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THE consolidated rules which have been for some time past in preparation, do not appear to be yet ready for publication. Their operation has been stayed until the 1st March instant, but if any great changes have been effected, we trust their coming into force may be still further postponed, so as to give the profession some time between their publication and their coming into force to make themselves acquainted with the change.

WE regret to learn that Mr. Justice Proudfoot has been unwell lately. His Lordship's indisposition, we hear, has seriously affected his hearing, and rendered the satisfactory discharge of his judicial duties very difficult. It is rumoured that the learned judge has applied for leave of absence, and in the event of its being granted, the circuit assigned to him will be probably be divided between the other judges of the Chancery Division.

THE Chancellor, we understand, leaves for British Columbia on the 1st of March instant, to attend the sittings of the arbitration pending between the Canadian Pacific Railway Company and the Dominion Government respecting a claim of the Company for compensation for the defective construction of a part of the line built for the Government by Onderdonk & Co., and subsequently taken over by the Railway Company on its formation. His Lordship has been appointed one of the arbitrators, and expects to be absent until about the middle of the month.

THE Revised Statutes of Ontario, 1887, have now been in force for three months, and still they are not ready for general distribution. This is bad management, and though we are quite prepared to admit that the work of revision is an extremely difficult task, and one involving a good deal more than the application of paste and scissors as some seem to imagine, yet we do think that the bringing of the Revised Statutes into operation, and their publication, ought to be coincident. The delay in publication is due, we believe, to the non-completion of the tables showing where the statutes consolidated are to be found in the Revised Statutes. It is a great pity that this part of the work has not been pushed with greater energy. Copies of the Statutes without these tables have been distributed for the use of the members of the Legislative Assembly. We are glad to see that an index accompanies each volume; it might, however, with advantage have been a more exhaustive one. The indexes to the Consolidated Statutes and Revised Statutes have been more or less wretched affairs.

Audi alterem partem is a good saying, and especially so in a legal journal. The *Winnipeg Sun* makes a lengthy extract from the article of F. C. W. in our number for February 1, on the subject of "Legal Aspect of Disallowance in Manitoba,' and says that it "affords them satisfaction to see the provincial side of the question so clearly set forth in such a publication as the CANADA LAW JOURNAL." G. W. W. concludes the discussion in a replication contained in a letter which we publish in this number. There is not much more to be said about the question involved than has been recently given to our readers.

INSANITY IN ITS RELATION TO MARRIAGE.

PROPOSITION I.—The contract of marriage is an engagement between a man and a woman to cohabit with each other, and each other only.

Authorities: (1) *Harrod* v. *Harrod*, 1 K. & J. 4, 1854, per Page Wood, V. C.: "The contract itself, in its essence, independently of the religious element, is a consent on the part of a man and a woman to cohabit with each other, and with each other only. They are married if they understand (by the religious ceremony) that they have agreed to cohabit together, and with no other person." (2) *Durham* v. *Durham*, 10 P. D. 80, 1885, per Sir James Hannen: "It appears to me that the contract of marriage is a very simple one, which it does not require a high degree of intelligence to comprehend. It is an engagement by a man and a woman to live together and love each other as husband and wife to the exclusion of all others."

Illustration: M. H., the validity of whose marriage was at stake, was deaf and dumb; had never been taught to talk with her fingers, and could neither read nor write. She was very dull of comprehension, and only those intimately acquainted with her could make her understand their meaning. She did not know the value of money. The conduct of M. H. was, however, perfectly proper; there was nothing in her appearance or demeanour indicative of imbecility; she was living in the same house with married people before her marriage, understood their relationship, and accepted the duties of a wife in her own case. The marriage of M. H. is valid: *Harrod* v. *Harrod.*

PROPOSITION II.—Such an engagement cannot be entered into by any one who is at the time prevented by natural weakness of mind, or by improper circumvention or pressure, from understanding its nature and deliberately accepting its effects.

Authorities: (1) *Durham* v. *Durham*, 10 P. D., per Sir James Hannen, at p. 82: "I accept for the purposes of this case the definition (of soundness of mind) which has been substantially agreed upon by counsel, viz., a capacity to understand the nature of the contract, and the duties and responsibilities which it creates. . . . A mere comprehension of the words of the promise exchanged is not sufficient; the mind of one of the parties may be capable of understanding

the language used, but may yet be affected by such delusions or other symptoms of insanity as may satisfy the tribunal that there was not a real appreciation of the engagement entered into." (2) *Hunter* v. *Edney*, 10 P. D., per Sir James Hannen, at p. 95: "The question which I have to determine is not whether the wife was aware that she was going through the ceremony of marriage, but whether she was capable of understanding the nature of the contract she was entering into, free from the influence of morbid delusions upon the subject." See, too, the language of the same learned judge in *Cannon* v. *Smalley*, *ibid*, at p. 96. (3) *Scott* v. *Sebright*, 12 P. D., per Mr. Justice Butt, at p. 24: "Whenever from natural weakness of intellect, or fear—*whether reasonably entertained or not*—either party is actually in a state of mental incompetence to resist pressure improperly brought to bear, there is no more consent than in the case of a person of stronger intellect and more robust courage yielding to a more serious danger."

Earlier obiter dicta implicitly overruled. (1) *Portsmouth* v. *Portsmouth*, 1 Hagg. E. R., at p. 359, per Sir John Nicholl: "Without soundness of mind there can be no consent—none binding in law. Insanity vitiates all acts." (2) *Hancock* v. *Peaty*, 1 P. & D. 335, 1867, per Lord Penzance: "The question here is one of health or disease of mind, and if the proof shows that the mind was diseased, the court has no means of gauging the extent of the derangement consequent upon that disease, or affirming the limits within which the disease might operate to obscure or divert the mental power."

Illustrations: (1) *Durham* v. *Durham*, 10 P. D. 80: This was an action brought by A to have his marriage with B declared null, on the ground of insanity. A and B were married on 28th of October, 1882, and at the date of the trial B was unquestionably insane. B was a shy girl of low intellectual powers, but had received an ordinary education, had acquired some accomplishments, had taken part in private theatricals, and had never been treated by her relatives as insane. She displayed a decided aversion to A, her future husband; but this was explained on the ground of a pre-attachment to another gentleman, and she made the arrangements for her marriage rationally and methodically. Declaration of nullity refused. (2) *Hunter* v. *Edney*, 10 P. D. 93: Action for declaration of nullity of marriage between A and B on the ground of B's insanity. The parties became acquainted in 1879, and on 16th of June, 1880, B accepted A as her husband. The marriage was fixed for 17th of March, 1881. On the 12th B wrote to put it off, and A found her troubled and excited. The marriage was, however, carried out as arranged. B refused to dress for church for some time, lay all night on her marriage bed in her clothes, and on the following morning asked her husband to cut her throat. A medical man was immediately called in, and pronounced B insane. Declaration granted. (3) *Cannon* v. *Smalley*, 10 P. D. 96: Here the parties were married 1st of January, 1884. B, whose capacity was in question, performed her usual duties till the day before marriage, and on 28th of December, 1883, had written a perfectly readable letter to A, the petitioner. The only evidence of her insanity before marriage was her dulness and reticence. On 11th of January, 1884, B was examined by Dr. Savage, and pronounced insane. Declaration refused. (4) *Scott* v. *Sebright*, 12

P. D. 21: "A, a young woman of twenty-two years of age, entitled to a sum of £26,000 in actual possession and a considerable sum in reversion, had become engaged to B, and, shortly after her majority, was induced by him to accept bills to the amount of £3,325. The persons who had discounted these bills issued writs against her, and threatened to make her a bankrupt. The distress caused by these threats seriously affected her health and reduced her to a state of mental and bodily prostration, in which she was incapable of resisting coercion and threats, and, being assured by B that the only method of avoiding bankruptcy proceedings and exposure was to marry him, she reluctantly went through a ceremony of marriage with him at a registrar's office." The marriage was never consummated, and was followed by the immediate separation of the parties. Declaration granted.

PROPOSITION III.—Supervening insanity is no ground for the dissolution of a marriage.

PROPOSITION IV.—Supervening insanity is no bar to divorce proceedings on behalf of or against a lunatic husband or wife.

Authorities. (1) "On behalf of a lunatic husband" (*Parnell* v. *Parnell*, 2 Hagg. C. R. 169, 1814) "or wife." Query in *Mordaunt* v. *Mordaunt* (2 P. & D. 103, 109, 382, 2 Sc. & Div. Ap. 374) answered affirmatively in *Baker* v. *Baker* (6 P. D. 12). (2) "Against a lunatic husband or wife," *Mordaunt* v. *Mordaunt* (*vide supra*).

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THE EXTRADITION OF CRIMINALS.

THE postponement by the United States Senate of the consideration of the proposed Extradition Treaty with Great Britain, is an event of some importance to Canadians. The Ashburton Treaty, with its limited list of extradition crimes, has for forty-five years served a useful purpose, but the usefulness of the new treaty, if we ever get it, will be greater than that of the old one only in so far as the list of extradition crimes is extended. It is not proposed to improve the Ashburton extradition stipulation in any other material particular, and therefore we may expect to see in the future, as we have seen in the past, the purpose of the treaty frequently defeated by technicalities raised by counsel and allowed by judges. It is proposed in this paper to inquire whether there is not some better way of dealing with the problem of which extradition treaties are supposed to furnish the solution.

Extradition proceedings fail so often on account of the difficulty of defining crimes, that one is tempted to ask why it should be thought necessary to embody a list of offences in such a treaty at all. Why not, if we must have a convention, agree with the United States that each country will hand over to the other any fugitive from criminal justice whose offence is technically a "crime" under the

aws of his own State? In Canada the Dominion Parliament defines "crime," and there is therefore with us substantial uniformity. It is not so with the United States. One State legislature may treat a certain offence as a crime, while another does not. In one State a certain act may be included by law under the term "forgery," while in another State the same act is excluded from its scope. Even in the same State what is a forgery now may not have been one when the Ashburton treaty was negotiated; and so of other offences.

It may be said that to give such scope to an extradition treaty would have the effect of including under its operation what are called "political offences." The answer is that "political crimes" may be specifically excepted, and that the right to decide whether an offence is "political" or not, must, in the last resort, rest with the Government of the country, which is asked to surrender a fugitive. There is a fair amount of common-sense agreement, tacit or explicit, between Great Britain and the United States, as to the distinction between political and other crimes. The Canadian Government never asked for the surrender of Louis Riel, though he was technically and undoubtedly guilty of the murder of Scott. Had John Brown escaped to Canada after the Harper's Ferry affair, no demand would have been made for his surrender, and if it had been made it would have met with the response that was subsequently given to the demand for the surrender of Bennett Young.

