sober, and temperate habits, otherwise the policy shall not be put in force, etc." " In case any note, cheque, or draft, given towards the payment of any premium, shall not be paid at maturity, this policy lapses in the same manner as upon the non-payment of the premium."

McN., the general agent of the company at Toronto, was in the habit of receiving payment of premiums after they were due, of which the company were aware, and did not disapprove. On 24th September, 1879, a cheque was given by the assured's firm to McN., with the understanding that it was to be held till there were funds, as he had often done formerly. It was several times presented and dishonored. On 8th October, McN.'s successor in office notified the assured that if the cheque were not paid at once the receipt would be returned to the company. On 21st October, in answer to S., the agent's messenger, assured's partner said that there were funds for the cheque at the bank ; but as it was nearly three o'clock, S. said he would wait till the morning. That evening the assured was killed, and the cheque was therefore not presented, but was retained by the company. The plaintiff produced all the premium receipts, except that of 10th August, 1879.

The jury found that the defendant's agent had waived the payment of the premium due 10th August by receiving the cheque, and a verdict was entered for the plaintiff.

Held, (CAMERON J., *dissenting*), that though the defendants appeared willing up to the 21st October to receive payment and keep up the policy, yet there was no waiver of the terms of payment, and no existing agreement or anything binding them to extend the time for payment and to remain liable, and that the cheque was not taken in payment.

Per CAMERON J. The application by the defendant's agent on the 21st October for payment of the premium and the retention of the cheque, was equivalent to accepting a new cheque, which (there being funds therefor) would be payment.

Ferguson, Q. C., (with him, *G. H. Watson*), for plaintiff.

Robinson, Q.C., for the defendants.

MOFFATT V. THE RELIANCE MUTUAL LIFE ASSURANCE SOCIETY.

Life policy—Authority of general agent—Overdue premium—Promissory note.

J. M. was insured by a policy under which thirty days grace were allowed for payment of premiums. A lapsed policy might be renewed within a year upon proof of health, payment of arrears and a fine. S. was the resident secretary in Canada of the defendants, with the powers of a general manager. There was a local board of directors in Canada, but S. communicated directly with the board in England,

took his instructions from them, and laid before them monthly accounts, from which it could be ascertained whether premiums falling due the preceding month were unpaid. The assured, being unable to pay a premium about to fall due, wrote to S., asking him to take a note at three months. S. replied: "I am sorry you require three months' time, but I suppose it must be done, although it is against our rules. I shall have to take the responsibility myself. I enclose your draft for acceptance, which please return early." He also wrote that the company were very particular about overdue premiums. From this time S. accommodated the assured by taking notes, to which interest was added. On the 9th August, 1879, E., the cashier of defendants, wrote to the assured, acknowledging the receipt of his letter with a blank note which had been sent to S., to be filled up for the renewal of a note about to fall due, and saying that S. was absent from town, and that, as the two premiums of November, 1878, and May, 1879, were so long overdue, he should have to refer the matter to S., on his return; adding, "until the back premiums are paid, the Society is off the risk."

The death occurred on the 24th October 1879, at which time there were two notes outstanding—one for the premium due 30th November, 1878, dated 7th Febuary, 1879, at six months, which was unpaid; and one dated 21st June, 1879, at six months, for the premium which fell due on the 30th May, 1879, which was still current. After the death, the amount of these two notes was tendered to the defendants and refused.

The jury found that the notes were taken by defendants' agent as cash payments, that the taking of them was within his authority, that he had waived payment upon the dates the premiums were due; and a verdict was entered for the plaintiff.

Held (HAGARTY, C. J., *dissenting*), that the evidence showed that it was within the authority of the resident secretary to accept notes in payment of premiums, and there was nothing in evidence which would give notice to the assured of any want of such authority, and the verdict ought not to be disturbed.

Per ARMOUR, J. The defendants had become aware of the acceptance of notes and had ratified it.

VACATION COURT.

Armour, J.] [March 1.

IN RE MCCORMICK AND THE CORPORATION OF THE TOWNSHIP OF COLCHESTER SOUTH.

Proposed school-house—Submission to electors.

It appeared from the affidavit of the secretary and treasurer of a school section that at two regularly called meetings of the duly qualified electors of a school section, at which a chairman was appointed, proposals to purchase a site, build a school-house and borrow money therefor, were put by way of motion and carried, upon which a by-law was passed authorizing the issue of debentures to raise money for such purposes.

Held, that under 42 Vic. ch. 34, sec. 29, subsec. 3, this was a sufficient submission to and approval of the proposal by the duly qualified electors of the section, and a rule to quash was discharged.

C. Moss, for the application.

J. K. Kerr, Q. C., contra.

Cameron, J.] [March 8.

IN RE RUSHBROOM & STARR,

Award—Validity—Unsworn testimony.

Held, that under R. S. O., ch. 50, sec. 224, it is imperative that the testimony on an arbitration should be sworn testimony, unless dispensed with under a definite arrangement between the parties. Such agreement may be proved otherwise than by the submission, rule, or order of reference.

J. E. McDougall, for application.

McMichael, Q. C., contra.

Cameron, J.] [March 11.

THE QUEEN V. MCHOLME,

Arrest here, on telegram from England, for larceny—Extradition.

The prisoner was arrested and detained on a telegram from the chief constable at Liverpool saying that a warrant charging prisoner with conspiracy to defraud his creditors, and with committing larceny, was out against him, and that he had absconded to Canada. The prisoner was brought before the police magistrate at Toronto, who remanded him under a warrant

but the proceedings were removed into the Queen's Bench by *certiorari*, and a writ of *habeas corpus* was also granted. The detective who arrested McHolme swore that he believed a warrant for his arrest had been issued in England, but the warrant of arrest itself was not produced, nor of course was it endorsed by a Superior Court Judge here, as required by Imp. Act, 6, 7 Vict., cap. 34.

Held, that under these circumstances the prisoner must be discharged, as under the Imperial Act persons charged with committing treason or felony in Great Britain and Ireland could not be arrested in the Colonies (or *vice versa*), until the warrant of arrest issued in the country where offence was committed was produced and endorsed by a judge or other officer in the country wherein the prisoner is arrested.

The learned judge said, however, that under the Extradition Act offenders from other foreign countries could be arrested on information and warrant issued here, without any warrant from the foreign State; and that there might be a way under the law of this country for protecting the arrest, but he had no right to assume that a warrant had been issued in England until the warrant itself was produced and endorsed.

Fenton, for the Crown.

Murphy, for the prisoner.

COMMON LAW CHAMBERS.

Mr. Dalton, Q. C.] [Feb. 17.

Osler, J.]

LOUNT V. CANADA FARMERS' INS. CO.

Execution—Mutual Insurance Co.—R. S. O. ch. 161, sec 61.

Under R. S. O. ch. 161 sec. 61, writs of execution against a Mutual Insurance Company cannot be issued until after the lapse of three months from the recovery of judgment.

Held, that this section applies equally in the case of a policy issued on the cash principle, and of one upon the premium note system.

Osler, J.] [Feb. 18.

POWITT V. FRASER.

Arrest—Attachment—Costs—R. S. O. ch. 50, sec. 343.

Defendant was arrested and held to bail for a debt alleged by plaintiff to be $704. As to $80 of this, plaintiff had no reasonable ground for believing defendant to be liable, and he abandoned it at the trial.

Held, that defendant was entitled to tax his costs of defence against the plaintiff under R. S. O. ch. 50, sec. 343.

Osler, J.] [March 1.

REGINA EX REL. MITCHELL V. DAVIDSON.

Quo warranto—Disclaimer—Costs.

Defendant admitted that he was disqualified from holding the office of councillor, and before the issue of the writ of *quo warranto*, sent the following memorandum to the council:—"Palmerston, Feby. 7, '81. To the Mayor and Council of town of Palmerston: Gentlemen, I beg to disclaim my seat at the council board. (Signed) G. S. Davidson."

Held, that the above disclaimer was not sufficient to disentitle the relator to costs.

CHANCERY.

Spragge, C.] [Feb. 17.

RIPLEY V. RIPLEY.

Dower—Election—Waiver.

The testator bequeathed to his widow for life, an annuity of $60, payable by his son, John Ripley, his heirs, &c., together with all and singular his household furniture, &c., and in the event of his widow remaining in the dwelling-house on the premises after his decease, she was to have the free use of certain rooms therein; and in case of sickness while there, his said son was to see that she had proper medical attendance and nursing; and charged this annuity and the other bequests upon the land in question, and devised the same so burthened to his said son, the defendant.