It is worthy of note that "political offences" are not mentioned in the Ashburton Treaty, nor is it there stipulated that a fugitive shall not be tried for any offence other than the one alleged as the basis of the demand for his surrender. The question whether a person extradited for one crime may properly, under the treaty, be tried for another, has been variously decided by courts, and variously pronounced upon by statesmen and jurists. The weight of authoritative opinion in both Great Britain and the United States seems to favour the theory that an extradited fugitive is entitled to his asylum as a kind of personal right, and that before he is apprehended on any new charge he should, whether tried or convicted on the extradition charge or not, be permitted to return to the place from which he was taken. This idea of the personal right of a criminal to a place of refuge seems to me a very absurd and mischievous one.* A fair construction of the Ashburton Treaty does not apparently warrant the view that by specifying seven offences for which a fugitive might be extradited, either the negotiators of the treaty or the governments which ratified it meant to limit the right of the recovering state to try the surrendered person for offences for which he could not have been extradited. We have the authority of President Tyler, who in 1842 submitted the Ashburton Treaty to the Senate, for saying that, "in this careful enumeration of crimes, the object has been to

*Chief Justice Taylor, of Manitoba, appears to have taken the same view of the matter in the Fant case (23 CANADA LAW JOURNAL, p. 422), while the opposite view was taken by Chief Justice Richards in the Burley case (1 CANADA LAW JOURNAL, p. 46), where he says: "When surrendered, I apprehend that the United States Government would, in good faith, be bound to try him for the offence upon which he is surrendered.

exclude all political offences or criminal charges arising from wars or intestine commotions," and that "treason, misprision of treason, libels, desertion from military service, and other offences of similar character, are excluded." The fact that President Tyler enumerates all varieties of "political offences" as intended to be excluded, seems to be warrant for contending that the treaty gave no guarantee of immunity of any kind to persons chargeable with non-extradition offences, that are at the same time non-political.

The presumption in favour of the criminal, as to his right of asylum after failure to convict him on the offence for which he was extradited, is a legal presumption, and is maintained by legal arguments. Akin to it is the assumption that because a government binds itself by treaty to deliver up to another government on requisition a person *prima facie* guilty of one of a list of crimes, it declares by implication that it will not deliver up persons *prima facie* guilty of other crimes when requested to do so. A government that is bound by treaty to surrender murderers, pirates, robbers and forgers, can, without being bound to do so, surrender burglars, swindlers, embezzlers and thieves. In this direction, and not to an extended list of extradition crimes, we must look for a solution of the difficulties caused by the criminals of Great Britain and Canada taking refuge in the United States, and *vice versa*. No treaty is necessary, and in fact a treaty is an obstruction, since the clearest and simplest of documents bristles with points on which subtle minds may raise technical obstacles to the extradition of criminals. All that is necessary is that each country should make a practice of surrendering to the other such of its criminals as it feels disposed to ask for, taking care only that (1) a *prima facie* case is made out against them, and (2) that they are not tried afterwards for political offences. Bad faith on the part of either government with respect to the latter point would justify the discontinuance of the practice of surrender. But on that score there is little ground for fear of trouble. Secretary Fish, in the correspondence growing out of the Winslow case in 1876, correctly describes the state of public feeling amongst English speaking people with respect to this matter, when he says:—

"Neither the extradition clause in the treaty of 1794, nor in that of 1842, contains any reference to immunity for political offences, or to the protection of asylum for religious refugees. The public sentiment of both countries made it unnecessary. Between the United States and Great Britain it was not supposed on either side that guarantees were required of each other against a thing inherently impossible, any more than by the laws of Solon was a punishment deemed necessary against the crime of parricide, which was beyond the possibility of contemplation."

It may be objected that if Canada were to commence the practice of surrendering all criminals on requisition from the United States, the latter country might not be willing to return the favour. What then? The obvious answer is, that whatever view the United States may take of the value of Canadian criminals as citizens, it is clearly a good thing for Canada to get rid of as many United States criminals as possible. A large proportion of our malefactors, from murderers down to pickpockets come over to Canada to operate when the United

States has become too hot to hold them. They leave their own country for their country's good, and we should send them out of ours on the same principle. If we could, in addition to unloading on the United States all our bank-wreckers, swindlers and embezzlers, succeed in sending back to that country all its criminal refugees of the same class, we would have reason to congratulate ourselves on so desirable a riddance. Why should we let the "right of asylum" trouble us? We can always treat that right with respect whenever we choose to do so, but there is no reason for harbouring to our own detriment men who are wanted by our neighbours because they have committed crimes.

It would be out of the question for us to surrender alleged criminals in this way to any country with a civilization lower than our own. We could not give up men if we did not know that they would get a fair trial, that they would be considered innocent until proved guilty, that they would not be subjected to torture, and that they would not be crucified, or impaled, or put to death in some other barbarous fashion. We could not surrender alleged criminals to Russia, or Turkey, or China, even under an extradition treaty, without some guarantee that they would be fairly dealt with in accordance with the requirements of sound jurisprudence, and with the dictates of humanity. The best guarantee that they would be so dealt with in the United States is that the civilization of that country is practically identical with our own, that their methods of ascertaining the guilt or innocence of an accused person are very similar, and that there is a like degree of similarity in the penalties attached to crimes. Such a frank recognition by us of the equality of the United States would in all probability secure the voluntary surrender of such criminals as we might desire to convict and punish in this country, and thus bring about a condition of perfect free trade in criminals without the intervention of any treaty stipulations to hamper and restrict the process of extraditing them.

Though the tendency of legal opinion in the United States has long been towards a narrow view of extradition, yet it is not asserted that criminals must never be delivered up to foreign nations except under treaty provisions. If a surrender were made without the authority of a treaty it would be based on "comity." In the early history of the United States a sound and liberal view was taken of the subject by the government officials. In 1796, Mr. Pickering, Secretary of State, expressed his concurrence with Mr. Liston, then British Minister at Washington, in the opinion that "while the reciprocal delivery of murderers and forgers is expressly stipulated in the 27th article of our treaty with Great Britain, the two governments are left at liberty to deliver other offenders as propriety and mutual advantage shall direct." The same Secretary, in a letter to the Governor of Vermont, says: "The reciprocal delivery of murderers and forgers is positively stipulated by the 27th article of the treaty; the conduct of the two governments with respect to other offenders is left, as before the treaty, to their mutual discretion, but this discretion will doubtless advise the delivery of culprits for offences which affect the great interests of society." Chancellor Kent, in 1826, went much further than this, holding that "it is the duty of the government to surrender up fugitives on demand, after the civil

magistrate shall have ascertained the existence of legal grounds for the charge, and sufficient to put the accused on his trial." Kent based this view on the "law and usage of nations," which, he said, "rest on the plainest principles of justice." So late as 1864 President Lincoln surrendered a Cuban criminal to the government of Spain, with which country the United States had then no extradition treaty. The act was questioned in the Senate, and in reply to a request for information on the subject, the President sent a report prepared by Secretary Seward, on whose advice the surrender had been made. *Inter alia*, Mr. Seward said:—

"There being no treaty between the United States and Spain, nor any Act of Congress directing how fugitives from justice in Spanish dominions shall be delivered, the extradition in the case referred to, in the resolution of the Senate, is understood by this department to have been made in virtue of the law of nations and the constitution of the United States. Although there is a conflict of authorities concerning the expediency of exercising comity towards a foreign government by surrendering at its request one of its own subjects charged with the commission of crime within its territory, and although it may be conceded that there is no national obligation to make such a surrender unless it is acknowledged by treaty or by statute law, yet a nation is never bound to furnish asylum to dangerous criminals who are offenders against the human race."

In a letter on the same case to the Chairman of the Judiciary Committee of the House of Representatives, Mr. Seward declared that "the object to be accomplished in all these cases is alike interesting to each government, namely, the punishment of malefactors—the common enemies of every society," and that "while the United States affords an asylum to all whom political differences at home have driven abroad, it repels malefactors, and is grateful to their governments for undertaking their pursuit and relieving us from their intrusive presence." This is precisely the view of extradition on which Canada and the United States should act without hampering themselves by any treaty on the subject, and if the United States declines to surrender our malefactors when we take the trouble for our own purposes to ask for them, we should nevertheless avail ourselves of every opportunity of sending across the border all the criminals that were wanted in the United States for punishment. Instead of conceding to criminals a right of asylum, we should regard it as a grievance when our neighbours do not offer to take back all their fugitive malefactors. It would be interesting to trace the origin and history of the above perverted view of "asylum," but such an inquiry is foreign to the subject before us.

WM. HOUSTON

COMMENTS ON CURRENT ENGLISH DECISIONS.

THE Law Reports for January include 20 Q. B. D. pp. 1-147; 13 P. D. pp. 1-13; and 37 Chy. D. pp. 1-55.

ECCLESIASTICAL LAW—IMPRISONMENT OF CLERGYMEN FOR DISOBEDIENCE OF ORDER OF SUSPENSION—APPEAL—HABEAS CORPUS.

The case of *Ex parte Cox*, 20 Q. B. D. 1, so far as the main point involved in it, is happily of no practical interest in this province, it will therefore suffice to say that the decision of the Divisional Court noted *ante* vol. 23, p. 329, is now reversed by the Court of Appeal; and that the Court of Appeal held that s. 19 of the Judicature Act, 1873 (see Ont. J. A. s. 37), gives an appeal from orders made by the High Court on application for *habeas corpus*, whether the order grants or refuses the writ.

TRUST—TRUSTEE—LIEN OF TRUSTEE ON FUND FOR COSTS—VOID SETTLEMENT.

In re Holden, 20 Q. B. D. 43, although a bankruptcy case, involves a point of general interest, a settlor made a post-nuptial settlement, which was valid at the time it was made, under which the trustees incurred expense of defending an action brought by the settlor to set it aside, and which action was dismissed with costs, which were not paid. The settlor subsequently became bankrupt, and, by reason thereof, the settlement became void under the Bankruptcy Act. The trustees claimed a lien on the trust estate for the costs above mentioned, and it was held by the Divisional Court (Cave and A. L. Smith, JJ.) that as the settlement was originally valid, and the costs were incurred by the trustees in performance of their duty, they were entitled to the lien they claimed as against the official receiver.

ARBITRATION—ARBITRATORS' REMUNERATION—RIGHT TO SUE FOR.