The widow filed her bill for payment of the annuity alone, not claiming any lien on the

land in respect of the charges created in her favor by the will or dower. The usual decree for payment or, in default, sale, was made with reference to the Master at Hamilton, under which the land was sold free from dower and other charges, and the purchase money was paid into court. In the Master's Office the widow made no claim, either for dower or in respect of the other charges; but she afterwards presented a petition to have it declared that she was entitled to dower in the land and to compensation in respect of the other bequests above set out; and prayed that a sum in gross out of the money in court should be paid to her in lieu of dower, and a proper sum allowed by way of compensation for the other benefits.

Held, following *Murphy* v. *Murphy*, 25 Grant 81, that the widow was not put to her election by the will, and that she was entitled to have a proper sum paid to her for dower out of the purchase money in court; but that by her acquiescing in the sale of the land, and by her laches she had waived her right to any compensation for the loss of the other benefits bequeathed to her.

Black, for petitioner.

R. Martin, Q. C., and *Watson*, for subsequent incumbrancers.

Spragge, C.] [Feb. 17.

NELLES (Assignee), v. BANK OF MONTREAL.

Insolvent Act of 1875, sec. 134—Payment in contemplation of insolvency.

Held, under the circumstances appearing in the case that certain transactions which took place between the defendants and K., an insolvent, shortly before the latter absconded, were not entered upon in contemplation of insolvency, but were attempts made in good faith to enable K. to carry on his business; and that the defendant's manager was not aware of the insolvent condition of K.

Boyd, Q. C., for plaintiff.

Moss, for defendant.

Blake V. C.] [Feb. 26.

HILL v. MANUFACTURERS' & MERCANTILE INS. CO.

Mutual Insurance Company—Receiver—Assessment on premium notes.

Where an application was made to the Court to add the persons who had signed premium notes as parties in the Master's office, and to direct the Master to assess the amounts due upon the notes, and to order payment of the same to the Receiver from time to time, it was shown that the directors had not made any assessments upon the notes pursuant to R. S. O. cap. 161, secs. 45 *et seq.*

Held, that as the liability attached only upon such assessment by the Directors, the Court could not add to, or alter the liability of the parties who had made the notes by referring it to the Master or a Receiver to do that which the Directors only could do, clause 75 of 36 Vict. cap. 44, which gave power to a Receiver to do this, having been omitted from the Statute on revision.

Duff, for plaintiff and Receiver.

B. B. Osler, Q. C., for defendant.

Lazier (of Hamilton), for some of the makers of premium notes proposed to be added.

Blake V. C.] [Feb. 21

SUMMERVILLE v. RAE.

Preferential conveyance—Bona fides—Absolute deed security only.

The defendant H. H. obtained from his co-defendant H. R., who was indebted to him, a deed of land in order to secure his debt, which conveyance was attacked by the plaintiff who had obtained an execution against H. R., after the delivery of the deed, on the ground that it was a fraudulent preference. It appeared in the evidence, however, that the grantee claimed to hold the land only as security for the amount due him:

Held, that the conveyance was *bona fide* and not to defraud creditors; that an account should be taken of the amount due H. H., and that the land should be sold, and the proceeds applied first in payment of the amount due to H. H. for principal, interest and costs, and the balance applied as in ordinary fraudulent con-

veyance cases, and for these purposes the usual reference to the master was directed.

Harding for plaintiff.

Idington, Q.C., *and McMillan* for defendant.

Blake V. C.] [Feb. 26

MCARTHUR v. PRETTIE.

Appeal from Master—Taking further evidence

On an appeal from the Master which turned upon the credibility and weight of evidence, the Court, though not satisfied as to the actual facts of the case, could not say that the Master had erred in his finding and therefore dismissed the appeal with costs; giving at the same time liberty to the appellant to examine the witnesses again at the next sittings before the Judge who had heard the appeal, in order to enable him to dispose of the matter with greater satisfaction to himself, in which case he reserved the costs till after such evidence was taken.

Hodgins, Q. C., for plaintiff.

Boyd, Q. C., for defendant.

Proudfoot V. C.] [March 9.

WEBSTER v. LEYS.

Demurrer—Style of cause—Married women—Administration suit.

In a bill the style of cause named several females as being severally wives of their respective husbands, but the stating part of the bill did not allege that they were married; a demurrer on the ground that their husbands were not named as parties was overruled with costs.

The bill shewed that the testator had appointed four executors, three of whom had died, but stated that those so dying had never received any portion of the assets. In a suit for the administration of the estate a demurrer *ore tenus* on the ground that the representatives of such deceased executors should be parties was also overruled with costs.

Boyd, Q. C., and *Black* for plaintiff.

Moss, and *Kingstone*, for defendant.

Proudfoot, V. C.] [March 9.

MCGARRY v. THOMPSON.

Will, construction of—Widow—Election—Dower—Maintenance—Conversion of realty into personalty.

A testator gave and devised all his real and personal estate to trustees to sell the realty and collect and get in the personalty, and, after paying debts, &c., to invest the proceeds of sale in their names upon trust, to pay annual incomes to his two sons in equal moieties—they maintaining their mother during her life—and after the death of each of said sons the trustees were to hold one moiety of the trust moneys upon trust to pay and divide and transfer same between and amongst such of their children as should be living at his decease, and the issue of such children as should be dead, as tenants in common, in course of distribution, according to the stocks, and not to the number of individual objects, and so that the issue of any deceased child should take, by way of substitution amongst them, their share or respective shares only, which the deceased parent or parents would have taken.

Held, (1), that the widow was not put to her election, but was entitled to dower as well as to the provision made for her by the will; and it being alleged that the sons had not provided for her maintenance, a declaration was made that she was entitled to such maintenance, and a reference was directed to find what would be a proper sum for that purpose; (2), that a complete conversion was effected by the trust for sale in this will, and the interests of the sons were to be ascertained, as if the will consisted of personal estate only; and that, therefore, the sons took only life estates therein, and one of the sons having died without children, there was an intestacy as to his share, subject, however, to a proportion of the charge for maintenance of the widow.

J. H. McDonald, for plaintiff.

Arnoldi, for defendant.

Proudfoot, V. C.] [March 9.

VANKOUGHNET v. DENISON.

Demurrer—Covenant against building—Injunction.

The owner of real estate in effecting a sale of a portion thereof covenanted with the purchaser that he would retain a certain square

unbuilt upon, except one residence with the necessary outbuildings including porter's lodge; the purchaser on his part covenanting that he or his assigns would not allow any business of a public nature, such as a tavern, requiring a license to make it allowable in the eye of the law to be carried on upon the portion conveyed to him. A bill was filed alleging that the vendor and the defendant E. M., who resided with him, were in violation of the covenant erecting a house upon such square not within the exception in the covenant. The bill set forth the dimensions of the square and alleged that the same was particularly shewn and delineated on the map of the city of Toronto published in 1857—and was situated between certain named streets.

Held,—on demurrer for want of equity—that the square was pointed out with sufficient distinctness, and the fact that it comprised about six acres of land while the portion conveyed to the purchaser was about ¼ of an acre only, was not such a ground of hardship as would prevent the Court from interfering by injunction to restrain the breach of covenant, and E. M. being joined with the vendor in the erection of the house, she could not be heard to say she had not notice of the covenant—and the demurrer was overruled with costs.

Maclennan, Q. C., for plaintiff.
Black, for defendant Denison.
Delamere for defendant Wynn.

Proudfoot, V. C.] [March 9.

SIEVEWRIGHT v. LEYS.

Will, construction of—Conversion of realty—Demurrer—Chose in action—Married woman.

The bill for the administration of the estate of G. E. alleged that G. had appointed his brother J. E. his executor, and devised to him all his estate upon trust for the benefit of the testator's wife and children as to J. should seem best: the will giving J. power to sell the realty. J.E. proved the will of G., and shortly after his death made his own will by which he purported to dispose of G.'s estate, the validity of which the bill impugned, and C. S. D. a married daughter of G. was made a defendant, the bill alleging her to be the wife of S. H. D. J. E. made an appointment under G.'s will of a certain portion of the estate in favor of C. S. D. The defendant demurred on the ground that S. H. D. should have been a party.

Held,—That the interest of C. S. D. was merely a chose in action not reduced into possession by her husband. in respect of which she might be sued as a *feme sole*, and therefore the demurrer was overruled with costs following *Lawson* v. *Laidlaw* 3 App. R. 77. The bill distinctly charged that the defendant had misapplied the moneys of the estate of G., mixing them with his own and employing them for his own purposes a demurrer *ore tenus* that G.'s estate was not properly represented, on the ground that one executor could not represent the estates of both G. and J., was also overruled with costs; for although during the progress of the cause it might become necessary to have different persons represent the two estates that did not constitute a ground of demurrer.

Boyd, Q. C., and *Black* for plaintiff.
Moss and *Kingsford* for defendant.