Crampton v. *Ridley*, 20 Q. B. D. 48, is chiefly to be noticed, not for the point actually decided, but for the expression of opinion it contains as to the right of arbitrators and umpires to whom a mercantile dispute is referred for arbitration, to sue for a reasonable remuneration for their services upon an implied contract on the part of the parties to the reference to pay the same. Upon this point, notwithstanding some earlier authorities which appear to lead to a contrary view, the learned judge was of opinion that if the point ever came up for adjudication, it would be found that the law would imply a contract to pay for such services, though not where the matter in dispute was one among friends, upon social or such like matters, and referred to mutual friends of the parties for settlement.

JUSTICES—DISQUALIFICATION—INTEREST—BIAS.

The Queen v. *Farrant*, 20 Q. B. D. 58, was an application to set aside an order of Kekewich, J., for a prohibition to the defendant, a magistrate, to prohibit him from sitting to hear and determine an assault case on the ground of alleged bias or interest. The application was granted by Stephen, J., and the case will be

found useful for the discussion it contains as to the ground of disqualification of justices on the score of interest or bias. The grounds of disqualification assigned were: (1) that Mr. Farrant had acted as medical attendant of one of the parties assaulted; (2) that he had advised a settlement; (3) that he had offered to bet that the case would be dismissed by the magistrates; (4) and that he would be required as a witness. The first and second grounds assigned were held not to constitute any disqualification; the third ground was also held to be no disqualification, though if he had actually made the bet, it was held that he would have had a pecuniary interest which would have disqualified him. The fourth ground was held also to be no disqualification, but a matter within the discretion of the magistrate. The mere fact that a judge is subpœnaed as a witness it was held could not on principle disqualify him from acting, otherwise a door would be opened which might enable parties to indefinitely postpone the trial of cases.

PRACTICE—CONTEMPT OF COURT—ABUSIVE LANGUAGE AND THREATENING GESTURES TO SOLICITOR AFTER HEARING OF APPLICATION IN CHAMBERS.

In re Johnson, 20 Q. B. D. 68, was an appeal by a solicitor from an order of Kekewich, J., committing him for contempt of court. The contempt consisted in abusive language addressed by the appellant to another solicitor in reference to an application to a judge in chambers. The abusive expressions were accompanied by threatening gestures, and were used by the appellant towards the other solicitor while in the passages leading to the exit from the court. The Court of Appeal held that the order had been rightly made, and dismissed the appeal.

DAMAGES—BREACH OF WARRANTY—SUB-SALE—COSTS OF DEFENDING ACTION BY SUB-VENDEE FOR BREACH OF WARRANTY.

The sole point in question in *Hammond* v. *Bussey*, 20 Q. B. D. 79, was the right of the plaintiffs, who brought the action for a breach of warranty, to recover as part of their damages the costs incurred by them in defending an action brought against them by certain sub-vendees to whom they had sold the goods with a similar warranty to that of defendant. The defendant was notified of this action, and claimed that the goods were according to contract, the present plaintiffs therefore defended the action and were defeated. The present defendant submitted to pay the damages recovered in that action, but contended he was not liable for the costs. The Court of Appeal (Lord Esher, M.R., Bowen and Fry, L.L.J.) affirming Field, J., held that he was. These costs it was considered might reasonably be supposed to have been a part of the damages in the contemplation of the parties as the probable result of a breach of the contract, within the rule laid down in *Hadley* v. *Baxindale*, 9 Ex. 341.

SHERIFF—UNDER-SHERIFF—VACANCY OF SHRIEVALTY—LIABILITY OF UNDER-SHERIFF FOR PROCEEDS OF EXECUTION—3 GEO. I. C. 15, S. 8 (R. S. O. C. 16, S. 43).

The Gloucestershire Banking Co. v. *Edwards*, 20 Q. B. D. 107, was an action brought by an execution creditor for money had and received, against the per-

sonal representatives of a deceased under-sheriff, who, during the vacancy of the shrievalty, under 3 Geo. I. c. 15, s. 8 (see R. S. O. c. 16, s. 43), had acted as sheriff and received the proceeds of an execution. The Court of Appeal (Lord Esher, M.R., Bowen and Fry, LL.J.) affirming the Divisional Court of the Queen's Bench Division (Day and Wills, JJ.) 19 Q. B. D. 575, held that the defendants were liable.

BILL OF SALE—SPECIFIC DESCRIPTION OF CHATTELS.

In *Witt* v. *Banner*, 20 Q. B. D. 114, the Court of Appeal (Lord Esher, M.R., Bowen and Fry, LL.J.) affirmed the judgment of Wills and Grantham, JJ., 19 Q. B. D. 276, noted *ante* vol. 23, p. 306, and held that "450 oil paintings in gilt frames, 300 oil paintings unframed, 50 water colours in gilt frames, 20 water colours unframed, and 20 gilt frames, at 47 Mortimer street," was not a sufficient description of chattels in a bill of sale.

MARRIED WOMAN—COMMITTAL FOR NON-PAYMENT OF DEBT—MARRIED WOMAN'S PROPERTY ACT, 1882, S. 1, SS. 2; (47 VICT. C. 19, S. 2, SS. 2 (O.).)

Scott v. *Morley*, 20 Q. B. D. 120, is another case throwing light on the meaning and effect of the Married Woman's Property Act, 47 Vict. c. 19, s. 2, ss. 2 (O.). A motion was made in that case to commit a married woman, against whom judgment had been recorded under the corresponding English Act, for non-payment of the judgment debt, but the Court of Appeal (Lord Esher, M.R., Bowen and Fry, LL.J.), reversing Kekewich, J. (before whom, however, the point raised by the appeal was not taken), held that no personal liability was incurred by a married woman against whom a judgment was recovered by virtue of the Married Woman's Property Act of 1882, and therefore she was not liable to committal for non-payment.

RAILWAY, BUILDING BY—LANDS INJURIOUSLY AFFECTED—COMPENSATION.

The points decided in *The Queen* v. *Poulter*, 20 Q. B. D. 132, are important. The question involved, was the right of a lessee to compensation under the following circumstances:—A railway, in the exercise of its statutory powers, commenced to build a warehouse which was intended to be one hundred feet high. If the warehouse had been actually built to the proposed height, it would have injuriously affected the light of a warehouse whereof the claimant was lessee for an unexpired time of fourteen years, which could be determined by six months' notice on 11th November next. The lessee gave notice to the railway company, and required them to say whether they would take over the lease, or whether he should give notice to determine the tenancy. The company refused to interfere, and the claimant then, of his own motion, gave notice to determine the tenancy. There was no evidence that at this time the railway company's building had so far progressed as to affect the light of the claimant's warehouse. The claimant afterwards claimed compensation from the company for injuriously affecting his lands. The Court of Appeal (Lord Esher, M.R., Bowen and Fry, LL.J.) held, reversing the Queen's Bench Division, that the act of the claimant

in giving notice to terminate his lease, not being the natural result of the acts of the company, he could not recover compensation on the footing that he was entitled to a fourteen years' lease, and that he could not recover compensation in respect of an injury which was merely prospective, and which did not exist at the time of making the claim. Compensation was allowed on the footing of the claimant having a lease only up to the 11th November, when he terminated it by notice.

COUNSEL—CONDUCT OF ACTION—COMPROMISE.

Matthews v. *Munster*, 20 Q. B. D. 141, is a case to which we have already referred. See *ante*, p. 2. The facts were shortly these: On the trial of an action for malicious prosecution, the defendant's counsel, in the absence of the defendant, and without his express authority, consented to a verdict for £350 with costs, upon the understanding that all imputations against the plaintiff were withdrawn. On this being communicated to the defendant, he repudiated the compromise, and now moved the court to set it aside and for a new trial; but the Court of Appeal (Lord Esher, M.R., Bowen and Fry, L.L.J.), affirming the Queen's Bench Division, refused the motion, holding that the relationship of counsel and client is not merely that of principal and agent, but that counsel, so long as his authority is unrevoked, has, subject to the control of the court, an "unlimited power to do that which is best for his client."

ADMINISTRATION — ADMINISTRATION DE BONIS NON — GRANT TO LEGATEE WITHOUT CITATION OF RESIDUARY LEGATEE.

Only two of the cases in the Probate Division seem to call for notice here. The first is *Re Wilde*, 13 P. D. 1. This was an application for administration *de bonis non*, by a specific legatee, in which it appeared that the residuary legatee, who was resident abroad, had notice by a letter that representation of the estate was required, and suggestion that he should renounce, to which he had made no reply; and it also appearing that he had no beneficial interest, there being no residue, it was held that the grant might be made without requiring the residuary legatee to be cited, or to renounce.

WILL—MISTAKE IN TRANSCRIBING DRAFT WILL—WILL ALTERED BY COURT TO CORRESPOND WITH DRAFT.

Re Bushell, 13 P. D. 7, strikes us as a somewhat curious case. Upon a will being propounded for probate whereby the testator had bequeathed a legacy to the "British Royal Infirmary," it was shown by affidavits that the legacy in the draft of the will was to the "Bristol Royal Infirmary." This draft had been read over to the testator and executed by him, and subsequently the engrossment had been executed by him without being read over. And, subject to an affidavit being produced that there was no such institution as the "British Royal Infirmary," the court granted probate of the will with the word "Bristol" substituted for "British."

WILL—HOLOGRAPH CODICIL—ATTESTING WITNESS UNABLE TO RECOLLECT EXECUTION—PRESUMPTION—PROBATE.

Woodhouse v. *Balfour*, 13 P. D. 2, is a case in which the witnesses to the signature of a testator to a holograph codicil, which appeared on its face to have been duly executed and attested, upon being called to prove it, while acknowledging their signatures as witnesses, were unable to recollect having written them, or of having seen the will or codicil before. They were clerks in the testator's employ, and had frequently witnessed papers for him. Under these circumstances the court presumed the codicil to have been duly executed, and granted probate of it.

COMPANY—EXTRAORDINARY GENERAL MEETING—IRREGULARITY IN CALLING BOARD MEETING—DIRECTOR, REMOVAL OF—AGREEMENT PRIOR TO FORMATION OF COMPANY, ADOPTION OF.