Proudfoot, V. C.] [March 11.

SMITH v. PETERSVILLE.

Municipal Council—Resignation of candidate after election—Notice of resignation of seat.

Sect. 195 of the Municipal Act provides that the effect of a party disclaiming the office to which he has been elected shall be to give the same to the candidate having the next highest number of votes.

Held, that this meant the candidate having such number of votes who has not been elected to the Council; therefore where the plaintiff was the candidate who was the fourth in that order, the three highest on the list having been declared elected Councillors for the village of Petersville, and one at head of the poll resigned his seat, an injunction was granted to restrain the Reeve and Councillors of the village from preventing the plaintiff entering upon and discharging the duties of such office.

The notice of the party resigning the office stated that he resigned his seat in the Council.

Held, sufficient, although the Act requires notice of a resignation of the "Office" to be given; and that the plaintiff was entitled to his costs to be paid by the defendants.

Boyd, Q.C., for plaintiff.

Hodgins, Q. C., for the municipality of Petersville and the Reeve.

Bartram for defendant Evans.

Proudfoot, V. C.] [March 11.

STEVENSON v. STEVENSON.

Will, construction of—Land subject to mortgage—Right to redeem given by testator—Costs.

The testator was seized of certain lands which were subject to incumbrances, and by his will directed the same to be sold if his sons in succession should not redeem. One of the sons R. to whom the first privilege of redeeming was given, availed himself thereof and redeemed the property, which was subject to certain charges imposed by the will, in addition to the incumbrances.

Held, that the right to redeem was in effect a right to purchase as the mortgages and charges created by the will amounted to about as much as the land was worth; and that R. had acquired a good title free from any claim of his brothers, and was entitled to recover his costs, not out of estate of the testator, but from the plaintiffs personally.

Cassels, for the plaintiffs.

Kingsford, for the defendants The Freehold Loan and Savings Company.

Moss, for the other defendants.

Proudfoot, V.C,] [March 11.

IN RE JOHN MCDONALD'S WILL.

Will, construction of—Mortmain—Costs.

A testator made his will, and within three weeks thereafter died, having by his will directed his lands to be sold, and out of the proceeds gave $2,000 to his widow in lieu of dower, and further directed that "all moneys then remaining in the hands of my executors shall be divided between the following funds: naming five different charities in connection with the Canada Presbyterian church—"such money to be divided in which ever way my executors may think best."

Held, that the bequests to the charities were void under the Mortmain Acts; and there being no residuary clause the bequests so failing to take effect went to the heirs-at-law, not to the next of kin of the testator: costs of all parties to be paid out of the estate.

Fraser, for petitioners.

Roaf, for widow of testator.

Meredith & Clarke, for other legatees.

Proudfoot, V. C] [March 11.

SCOTT V. DUNCAN.

Will, construction of—Estate tail—Vested interest.

The testator directed all his lands to be sold by public auction or private sale, and proceeds to be retained by his executors till his youngest surviving child should attain the age of twenty-one, when the amount was to be divided amongst all the surviving children share and share alike; but in the event of either of his children dying without issue before the youngest surviving child should attain twenty-one, the share of the one so dying should go to the survivors.

Held, that these words did not create an estate tail or *quasi* entail—and that the shares of the legatees were vested.

Hoskin, Q. C., and *Crickmore*, for plaintiffs.

Cameron and *Ewart*, for defendants.

The Chancellor] [March 12

MCGEE v. CAMPBELL.

Insolvency—Concealment of Assets.

The omission by an insolvent from his schedule of assets, of any property or stocks, in order to render him liable to the consequences provided by the 50th and 140th Sections of the Insolvent Act, must be shown to have been so omitted with a fraudulent intent.

A firm consisting of three members having become insolvent, the members thereof procured the usual discharge, which, so far as C. one of the members was concerned, was impeached by a creditor of the firm, on the ground that C. had omitted from his schedule certain railway shares which it appeared had been allotted to C. at the original organization of the company in the same manner as shares were allotted to other persons, and marked paid up shares, no money consideration however having been paid by the allottees, and no scrip issued for the shares, such persons being appointed directors

of the undertaking and receiving no other compensation for their services. The shares however had not any money value whatever, and C. in his evidence swore that he had not thought of this stock when making up his schedule of assets, so utterly valueless was it. The Court [SPRAGGE C.] being of opinion that the excuse offered by C. was not untrue *held* that there was no fraudulent or even wilful omission in respect of such stock.

Prior to the time of C. making up his schedule he had, during the absence of the President of the road in England for about a year endeavoring to raise funds for carrying on the undertaking, acted as Vice-President and rendered services for which he hoped at some time to receive some compensation, but no promise, express or implied, had been made to him; subsequently, however, and after C. had applied for his discharge, a resolution was passed, granting him a sum of $5,000, which was given more as a gratuity, and with a view of relieving him in his distress, than as a payment of a debt, and C. was unaware of the resolution of the Board granting this money until he had obtained his discharge.

Held, that, under the circumstances, it could not be considered there was in strictness any debt due to C.; and in any event that the non-insertion of the money in the schedule was not a fraudulent concealment within the meaning of the Act.

At the date of the insolvency a large number of shares of another railway was held by C. as trustee, such shares being of actual pecuniary value to C. as enabling him to be appointed a Director of the company, and for some years he received a salary as Director; and the stock was shown to have been worth about from 7 to 15 per cent, not on account of any anticipated dividends, but as a qualification for the Directorate. At the date of the insolvency C., according to the arrangement with the owners of this stock was bound at any time he might be called upon to re-transfer it, in consequence of his failure to "give value" to it, but he was not called upon to re-transfer, nor had he been at the time the cause was heard called upon to do so; and he stated in his evidence that he had been advised he could not properly insert this stock in his schedule of assets. Subsequently to the date of the deed of composition and discharge and the filing of the certificate of the assignee, but eight days prior to the order of confirmation by the judge, C. acquired as his own property a portion of this stock.

Held, that his omission to bring such after acquired stock in by a subsequent schedule of assets was not a case of fraudulent concealment; and the bill by reason of the serious nature of the charges which the plaintiff must have established before he could succeed was therefore dismissed with costs.

REHEARING TERM.

CAMERON v. WELLINGTON GREY & BRUCE RAILWAY COMPANY.

Farm crossings—Parol agreement—"Make and maintain"—Construction of.

The plaintiff conveyed a right of way over his land to the defendants, and the deed contained a stipulation that "The company should make and maintain a farm crossing, with gates at the present farm lane." R., the company's engineer, treated for the conveyance, but had no power to agree for a second crossing. It was said, however, that he had promised, if he should find a second crossing necessary, he would, so far as in him lay, get it made, and the deed was executed upon this understanding.

Held, reversing the decree of PROUDFOOT, V. C., 23 Grant 95, that the defendants could not be compelled to make a second crossing for use in winter, the existing one being then impassable, and that upon the construction of the words above set forth, they were bound to continue the crossing, not to close it up or impair it, or alter its character as a farm crossing, but were not obliged to keep it free from snow.

PROUDFOOT, V. C., dissented.

Boyd, Q.C., for plaintiff.

Bethune, Q.C., for defendants.

IN RE LAWS, LAWS v. LAWS.

Husband and Wife—Wife's chose in action—Reduction into possession—Evidence—Statute of Limitations.

The widow of the intestate claimed against his estate for a sum of $700, which she alleged he had borrowed from her after their marriage, and some years before his death, for the purpose

of buying stock in trade. The money was deposited in a bank at the time of the marriage, which took place before the C. S. U. C., cap. 73. The only evidence offered in corroboration of the claimant was that of one B., who said "he (Laws) told me he had got $600 or $700 from his wife. She had a little money. He said he had paid that money for the things he had in the store. This was after he had bought L. out. * * He said his wife had helped him to $600 or $700 * * I understood he had used the money to buy out the business."

Held, affirming the order of the Chancellor, reversing the finding of the Master, that she could not recover.

Per BLAKE, V. C. The evidence of the widow was not sufficiently corroborated.

Per PROUDFOOT, V. C. The evidence that the chose in action was originally hers, and that she gave it to her husband, was sufficiently corroborated, but the transaction having taken place before the C. S. U. C., cap. 73, under which she had the right to assert her proprietorship as against her husband, and as incident thereto, the right to bring a suit against him; and as to any such proceedings the Statute of Limitations would be a bar, her remedy was gone.

F. Beverley Robertson, for widow.

Laidlaw for defendant.

KASTNER V. BEADLE.

Right of way—Obstruction of.