Proceeding now to the cases in the Chancery Division, *Browne* v. *La Trinidad*, 37 Chy. D. 1, covers some important points of company law. A meeting of directors passed a resolution for calling a general meeting, at which were to be proposed special resolutions for removing the plaintiff from the office of director, and for increasing the capital. The plaintiff was not notified of this meeting of directors until ten minutes before it was held, and was not then notified of the business intended to be transacted at it, and did not attend it. The general meeting was duly called in pursuance of the resolution for the 12th, for the adoption of the resolutions; and for 28th October for the ratification of the resolution adopted on the 12th October. On the 8th October, the plaintiff commenced the present action against the company and his co-directors, claiming *inter alia* a declaration that the extraordinary meeting had not been duly called for the 12th October, because of the alleged irregularity in calling the meeting of directors, and also an injunction restraining the defendants from removing him from his directorship, on the ground that prior to the formation of the company, it had been agreed by the promoters with the plaintiff, who was vendor of the corporate property, that plaintiff should be a director of the intended company irremovable until after the year 1888, and that this agreement had been embodied in the articles of association and adopted by the company having passed a resolution inviting the plaintiff to join the board as a director pursuant to the agreement. Charles, J., had granted an injunction on the ground of the insufficiency of notice in calling the meeting of directors; but the Court of Appeal (Cotton, Lindley and Lopes, LL.J.) were of opinion that even though the meeting of directors was irregularly called, and might have entitled the plaintiff promptly to have insisted on another meeting being called, yet as he had not chosen to do so, the meeting was not so called as to be unable to act as a board, and therefore the general meeting was not irregularly called. And on the main point, on which Charles, J., did not pronounce an opinion, they held that the incorporation of the agreement into the articles of association merely amounted to a contract between the members of the company *inter se*, and was not an adoption of the contract between the company and the plaintiff. Doubt was also expressed whether an agreement not to remove a director was one that could be specifically enforced at the suit of the director.

PRACTICE—APPEAL AFTER TIME.

In re Clayton Mills Manufacturing Co., 37 Chy. D. 28, an order had been made requiring six directors to refund certain moneys which had been paid to three of these directors out of the assets of the company, liberty being reserved to the three who had not received the money to apply as to the liability of those who had. Three of the latter on the last day entered an appeal, and this was an application by the other three for leave to appeal also, which was granted; otherwise, as Lindley, L.J., put it, there might have been this paradoxical result, if the first appeal succeeds, that the persons who *prima facie* are primarily liable might get off, while the persons who *prima facie* are only secondarily liable would have to pay.

SETTLEMENT—VOLUNTARY CONVEYANCE—SETTLEMENT BY WIDOWER IN FAVOUR OF ISSUE OF A FORMER MARRIAGE—27 ELIZ. C. 4.

In re Cameron and Wells, 37 Chy. D. 32, it was held by Kay, J., that where a widower on a second marriage makes a settlement of his property wherein limitations are contained in favour of his issue by his former wife, such limitations are voluntary, and are void as against a subsequent purchaser for value. The learned judge held that the contrary principle laid down as regards settlements by widows in *Newstead* v. *Searles*, 1 Atk. 265; 9 App. Cas. 320 (a principle which the learned judge says he does not profess to understand), should not be extended to settlements made by widowers.

VENDOR AND PURCHASER—VENDORS AND PURCHASERS ACT—JURISDICTION—NOTICE TO RESCIND CONTRACT, VALIDITY OF—(R. S. O. 1887, C. 112.)

Jackson & Woodburn, 37 Chy. D. 44, was an application to North, J., under the Vendors and Purchasers Act (see R. S. O. 1887, c. 112, s. 3), to determine whether a notice to rescind the contract was valid or not. The Act, it may be remembered, enables all questions arising out of or connected with the contract ("not being a question affecting the validity or existence of the contract") to be disposed of by a judge on a summary application. The point which North, J., had to decide was whether the question submitted did or did not fall within the exception. On this point he says: "I think that, according to the true construction of section 9" (R. S. O. 1887, c. 112, s. 3), "the words of exception refer to the existence or validity of the contract in its inception, and do not preclude the court from deciding upon a summons the validity of a vendor's notice to rescind the contract. The question whether a power to rescind has been well exercised has often been decided by the court upon a summons under this section. *In re Dames and Wood*, 29 Chy. D. 626, is one of such cases." On the merits he held that the notice to rescind was valid.

LEGACIES CHARGED ON REALTY—LEGATEE, RIGHT OF, TO ACCOUNT OF BACK RENTS FROM DEVISEE IN POSSESSION.

Garfitt v. *Allen*, 37 Chy. D. 48, is another decision of North, J. The point in issue was whether a legatee, whose legacy is charged upon land, is entitled to

an account of back rents against the devisee, who has been in possession, when the land is insufficient to satisfy the legacies. The learned judge held that a legatee in such circumstances stands in no higher position than a mortgagee who has not entered into possession, and therefore that he was not entitled to the account of the back rents.

AUCTION—FICTITIOUS BIDDING BY STRANGER—SALE BY COURT—SETTING ASIDE SALE—TEXT-BOOKS AS AUTHORITIES.

Union Bank v. *Munster*, 37 Chy. D. 51, was an action brought for specific performance of a contract for the purchase of certain land which had been offered for sale under the order of the court in a mortgage action. The defence was, that a stranger had at the auction made, at the instigation of the mortgagor, a fictitious bid, whereby the defendants had been induced to bid a higher price than they otherwise would have done. Kekewich, J. held this was no defence, and in the course of his judgment makes some noteworthy remarks on the citation of text-books as authorities. The argument of the defendants' counsel was mainly based on a passage in Fry on Specific Performance, and he says: "It is to my mind much to be regretted, and it is a regret which I believe every judge on the bench shares, that text-books are more and more quoted in court. I mean, of course, text-books by living authors, and some judges have gone so far as to say that they shall not be quoted. In the preface to this very book we have a warning against it by the learned author himself. I cannot forbear from quoting the words: 'There is one notion often expressed with regard to works written or revised by authors on the bench, which seems to me in part at least erroneous, the notion I mean that they possess a *quasi* judicial authority,' and then he gives a reason which must commend itself to all students why that notion is erroneous."

Reviews and Notices of Books.

Acts of the Legislatures of the Provinces now comprised in the Dominion, and of Canada, which are of a public nature, and are not repealed by the Revised Statutes of Canada for the reasons set forth in Schedule B to the said Revised Statutes.

In the paper respecting the Revised Statutes of Canada, signed "W.," and printed in the number of this journal published on the 1st of June, 1887, after giving an account of the inception and completion of that work, and its contents, and of the schedules appended to it, and their use in connection with it, we referred more especially to schedule B, headed: "Acts and parts of Acts, of a public general nature, which affect Canada, and have relation to matters not within the legislative authority of Parliament, or in respect to which the power

of legislation is doubtful, or has been doubted, and which, in consequence, have not been consolidated; also Acts of a public nature which, for other reasons, have not been considered proper Acts to be consolidated." The Commissioners were, by their commission, directed to "note the enactments of the old Provincial Statutes which have been repealed or altered; and also to classify all unrepealed enactments according to their subjects, care being taken to distinguish those applying to one or more Provinces only;" and they did so, and ascertained what enactments in the said Statutes were clearly in force, and related to subjects now under the jurisdiction of the Dominion Parliament, or as to which the jurisdiction was doubtful; and we stated that when such Provincial enactments related to matters forming the subject of a chapter of the Revised Statutes, they were printed with such chapter, but were made separate sections, and the Province or Provinces to which alone they apply were distinctly indicated; but if they related to matters with respect to which there was no chapter in the Revised Statutes, or the question of jurisdiction was doubtful, they were not printed in that work as then distributed, but only referred to in Schedule B, annexed to it, and left to be printed with the others referred to in the heading to that schedule, in a third and separate volume, which is now printed and distributed, and is that of which the title forms the heading of this article. It contains all the Provincial Acts or enactments on subjects within the jurisdiction of the Dominion Parliament, or as to which its jurisdiction or that of a Provincial Legislature is doubtful, or has been questioned, which are still in force in the Provinces by the Legislatures whereof they were respectively enacted (including those of the Civil Code of Lower Canada, now the Province of Quebec,)—except such as are incorporated as above mentioned in the Revised Statutes, Vols. 1 and 2, in the chapters on the subjects to which they relate.

This third volume is, in some respects, the one which was most needed. Every lawyer, and indeed every man of business in the Dominion, requires occasionally to know not only the statute law in force in the whole of the Dominion, but that in force in some one or more Provinces. That applying to the whole Dominion was to be found in its Statutes, of which most lawyers have a complete copy, while few have copies of the Statutes of all the Provinces. Yet lawyers, bankers, merchants and men of business in any Province are constantly becoming interested in questions affected by the statute law of other Provinces, as, for instance, those relating to bills of exchange, carriage of goods on inland waters, and many other subjects. These Provincial enactments will now be found in one or other of the three volumes prepared by the Commissioners. And still more important will be the volume now before us to the legislator wishing to amend and consolidate the law on any subject, and make it uniform throughout the Dominion. The third volume contains also the Public General Acts of the Dominion Parliament in force at the time of the publication of the Revised Statutes, but which, as being of a temporary nature, or for other reasons, were not considered proper Acts for consolidation.

Some idea of the extent, value and efficiency of the work performed by the

Commissioners may be formed from the following brief summary of the contents of the volume now before us, viz.:—

Acts of the late Province of Canada (Upper and Lower Canada united) prior to the Consolidated Statutes of 1859—13 Acts, 87 pages.

Acts forming part of the Consolidated Statutes of the Province of Canada—8 Acts, 92 pages.

Acts forming part of the Consolidated Statutes for Upper Canada—13 Acts, 68 pages.

Acts forming part of the Consolidated Statutes for Lower Canada—9 Acts, 51 pages.

Acts of the late Province of Canada, after the Consolidated Statutes of 1859, including parts of the Civil Code of Lower Canada—25 Acts, 155 pages.

Acts of Nova Scotia, Revised Statutes, third series—15 Acts, 40 pages.

Act of Nova Scotia prior to the Revised Statutes, third series—1 Act, 5 pages.

Acts of Nova Scotia subsequent to the Revised Statutes—5 Acts, 7 pages.

Acts of New Brunswick, Revised Statutes—15 Acts, 34 pages.

Acts of New Brunswick prior to the Revised Statutes—3 Acts, 17 pages.

Acts of New Brunswick subsequent to the Revised Statutes—22 Acts, 37 pages.

Act of British Columbia, (Colony of Vancouver Island)—1 Act, 2 pages.

Acts of former separate Colony of British Columbia—2 Acts, 4 pages.

Acts of British Columbia after the union of the two Colonies—11 Acts, 33 pages.

Acts of Prince Edward Island, Revised Statutes (20 Geo. 3)—24 Acts, 77 pages.

Acts of Prince Edward Island after the Revised Statutes—6 Acts, 12 pages.

Acts of the Parliament of Canada—153 Acts, 450 pages.

In all, 328 Acts and 1,171 pages.