An arrangement made between the plaintiff and B., whereby the latter "was allowed to go through" the plaintiff's land, was superseded by an arrangement whereby, in consideration of 150 cords of wood and the making of the road by B., the latter was to have a right of way through the plaintiff's land. The plaintiff was to erect and keep up the gate at one end, and B. to keep up the gate at the other end, of the road. The wood was delivered, and the road made, according to the terms of the agreement. The plaintiff subsequently erected three gates along the course of the right of way, which were not necessary for the enjoyment of the land. The bill was filed to restrain the defendant from using the way except upon the terms of shutting those three gates when going through.

Held, reversing the decree of the Chancellor, that the right of way having been purchased when there were but two gates, the plaintiff had no right to fetter the enjoyment of the way by adding additional gates.

Boyd, Q.C., for plaintiff.

Idington, Q.C., for defendant.

EXCHANGE BANK V. SPRINGER.

THE SAME V. BARNES.

Parties—Principal and surety—Non-joinder of principal.

One M., and the defendants as his sureties, executed a bond conditioned for the good behavior of M., a clerk of the plaintiff's at Montreal. The bond was executed at Hamilton by the defendants who were resident there. M. made default at Montreal and absconded. Proceedings were then taken against the sureties, without joining M.

Held, affirming the order of PROUDFOOT, V.C., that the plaintiffs could not proceed against the sureties alone, if they required the joinder of the principal in order that they might have their remedy over against him.

Per SPRAGGE, C. Though the breach occurred in Montreal, and there was no cause of action till default, yet there was a potential equity in the defendants, co-eval with the execution of the bond, which became a right of suit on the default of M.; and there was also an implied contract on the part of M., upon execution of the bond, to repay to his sureties any moneys that they might have to pay by reason of his default.

Per BLAKE, V. C. The plaintiffs having filed their bill in Ontario, must be taken to admit that the Court has jurisdiction in respect of the matters therein embraced; and the practice of the court requiring it, and a method having been provided for service of process out of the jurisdiction, the plaintiffs were bound to follow the practice if objection taken.

Bethune, Q.C., and *E. G. Patterson*, for plaintiffs.

Boyd, Q.C., and *MacKelcan*, Q.C., for defendant Springer.

R. Martin, Q.C., for defendant Barnes.

CORRESPONDENCE.

Professional Ethics.

To the Editor of the CANADA LAW JOURNAL.

SIR,—When a member of the profession so far forgets the dignity of the position he holds, and the code of honor existing amongst professional men, as, to be guilty of conduct such as the following circumstances disclose, he deserves exposure:

The following are the facts:—A gentleman in Buffalo, a client of a Toronto firm, had a claim for an account against a customer in Brantford. The account was placed in the hands of the Toronto firm for collection, and a correspondence toko place with the debtor which resulted in a short extension of time for payment. When the time for payment arrived, the debtor somehow or other fell into the hands of a Brantford barrister, and instead of a remittance being made to the solicitors in Toronto the aforesaid barrister sent his cheque direct to their client in Buffalo and added to his letter the following:—"If you want any accounts collected in Western Ontario you can find out by inquiries at ————'s, Buffalo, or Messrs. ———————— wall paper manufacturers, Buffalo, whether or not you are likely to meet with satisfactory returns by sending them direct to me. By sending accounts to Toronto you incur double the expense, the Toronto lawyer having to employ an agent here to sue it and of course he must charge himself a small morsel.

"Faithfully yours,
"X————."

I spare his several initials and call him "X," preferring to leave him as the *unknown quantity*. At the same time was posted to the Toronto firm a post card purporting to be written by the debtor, but in the *handwriting* of the "unknown quantity," informing them of a remittance to Buffalo by the *debtor* direct. Comment on such a proceeding is useless.

Yours, etc.,
A. B.

Toronto, 1st March, 1881.

[The Discipline Committee will apparently have enough to do under the recent Act. Such things as the above will perhaps convince even Mr. Meredith, who opposed the bill, of the necessity of giving ample powers to the Benchers in such matters.—ED. C. L. J.]

To the Editor of the CANADA LAW JOURNAL.

DEAR SIR,—Enclosed I send you a clipping from the *Northern Advance*, published in this town, which will show you to what length our post-master-pettifogger will go.

Yours truly,
"SUBSCRIBER."

Barrie, Feb. 14, 1881.

MORTGAGE SALE.—Under and by virtue of a Power of Sale contained in a certain mortgage, which will be produced at the time of sale, and upon which default has been made, there will be sold at, &c., &c. Terms—One-tenth of the purchase money to be paid down on the day of sale; for balance, terms made known on the day of sale. For further particulars application to be made to JAMES EDWARDS, Conveyancer, Barrie, Vendor's Agent."

[This person is doubtless thoroughly versed in real property law and his services are of course much sought after as a "conveyancer," and as a "Vendor's Agent." This being so it is a pity he should be cramped by any remembrance of the fact that he occupies an important position in the public service. So that this difficulty may be remedied as far as possible, (and doubtless his modesty stands in his way) we shall send a copy of this journal to the Postmaster General, so that, being aware of the facts, he may be graciously pleased to apply the appropriate remedy. One very efficient and summary one occurs to us, and we trust may also occur to him.—ED. C. L. J.]

Unlicensed Conveyancers.

Editor LAW JOURNAL, *Toronto*,

MY DEAR SIR,—As it appears the Legislature will not protect us in our legitimate calling, I would suggest that country practitioners throughout Ontario send circulars to the farmers and others in their respective neighborhoods, showing the danger they incur in doing business with incompetent men and their legal responsibility for errors.

This is our only possible chance to secure even a measure of protection, and I suppose

the Law Society could not hold us guilty of unprofessional conduct in doing so, as conveyancing is evidently considered by them as well as our law makers as no longer a branch of the legal profession.

Yours truly, LEX.

26th Feb'y, 1881.

[As the subject-matter referred to above has now been brought formally before the Benchers by one of their number we shall refrain from comment at present.—ED. C. L. J.]

To the Editor of the LAW JOURNAL :

SIR,—As a Law Student I take the liberty of troubling you with the following question and request an answer through the columns of the LAW JOURNAL. I have sought for the information from several barristers, most of whom differ in their opinions : A., a tenant in fee simple of certain lands, devises them "to B., and his *heirs* except his *grandfather*." What estate does B. take ?

Yours, etc. J. A. M.

February, 1881.

[Our off-hand impression is that B. takes an estate in fee simple, the exception being void for repugnance. Perhaps some of our young friends will look up the point and give J. A. M. the benefit of their investigations.—ED. L. J.]

TO CORRESPONDENTS.

F. G. M.—The subjects required of candidates for the Primary Examinations will be found in the last page of the LAW JOURNAL You will there also see that these examinations can only be dispensed with in two cases : (1) graduates of Universities and (2) students of Universities who can present a certificate of having passed an examination in the prescribed subjects within four years of their application. The next primary examinations will begin on the 3rd of May next.

GENERAL RULE OF THE COURT OF COMMON PLEAS.—It has been ordered by Rule of Court issued on 11th inst., that rules Nos. 13 and 14 of the General Rules for the trial of controverted elections of members of the House of Commons made as of Michaelmas Term, 42nd Vic. H. T. 1878, be and the same are hereby rescinded.

Law Society of Upper Canada.

OSGOODE HALL.

HILARY TERM, 44TH VICT.

During this Term the following gentlemen were called to the Bar.

The names are arranged in the order in which they entered the Society, and not in the order of merit.

George A. Skinner, John Philpot Curran, Reginald Boultbee, Harris Buchanan, Goodwin Gibson, William James Thorley Dickson, James Alexander Allan, Walter Alexander Wilkes, James Harley, William White, Daniel Erastus Sheppard, Wallace Nesbitt, James B. McKillop, Colin Campbell, Philip Henry Drayton, Thomas C. L. Armstrong, John Doherty, Alexander Dawson, Thomas Dickie Cumberland, J. Gordon Jones.

The following gentlemen were admitted into the Society as Students-at-Law.

GRADUATE.

Henry Gordon Mackenzie.

MATRICULANTS OF UNIVERSITIES.

James M. Knowlson, Edwin Mowat Henry, Edward Wilson Boyd, Reginald Rudgerd Boulton, William Arthur Campbell, Arthur Luke Rundle, Frederick Laing Fraser.

JUNIOR CLASS.

James F. Williamson, John Thacker, Edmund Walker Head Van Allen, Robert George Code, William Robert Smyth, William Nassau Irwin, Edward Herbert Ambrose, George Edgar Martin, John Smith Meek, Archibald McKechnie, William Henry Tweedale, Thomas Francis Johnson, Sidney Chilton Mewburn, George Hutchison Esten, William Lawrence Leslie.

The following gentlemen passed their examination as Articled Clerks.

Albert Wesley Benjamin, John Hambly, James Joseph Berry.

RULES

As to Books and Subjects for Examination, as varied in Hilary Term, 1880.

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