The Acts in this volume are printed as in the two preceding it, each Act separately and with the Royal arms and the imprint of the Queen's Printer, so that he can furnish copies of any required Acts or number of Acts; or the Acts relating to any subject or class of subjects can be taken out of the volume and bound or stitched separately. A table of contents with the full titles of every Act is prefixed, and a copious index appended. The Acts of the Parliament of Canada inserted are, of course, to be found in the Statutes at large, but they are there dispersed through twenty-one volumes instead of being included as now in part of one; a point of no small convenience. The Acts in this volume are all of great public importance, though not of the same general character and extent as those revised and consolidated in the two preceding volumes. Those of the late Province of Canada of course apply to Quebec and Ontario, which then formed that Province, unless expressly limited to only one of them. They include those articles of the Civil Code of Lower Canada (now Quebec) made statute law by the Act 29 Vict. c. 41, the subjects of which were mentioned in the paper in our number for the 1st of June, 1887, and one more which the Commis-

sioners found necessary to the understanding of one of those we mentioned. These articles are given in full, and will be found exceedingly interesting and important, for the reasons assigned in our last paper, to which we confidently refer. They are well and clearly drawn by a Commission comprising three of the ablest lawyers in Canada, and are unquestionable law in the Province of Quebec, and must often affect the rights and interests of merchants, bankers and others in other parts of the Dominion.

The volume before us has added to the obligations under which the Dominion lies to the Commissioners for the manner in which their important, laborious, and difficult work has been done.

SUMMARY.

The Public General Acts of the Parliament of the Dominion of Canada requiring consolidation have been consolidated, and will be found in Vols. 1 and 2; and those which for reasons before mentioned did not require consolidation will be found in Vol. 3, pages 722 to 1171.

The Acts and enactments of Provincial Legislatures, in force in the Provinces by the Legislatures of which they were passed, and relating to matters forming the subjects of chapters in Vols. 1 and 2, will be found in such chapters respectively (but clearly distinguished as applying to such Provinces only),—except those from the Civil Code of Lower Canada (now Quebec), which are in Vol. 3, pages 393 to 440.

Those which are not so inserted in Vols. 1 and 2, and those from the said Code, will be found in Vol. 3, pages 1 to 721.

The Acts and enactments in Vol. 3, from the Consolidated Statutes of Upper Canada, and those from the Statutes of the Maritime Provinces and British Columbia, are translated and published for the first time in French.

W.

Correspondence.

DISALLOWANCE.

TO THE EDITOR OF THE CANADA LAW JOURNAL:

Dear Sir,—In the number of the CANADA LAW JOURNAL for February 1st, F. C. W., dating from Winnipeg, says that I was wrong in the conviction I expressed in my contribution to your preceding number, that the Dominion Government were bound to use every legal means in their power to give effect to their contract with the C. P. R. Company, confirmed by the Act 44 Vict. c. 1, declaring that it should "have effect as an Act of the Parliament of Canada." But I can find in his paper no reason for changing the opinion I then expressed, or the statement with which I concluded that "there is no doubt that Parliament by the said Act grants and intended to grant the twenty year monopoly, and that it was part of the consideration for which the company undertook to make the railway, and made it:" and if the line of the C. P. R., as defined in the Act 37 Vict. c. 14, passes, as I believe it does, through old Manitoba, it is clear that the monopoly clause applies to it.

I will not take up your space in arguing the question as to the right of a Province, under the B. N. A. Act, to authorize the construction of a railway *to* the national boundary line. I expressed my doubt modestly, and gave my reasons for it. Though I respect the judgment of the chief justice and Supreme Court of New Brunswick, in the case before them, I think they would not have given the same judgment in the case of a railway constructed in avowed contravention of the expressed will and intention of Parliament, and of the contract it had approved and confirmed as its Act. If I am wrong in so thinking, my error does not affect my position that the promise and pledged faith of the Government and Parliament of Canada must be kept. Parliament would *authorize* the construction of a railway if it permitted Ministers to allow it. I earnestly wish that the monopoly complained of should cease, with the consent of the company, on fair compensation to them, if thereby they sustain loss; and I have always thought that every possible facility should be given to Manitoba and the North-West Territories in consideration of the disadvantage at which they are placed by their very great distance from the sea-board, and have wished that the Finance Minister could see his way to some abatement in the duties on goods imported by sea for, and conveyed directly to, them, from the port of entry, in consideration of the heavy expense of their transport. I thank F. C. W. for giving me the opportunity of saying this, and for his correction of the misprint of s. 94 for s. 92 of the B. N. A. Act. It was corrected in the copy printed in the Montreal *Legal News*.

Yours, etc.,

G. W. W.

Proceedings of Law Societies.

COUNTY OF YORK LAW ASSOCIATION.

THE Second Annual Meeting of the County of York Law Association was held in Convocation Hall at Osgoode Hall, on Monday the 6th of February, Mr. B. B. Osler, Q.C., in the chair. There was a large attendance of members.

The following report was then read to the meeting:—

To the Members of the County of York Law Association—

GENTLEMEN: The Trustees take pleasure in reporting that the affairs of the Association are in a very satisfactory condition, that the purposes laid down in the Memorandum of Incorporation are being accomplished, and that the Association lends a mode of promoting the general interests of the profession, which is of singular value.

At the last Annual Meeting a resolution was passed directing the Board to take measures to bring about a meeting of delegates of the various County Law Associations in the Province, for the purpose of discussing matters of general interest to the profession, and immediately after the meeting correspondence was opened with the view of bringing about such a conference.

Before, however, the details of this arrangement had been completed, the draft of the proposed Revised Rules was laid before the Committee on Legislation, and this draft contained so many features requiring careful consideration, that the Committee on Legislation of the Hamilton Law Association was invited to meet with our Committee, and take up the consideration of the draft Rules. This Joint Committee met, and was subsequently enlarged by inviting all the other Law Associations in the Province to send representatives to the meetings. Most of the other Associations were represented at the subsequent meetings of the Committee; and ultimately a report was made, setting forth the suggestions of the Committee, the details of which are, without doubt, well known to the members of this Association.

The result of the labours of this Committee has been recognized and freely adopted by the judges and by the Attorney-General, and the report has been recognized as fairly representing the opinions of the profession on the subject of the new Rules. The Trustees, in giving prominence to the work of the Committee, desire to point out that had it not been for the existence of the Law Associations it would have been impossible to obtain any representative expression of opinion from the Bar of the Province, nor could expression have been given to an opinion from the Bar which would have carried the weight the report of the Joint Committee admittedly bore.

One of the principal features proposed by the Joint Committee provided for fixing definitely the mode of trial before trial. On no point were opinions so strongly and vigorously expressed as upon this, and as the solution, a very strong recommendation was made to take away the absolute discretion of the trial judge.

Almost as strong was the recommendation to establish a permanent circuit list for the trial of all cases in the High Court, with the necessary rearrangement of the sittings of the Divisional Courts. While we feel gratified that the judges have so far recognized the labours of the Committee as to have adopted nearly all their suggestions, we regret that in framing the Rules they have not adopted either of these recommendations, which the Trustees now lay before the Association for consideration.

The Trustees have aided so far as they could in urging upon Parliament the important question of raising the judicial salaries, which are now most inadequate, and it is earnestly to be hoped that the efforts made in this direction may meet with some measure of success.

The present efficient state of the library is due to the labours of the librarian, whose systematic plan of keeping the reports noted up has proved most valuable, especially at *Nisi Prius*. No book has ever been lost from the library.

The daily attendance in the library is large, and its usefulness is now well recognized. 159 volumes have been added during the year.

Two members of the Association, Mr. W. G. Falconbridge, Q.C., and Mr. Hugh MacMahon, Q.C., were promoted to the Bench during the year.

The Trustees have to record, with regret, the death of one member during the year, Mr. G. D'Arcy Boulton, Q.C.

At the date of the last Annual Report the Association numbered 216 members. Forty-four new members have subscribed for stock during the year. One member, Mr. Allan McNab, has withdrawn from the Association. There are now 256 members of the Association.

Two further donations of portraits have been promised to the Association, one by Mr. Ritchie, Q.C., and the other by Mr. Shepley, and it is hoped that members of the Association will contribute, from time to time, portraits of the judiciary of the Province.

The Historian of the Association hopes soon to publish his "Lives of the Judges."

The particulars required by the By-Laws accompany this report, being—

1. The names of the forty-four members admitted during the year.
2. The names of the 256 members at the date of this report.
3. A list of the books contained in the library.
4. A list of books added to the library during the year.
5. A list of periodicals received during the year.
6. A detailed statement of the assets and liabilities of the Association at the date of the report, and of receipts and disbursements during the year.

The Treasurer's accounts have been duly audited, and the Report of the Auditors will be submitted to you for your approval.

A copy of the Report of the Inspector of County Law Libraries upon the library of this Association accompanies this report.

B. B. OSLER, *President.*
WALTER BARWICK, *Treasurer.*

December 31, 1887.

On the motion of Mr. Barwick, seconded by Mr. Moss, Q.C., the report was adopted.

The Auditor's Report was then read to the meeting by Mr. Nicol Kingsmill.

STATEMENT FOR THE YEAR ENDING 31ST DECEMBER, 1887.

DR.			CR.	
FOLIO.			FOLIO.	
	Due Carswell & Co., 31st Dec., '87	$691 91		Balance of Cash on hand Dec. 31st, 1886 ..... $720 06
23.	Reports and Statutes	361 70	1.	Stock Subscriptions 220 00
29	Text-Book	300 00	5.	Annual Fees 505 00
33.	Periodicals and Subscriptions to Gazettes and Annual Reports and Digests	139 25	15.	Annual Grant from the Law Society 433 00
37.	Binding	82 50	21.	Carswell & Co., balance account remaining unpaid 232 61
41.	Furniture	10 50	141.	Interest on Bank Deposits for 1886 ..... 39 20
43	Salaries, Printing, Expenses, etc.	476 28		
	Balance on hand (exclusive of $7.90 interest, 1887)	87 73		
		$2,149 87		$2,149 87

STATEMENT OF ASSETS AND LIABILITIES ON THE 31ST DECEMBER, 1887.

ASSETS.		LIABILITIES.	
Reports and Statutes	$2,760 66	Stockholders	$1,305 00
Text-Books	984 77	Carswell & Co.	232 61
Periodicals	238 75	Profit and Loss Account	2,589 85
Furniture	55 55		
Cash in Bank (exclusive of $7.90 interest for 1887)	87 73		
	$4,127 46		$4,127 46

PROFIT AND LOSS ACCOUNT, 1887.

DR.		CR.	
Expenses	$476 28	Balance, 31st December, 1886	$2,088 93
Balance	2,589 85	Annual Fees	505 00
		Law Society	433 00
		Interest	39 20
	$3,066 13		$3,066 13
		Balance	$2,589 85

Toronto, December 31, 1887.

WALTER BARWICK, *Treasurer.*

The undersigned beg to report that they have examined the books, accounts and vouchers of the Treasurer, and find the above report correct.

NICOL KINGSMILL,
N. GORDON BIGELOW, } *Auditors.*

On the motion of Mr. Kingsmill, seconded by Mr. John Hoskin, Q.C., the report was adopted.

On the motion of Mr. Barwick, seconded by Mr. Ritchie, Q.C., the following amendment to the thirty-fourth by-law was adopted: "The payment by a Barrister or Solicitor subscribing for a share in the Association shall cover his annual fee for the current year."

On the motion of Mr. Marsh, seconded by Mr. John Hoskin, Q.C., the following resolution was adopted: "That the Joint Committee on Legislation be requested to interview the judges and the Attorney-General, and urge upon them, and, if necessary, urge upon the Legislature, the necessity for embodying in the Statutes the recommendations in the following paragraphs in the Report of the Joint Committee on Legislation:—

"'The creation of a permanent circuit list for the trial of all actions in the High Court, and the necessary rearrangement of the sittings of the Divisional Courts.

"'That some means should be devised to settle definitely before a case is called for trial whether it is to be tried with or without a jury.'"

Mr. C. H. Ritchie, Q.C., moved, seconded by Mr. J. K. Kerr, Q.C., "That a Committee on Legislation be appointed by this Association for the ensuing year, whose duty it shall be to consider, from time to time, what changes in or amendments of the laws, rules of court, or practice may, in their opinion, be desirable, and to submit their views thereon in the proper quarters, and to use their efforts to have the same carried into effect, also to make such suggestions in regard to proposed legislation as they may deem advisable; and that such Committee be composed of the following persons: John Hoskin, Q.C., Charles Moss, Q.C., Walter Cassels, Q.C., John Bain, Q.C., T. D. Delamere, E. Douglass Armour, J. A. Worrell and D. E. Thompson." The motion was carried.

Mr. J. K. Kerr, Q.C., was elected President for the ensuing year.

Mr. B. B. Osler, Q.C., thereupon vacated the chair, and Mr. Kerr, Q.C., took the chair as President.

It was moved by Mr. Moss, Q.C., seconded by Mr. E. D. Armour, and carried unanimously, that a vote of thanks be presented to the retiring President, Mr. B. B. Osler, Q.C., for his services during the two years which he had been in office.

The other officers elected were Vice-President, James Maclennan, Q.C.; Treasurer, Walter Barwick; Curator, E. D. Armour; Trustees, Messrs. J. H. Macdonald, Q.C., Z. A. Lash, Q.C., N. G. Bigelow, A. H. Marsh and G. H. Watson; Secretary, Mr. Thomas Urquhart.

It was moved by Mr. B. B. Osler, Q.C., seconded by Mr. Walter Barwick, and carried unanimously, That a vote of thanks be presented to Mr. Alexander Munro Grier, retiring Secretary, to whom it was due that the minutes should be entered upon the books of the Association, indicative of their appreciation of his services.

The meeting then adjourned.

DIARY FOR MARCH.

1. Thur ...St. David.
4. Sun.....*3rd Sunday in Lent.*
5. Mon....Holt, C.J., died, 1710, æt. 65.
6. Tues....Court of Appeal sits. Gen. Ses. and C. C. sittings for trials in York. York changed to Toronto, 1834.
11. Sun.....*4th Sunday in Lent.*
13. Tues....Lord Mansfield born, 1704.
17. Sat. ....St. Patrick's day.
18. Sun.....*5th Sunday in Lent.* Arch. McLean, 8th C.J. of Q.B., 1862. Princess Louise born, 1848.
19. Mon....P. M. Vankoughnet, 2nd Chancellor, 1862.
25. Sun.....*6th Sunday in Lent.*
28. Wed....Lord Romilly appointed M.R., 1851.
30. Fri.....Good Friday. B.N.A. Act assented to, 1867. Reformation in England began, 1534.

Early Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE FOR ONTARIO.

Queen's Bench Division.

TRAVERSY *v.* GLOUCESTER.

Bridge—Approach—Liability of local municipality not taken away by sec. 530 of the Municipal Act.

Section 530 of the Municipal Act, 46 Vict. cap. 18, provides that "The approaches for one hundred feet to and next adjoining each end of all bridges belonging to, assumed by, or under the jurisdiction of any municipality or municipalities, shall be kept up and maintained by such municipality or municipalities; the remaining portion or portions of such approaches shall be kept up and maintained by the local municipalities in which they are situate."

The action was brought under Lord Campbell's Act. The deceased met with the accident which caused his death at the intersection of two roads, both alleged to be out of repair, and both lying within the boundaries of the defendant township, but one of them leading to a bridge under the joint jurisdiction of the city of Ottawa and the county of Carleton, and the approaches to which, therefore, under the above section, should have been kept up and maintained by the city and county. The point where the accident occurred was within one hundred feet of the end of the bridge, but it was not shown that there was any artificial structure to enable the public to pass from the road to the bridge and from the bridge to the road, which would cover the point where the accident occurred.

Held, reversing the judgment of ROBERTSON, J., at the trial, nonsuiting the plaintiff.

1. That the word "approaches" in the section means all such artificial structures as may be reasonably necessary and convenient for the purpose of enabling the public to pass from the road on to the bridge, and from the bridge on to the road, and does not include the highway to the distance of one hundred feet from each end of the bridge, at all events, unless the artificial structures extend so far.

2. That in any case sec. 530 does not relieve the local municipality from its statutory liability to repair, but merely gives the local municipality the right to enforce its provisions against the municipality or municipalities owning the bridge.

REGINA *v.* TRIGANZIE.

Assault—Evidence of previous indictable offence—General reputation.

An indictment for an assault occasioning actual bodily harm contained a second count, charging a prior conviction for an indictable offence. The offence disclosed by the indictment upon which the prisoner was tried was not one of that class of offences for which, after previous conviction for felony, additional punishment might be imposed. The first part of the indictment only was read in arraigning the prisoner, and no allusion was made to the second part charging the prior conviction. The prisoner, in his defence, gave evidence of good character. The Crown gave some general evidence in rebuttal, and then tendered, under 32-33 Vict. c. 29, s. 26, a certificate to prove a prior conviction, and read the second clause of the indictment charging such prior conviction.

Held, that this evidence was not properly admissible as to character, and that such evidence can only be as to general reputation, evidence of a prior conviction going to the matter of punishment, and not to general character.

Regina v. *Rowton*, 10 Cox, C. C. 25 followed.

ARCHBOLD *v.* THE BUILDING AND LOAN ASSOCIATION.

Mortgage—Six months' notice of intention to pay off after default—Contract as to time—Interest after maturity.

T. borrowed money from defendants, and gave a mortgage on certain lands as security, with other securities as collateral, giving a second mortgage on the said lands to plaintiff. Both mortgages being in default, defendants agreed in writing with plaintiff, who began foreclosure proceedings, that if he obtained a final order, subject to their claim, they would accept from him a new mortgage on the same property for $15,000, payable in five years from date of order, with interest at eight per cent., and that he was "to have the privilege of paying any part of the principal at any time." Upon payment, as aforesaid, defendants were to assign to plaintiff their mortgage from T., and all collaterals. Plaintiff obtained a final order, and gave defendants a mortgage dated 8th January, 1881, for the above amount, payable at the expiration of five years, with interest at eight per cent., half yearly, "until fully paid and satisfied." The mortgage provided, after payment, for the assignment to the plaintiff of the original securities, and had a clause that the mortgagor may at any time pay off the whole or any part of the said $15,000 before the expiration of the said term of five years, and the said mortgagees shall accept payment of any sum that may be paid to them by said mortgagor on account of the principal, and interest shall thenceforth cease to grow due upon the sum so paid." After the expiration of five years plaintiff paid interest at the said rate on said sum until the 1st of January, 1887, and on the 22nd of March following tendered defendants the principal and interest at the said rate up to that day, and demanded an assignment of the original mortgage and securities. Defendants refused to accept the same, claiming that they were entitled to six months' notice of the mortgagor's intention to pay, or to six months' interest in advance.

Held, ARMOUR, C.J., dissenting,

1. That the rule followed by courts of equity in England that a mortgagor must, after default by him in payment of the money according to the proviso in the mortgage deed, give the mortgagee six calendar months' notice of his intention to pay off the mortgage, unless the mortgagee has demanded or taken any steps to compel payment, had the force of law in Ontario.

2. That there were no circumstances in the present case to do away with its effect, the provision for payment of the principal being limited to the five years within which plaintiff had covenanted to pay the same.

3. That after the expiration of five years from the date of the mortgage there was no contract in force for the payment of interest, defendants could only claim as damages compensation for non-payment of principal at the time stated, and that the measure of damages should be the ordinary value of money while it was withheld, and during the currency of the six months' notice.

4. That in this case the defendants were entitled to the six months' notice, and the tender on the 22nd of March, 1887, was insufficient, and as no evidence was given by defendants as to the rate of interest after default, and evidence offered by plaintiff on the point was refused at the trial, the legal rate of six per cent. would be taken as the measure of damages.

Practice.

Patterson, J. A.] [May 17, 1887.
Court of Appeal.] [Jan. 10, 1888.

PLATT *v.* GRAND TRUNK RAILWAY CO.

Appeal—Dismissal for delay—Extending time—Special circumstances—Judge in Chambers, powers and discretion of.

Motion to dismiss defendants' appeal to this court for want of prosecution. The judgment appealed from (12 O. R. 119) was pronounced on the 28th of April, 1886, and notice of appeal was given two weeks thereafter. Security was given at the end of June, but the draft appeal case was not sent to the plaintiff's solicitors till the 24th of September following, and did not reach them till the 27th of September. The period from that date till the 1st of March, 1887, was occupied by correspondence between the solicitors for the parties in an attempt to settle the appeal case, and at the end of that period it became apparent that

there must be a motion to a judge to settle the case. From the 1st of March, however, till the 28th of April, when a year had run from the pronouncing of judgment, nothing was done, and this motion was made on the 14th of May, 1887. The reason given for the delay after the 1st of March was that the appellants' solicitor thought it best to have the case settled by the judge who tried the action, and that the judge did not during the time in question hold Chambers, he being away on circuit. It was shown, however, on the other side, that he was not continuously absent during this period.

Held, by PATTERSON, J.A., in Chambers, that no special circumstances were shown to justify an extension of time, and that the appeal should be dismissed for want of prosecution.

Held, on appeal by the court, that the judge in Chambers had power to make the order dismissing the appeal, and that his discretion should not be interfered with.

S. H. Blake, Q.C., and *W. Cassels*, Q.C., for the appellants.

J. Maclennan, Q.C., and *T. Langton*, for the respondent.

Boyd, C.] [Jan. 9, 1888.

HARVEY *v.* MCNEIL.

Creditors' Relief Act—Mortgage action—Execution creditors against lands—Ratable distribution of proceeds of sale—Foreclosure judgment.

The Creditors' Relief Act applies to execution creditors against land in question in a mortgage action for foreclosure or sale, and all such creditors must share ratably in the proceeds of sale.

Semble, in the case of foreclosure, the old form of decree giving execution creditors, as subsequent encumbrancers, liberty to redeem according to their priorities is no longer applicable.

In this case the judgment for foreclosure was changed to sale, and the following order was pronounced on appeal from a Master's Report: Let the land be sold, and after paying what is due to the mortgagee, and interest and costs applicable to his claim, let the balance be divided ratably between the execution creditors, who are each to add their costs of this appeal to their claims, and any other execution creditors who may come in before the Master on his calling for such claims before report on sale.

C. J. Holman, for defendant, Warnock.
Middleton, for plaintiff.

Boyd, C.] [Jan. 10, 1888.

ARPIN *v.* GUINANE.

Venue—Preponderance of convenience—Disclosing the names and evidence of witnesses.

The plaintiff lived in Montreal and the defendant in Toronto; the plaintiff had twenty-six witnesses in Montreal, and the defendant twenty-eight in or near Toronto. On a motion to change the venue from Cornwall to Toronto, the Master in Chambers directed the parties to put in affidavits disclosing the names and the nature of the evidence of the witnesses, and upon these determined that the evidence of some of the Montreal witnesses would be irrelevant to the issues, while all the Toronto witnesses might be important; and changed the venue to Toronto. Upon appeal,

Held, that the conclusion of the Master as to the evidence was correct, and his order for change of venue proper upon the affidavits before him; but

Semble, the direction to disclose the names and evidence of witnesses was improper; not having been appealed against, however, and having been complied with, it could not be disturbed.

Hoyles, for the plaintiff.
H. T. Kelly, for the defendant.

Street, J.] [Jan. 20, 1888.

In re SOLICITOR.

Solicitor and client—Reference to taxation at Solicitor's instance—Order for payment—Costs of reference.

A solicitor who has obtained an order for taxation of his bill of costs against his client, and taxed his bill under it, is not entitled to a summary order for payment of the amount found due. Where the client obtains the order for taxation, he thereby submits himself to the summary jurisdiction of the Court, and

there should be a clause in the order directing the payment by the client of the amount to be found due to the solicitor.

Semble, also, that the order for taxation under Rule 443 should, under the authority of sub-sec. "*d*" of that Rule, where it is made upon the client's application, contain an order for the payment by him of the amount to be found due upon the reference, but when it is made upon the solicitor's application, should contain no such order. The solicitor should be entitled to add the costs of the reference to his claim only in the event of the client appearing upon the reference.

Millar v. *Cline*, 12 P.R. 155, distinguished.

In re Harcourt, 32 Sol. J. 92, followed.

H. H. Macrae, for the solicitor.

No one for the client.

Armour, C. J.] [Jan. 16, 1888.

LAING *v.* SLINGERLAND.

Arrest—Capias—Affidavit—"Intent to defeat."

The use in the affidavit upon which an order for the issue of a *ca. re.* was granted of the words "intent to defeat," instead of "intent to defraud," the latter being the words prescribed by R. S. O. c. 67, s. 5.

Held, not fatal to the arrest.

Neven v. *Butchart*, 6 U. C. R. 196; *Hargreaves* v. *Hayes*, 5 E. B. 272; *McInnes* v. *Macklin*, 6 U. C. L. J. 14; *Swift* v. *Jones*, 6. U. C. L. J. 63; *Bamberg* v. *Solomon*, 2 P. R. 54, referred to.

Aylesworth, for the plaintiff.

Watson, for the defendant.

Street J.] [Jan. 21, 1888.

In re ST. CATHARINES AND NIAGARA CENTRAL RAILWAY CO. AND BARBEAU.

Railway company—Incorporation by Provincial Act—Subsequent legislation by Parliament of Canada—Applicability of ss. 4 to 39 of the General Railway Act of Canada.

A railway company, incorporated by an Act of the Ontario Legislature, was thereby authorized to construct, equip, and operate a railway between certain points.

By an Act of the Dominion Parliament, the Governor-in-Council was authorized to grant a subsidy to the company; and by another Act of the Dominion Parliament the company's railway was declared to be a work for the general advantage of Canada, and the company was authorized to build a branch line. No further powers of any kind were conferred upon the company by the Dominion Parliament.

Held, that the effect of the declaration that the railway was a work for the general advantage of Canada was to bring it under the exclusive legislative authority of the Parliament of Canada, but that the Acts of the Ontario Legislature previously passed were in no way affected; that the railway in question was not one "constructed or to be constructed under authority of any Act passed by the Parliament of Canada" (see sec. 3 of the Railway Act of Canada R. S. C., chap. 109); and, therefore, secs. 4 to 39 of R. S. C., chap. 109 did not apply to it; and a motion to a judge of the High Court of Justice, under sec. 8, for a warrant of possession of certain lands was refused.

Aylesworth, for the company.

Robinson, Q.C., for the landowner.

Street, J.] [Jan. 21, 1888.

MCINTOSH *v.* ROGERS.

Vendor and purchaser—Verification of abstract—Mortgage thirty-six years old, presumption or proof of payment—Registration of instrument, evidence of—Possessing title, evidence of—Election to make perfect title, notwithstanding terms of contract.

Upon a reference as to title in an action to enforce specific performance of a contract for the sale of land, a solicitor's abstract was delivered by the vendor, and certain objections made by the purchaser to the verification of it. The purchaser appealed from the Master's rulings upon these objections:

(1) A mortgage made by W. in 1850 to the M. B. Society was set forth in the abstract, and it was alleged that it had been paid, and, besides that, it was barred by the Statute of Limitations, W., and those claiming under him, having been in possession for thirty-six years. The mortgage was produced, and had indorsed upon it a memorandum without date and purporting to be signed by the Secretary-Treasurer

of the M. B. Society, that it was paid and settled in full, but the signature was not proved. The mortgage recited that W. had become the purchaser of two shares in the M. B. Society, and had agreed to pay £100 therefor; the proviso was for payment at the times appointed by the rules of the Society—by monthly subscriptions, to continue until the objects of the Society should be attained. Affidavits were produced from the vendor and the persons who had owned the land during the ten years next before the contract, that they had paid nothing and had never been asked to pay anything upon this mortgage. In a conveyance dated 3rd of May, 1856, this mortgage was treated as a subsisting incumbrance, and in a conveyance dated 10th of October, 1874, the grantor covenanted that he would procure a discharge of this mortgage. No evidence was given as to when the mortgage money became payable under the rules of the Society, nor whether the objects of the Society had been attained, nor any explanation as to why the mortgage had not been discharged, nor as to any difficulty in showing payment.

Held, that this mortgage should not, in favour of the vendor, be presumed to have been satisfied; nor, having regard to the provisions of Chancery General Orders 394 and 396, should the question be disposed of upon a presumption of law. The vendor should show that some portion of the purchase money did not become payable under the rules of the Society within the period of ten years before the contract, or that this could not be ascertained; that the records of the Society could not be referred to; or that there was difficulty in proving the fact set forth in the indorsement on the mortgage that it had been paid in full.

(2) The purchaser required evidence of the registration of a deed from L. G., and other named persons, to S. G., which deed was set out in the abstract and stated to be registered. The vendor produced a deed answering the description in the abstract, but having no certificate of registration indorsed upon it, and a registrar's abstract containing a statement of the registration of a conveyance bearing the same date and covering the same land as the abstracted deed, but setting forth the parties to it only as "L. G. *et al.* to S. G."

Held, that the purchaser was entitled to some further pooof of the identity of the registered conveyance with the one produced; either the production of a certified copy of the registered conveyance, or the certificate of the registrar indorsed upon the instrument produced that the original was registered in his office. The purchaser was not bound to take the statement produced and examine it with the registered instrument, or procure a copy at his own expense.

Re Charles, 4 Chy. Chamb. R. 19, not followed.

(3) The vendor set out a perfect paper title in his abstract, and wound up with an assertion that he had also a good title by virtue of the statute of limitations.

Held, that if the vendor relied upon the possessory and not the paper title, the purchaser would be entitled to stricter and more satisfactory and complete evidence, and should have the persons who made the affidavits produced for cross-examination, for the reasons given in *re Boustead* and *Warwick*, 12 O. R. App. 491.

(4) It appeared that the vendor had elected to make out a title perfect both as to abstract and verification, in order that he might compel the purchaser to accept it.

Held, that this being so, the purchaser was entitled to have the title made out as strictly and completely as if the vendor had not in any way guarded himself by the terms of the contract.

[As to the operation and effect of the contract, see this case reported, 14 O. R. 97.]

Hoyles, for the plaintiff.

G. W. Marsh, for the defendant.

Mr. Dalton.] [Feb. 1, 1888.

BROWN *v.* PEARS.

Discovery—Action for specific performance—Examination of grantors of vendor before defence—Objections to title—Condition in contract—Time.

In an action by a vendor for specific performance of a contract for sale of land at the price of $24,000, it appeared that less than three weeks before the contract the vendor had obtained a conveyance of the land from his two sisters, in which the consideration expressed was $5,000. The sisters were old and infirm, and being unmarried, lived, and had

for a great many years lived, with the plaintiff, and were said to be under his influence. The defendant was advised that so great a difference in the price required explanation, and had made endeavours to see the sisters, but had been refused access to them, and the plaintiff had refused to procure them to join in the conveyance to the defendant.

Held, that under these circumstances, the defendant should be allowed under rule 285, to examine the two sisters before delivering his defence.

It was contended on behalf of the plaintiff that the title could not now be objected to by the defendant, as by the terms of the contract all objections to the title were to be notified by the 26th December, 1887, and this was not taken until a week later.

Held, following *Want* v. *Stallitcras*, L. R. 8 Ex. 175, that such a condition should not apply to the case of the vendor being unable to give a good title, but only to objections and requisitions which might have been properly enforced against a vendor who had a valid title; and the objection here might go to the root of the plaintiff's title.

Watson, for the plaintiff.

Alan Cassels, for the defendant.

Street, J.] [Feb. 4, 1888.

EMERSON *v.* GEARIN.

Counter-claim—Costs—Construction of order.

Although for some purposes a claim and counter-claim form but one action, yet the costs of the counter-claim are to be taxed separately from the costs of the action, a counter-claim being for the purposes of taxation to be treated as a cross action.

McGowan v. *Middleton*, 11 Q. B. D. 464, and *Beddall* v. *Maitland*, 17 Chy. D. 174, followed.

And where the order of a Divisional Court varied the judgment at the trial by directing that the counter-claim should be struck out and not dismissed, and should be disposed of in a separate action, and also directed that the defendants should pay into court the amount of the costs *of the action*, but was silent as to the costs of the counter-claim.

Held, that the rights of the parties must be governed by this order and not by anything that preceded it, and that under it the plaintiffs were not entitled to take the costs of the counter-claim.

McClive, for the plaintiffs.

H. H. Collier, for the defendants.

Q. B. Divisional Court.] [Feb. 6, 1888.

In re GRAHAM *v.* TOMLINSON.

Prohibition—Division Court—Notice disputing jurisdiction—Ascertainment of amount.

The operation of s. 14 of the Division Courts Act, 1880, is restricted to cases within the general jurisdiction of the Division Courts, and the absence of a notice under that section disputing the jurisdiction cannot give jurisdiction when the amount claimed is beyond the competence of a Division Court.

In re Knight v. *Medora*, 14 A. R. 112, and *In re Mead* v. *Creary*, 32 C. P. 1, followed.

But where a cheque for $122 was given to the defendant by the plaintiff as a loan of the money represented by it;

Held, on motion for prohibition, that the indorsement of the signature of the defendant on the cheque was a sufficient ascertainment of the amount of the plaintiff's claim by the signature of the defendant to satisfy s. 54 of R. S. O. c. 47, as amended by s. 2 of 43 Vict. c. 8, and to give a Division Court jurisdiction.

Kinsey v. *Roche*, 8 P. R. 515, overruled; and *Wiltsie* v. *Ward*, 8 A. R. 549, and *Forfar* v *Clunie*, 10 P. R. 90, considered.

C. C. Robinson, for the plaintiff.

Morson, for the defendant.

Robertson, J.] [Feb. 6, 1888.

HARTNETT *v.* CANADA MUTUAL AID ASSOCIATION.

Discovery—Examination of local agent of Life Insurance Company.

In an action upon a life insurance policy, an order was made at the instance of the plaintiff for the examination for discovery only of the local agent of the insurance company who procured the application for insurance.

O'Sullivan, for the plaintiff.

Masten, for the defendants.

Q. B. Divisional Court.] [Feb. 6, 1888.

In re CURRY.

Arbitration — Extending time for making award—Death of party—No provision for appeal—Statute of Limitations.

Two persons submitted certain matters in dispute between them to the award of a barrister of character and standing. The submission provided that the death of either party should not act as a revocation of the power and authority of the arbitrator; there was no provision for an appeal from his award. The arbitrator allowed the time for making his award to run out before entering on the reference. One of the parties had died since the submission, and the survivor now applied to the court to enlarge the time. It appeared that the Statute of Limitations had so run since the submission as to bar portions of the applicant's claim.

Held, reversing the decision of ROSE, J., that the facts of the death and the absence of the right of appeal would not warrant the court in refusing to enlarge the time, and that, under the circumstances, no injustice would be done by enlarging it.

Edwards v. *Davies*, 23 L. J. Q. B. N. S. 278; *Brown* v. *Williams*, 6 D. & L. 235; *Lord* v. *Lee*, L. R. 3 Q. B. 404; *Denton* v. *Strong*, L. R. 9 Q. B. 117, referred to.

Aylesworth, for the applicant.

H. J. Scott, Q.C., contra.

Mr. Dalton, Q.C.] [Feb. 6. 1888.

FOLEY *v.* LEE.

Action — Dismissal for non-prosecution — Motion by two defendants where there are others.

A motion by two of the defendants to dismiss the action as against them for the plaintiff's default in not proceeding to trial was refused, where it appeared that one of the defendants, a necessary party, had for apparently sufficient reasons not been served with the writ of summons, while the action had proceeded against the other defendants, and as against them was ripe for trial.

Held, that it was the duty of the applicants to have applied to the plaintiff's solicitor for information as to the state of the cause in regard to the other defendants before making such a motion.

J. M. Quinn, for the motion.

G. W. Holmes, contra.

Armour, C. J.] [Feb. 7, 1888.

ODELL *v.* CITY OF OTTAWA.

Discovery—Examination of servant of corporation.

In an action for damages, for negligence against a corporation in which the complaint was that a traction engine of the defendant's had caused an accident which resulted in injury to the plaintiff, an order was made at the instance of the plaintiff for the examination for discovery of the driver of the engine.

Aylesworth, for the plaintiff.

Watson, for the defendants.

MacMahon, J.] [Feb. 9, 1888.

REGINA *ex rel.* CHAUNCEY *v.* BILLINGS.

Municipal elections — Quo warranto — Defective material—Statement—Recognizance — Affidavit—Amendment.

Upon an application for a *fiat* for the issue of a summons in the nature of a *quo warranto* under the Municipal Act of 1883, to try the validity of the respondent's election as a municipal councillor, the statement of the relator did not show that he was a candidate or an elector who voted, or who tendered his vote, at the election, as required by sec. 185 of the Act; and the recognizance filed by the relator was not entered into before a judge or commissioner for taking affidavits, nor allowed by the judge in the manner prescribed by sec. 186, nor was it conditioned to prosecute the writ with effect, and the affidavit of the relator in support of the application did not set out fully and in detail the facts and circumstances alleged in the statement, as required by rule 2 of the rules of Michaelmas Term, 14 Vict.

Held, that these were defects in the material necessary to ground the application, not mere irregularities which could be amended at a later stage; and the *fiat*, the writ, and all proceedings were set aside with costs.

Q. B. Divisional Court.] [Feb. 6, 1888.

ADAMS *v.* WATSON MANUFACTURING CO.

Debtor and creditor—Partnership—Change in firm—Assignment for creditors under 48 *Vict. c.* 26*—Rights of assignee—Fraudulent preference—Amendment—Rule* 103.

The firm of R. & Co., consisting of three members, supplied goods to the defendants up to the 2nd of December, 1885. After that date one of the members retired, and assigned his interest in the assets of the firm to the remaining partners, who continued to carry on business under the same firm name, and subsequently made an assignment to E. under 48 Vict. c. 26, for the benefit of their creditors. E. sold to the plaintiff the account supposed to be due from the defendants to R. & Co. for the price of the goods supplied, and the plaintiff brought this action for the amount of such account.

The defendants, however, set up that the goods in question were not purchased by them, but were consigned to them for sale by R. & Co., and that the proceeds of the goods actually sold were by instruction of R. & Co. remitted to H. & Co., to whom R. & Co. had assigned the proceeds of such sale, and submitted that H. & Co. should be made parties.

At the trial, it appeared from the evidence that the defence was undertaken and conducted for the defendants by H. & Co. The trial judge found that no debt had ever existed from the defendants to R. & Co., and dismissed the action, refusing to add H. & Co. as parties.

The plaintiff moved, by way of appeal from this judgment, seeking to make H. & Co. and E. parties, and to charge the defendants in the character of bailees of the residue remaining unsold of the goods consigned to them by R. & Co., in which he claimed an interest, subject to the right of H. & Co. if the transfer to them should be upheld, or absolute if that transfer should be set aside as a fraudulent preference.

Held, that these questions were "questions involved in the action" within the meaning of Rule 103, having regard to the manner in which the defence was conducted, and to the fact that the transfer to H. & Co. was set up in the defence, and that the plaintiff should be allowed to amend under that rule; but that the amendment must be confined to the plaintiff's possible rights.

By s. 7 of 48 Vict. c. 26, E. was the only person entitled to enforce the right of the creditors of R. & Co. to set aside the transfer to H. & Co.; but that transfer was not made by the same firm of R. & Co. which assigned to E.; the two estates were distinct, and the creditors of the original firm, not the creditors of the new firm, were those against whom only a fraudulent preference by the original firm could be declared void. The plaintiff could have no higher right than E., through whom he claimed, and could not therefore attack the assignment to H. & Co.

The plaintiff was granted leave to amend by adding H. & Co. as defendants, his claim against them to be limited to an account of their debt and of payments on account thereof, and as against the original defendants to obtain the unsold goods as soon as the debt due H. & Co. should be satisfied; and by adding E. as a plaintiff upon filing his consent, payment by the plaintiff of the defendants' whole costs to be a condition precedent. Falconbridge, J., *dubitante* as to the disposition of costs.

G. T. Blackstock, for the plaintiff.

John Crerar, for the defendants.

Street, J.] Feb. 9, 1888.

In re HOOPER AND ERIE & HURON RAILWAY CO.

Railway company—Notice of expropriation—Desistment.

A railway company at different times served H. with three several notices, under the Dominion Railway Act, stating that portions of land owned by him were required for the company's line. To each of the first two notices H. replied by a notice appointing an arbitrator, but stating such appointment to be expressly without prejudice to his right to insist that the company had no right to take any part of his land. The company served successive notices of desistment from all their three notices, and H. gave notice that he objected to the third notice of desistment, and claimed that the company had no right to desist from their third notice of expropriation.

Held, that the company had not exhausted their powers of desistment, but had the right to desist from their third notice. H. could

not be allowed to complain of the abandonment by the company of proceedings to compel him to sell his land to them, when he had notified them at every opportunity that he intended to contest their right to compel him to do so; after they had acted upon his expressed intention, and abandoned the notice to which he objected, it was too late for him to endeavour to insist upon its validity.

Grierson v. *Cheshire Lines Committee*, L. R. 19 Eq. 83, referred to.

Wm. Macdonald, for the landowner.

Lash, Q.C., for the railway company.

MacMahon, J.] [Feb. 10, 1888.

HEDDLESTONE *v.* HEDDLESTONE.

Devise of land—Restraint on alienation—Invalidity of devise.

Testator devised as follows: "I also will that that portion of the within mentioned lands, which I have hereby bequeathed to my son William, to my son Robert, and to my son James, shall not be disposed of by them, either by sale, by mortgage, or otherwise except by will to their lawful heirs."

Held, invalid, and that the plaintiff, one of the devisees, was entitled to hold the land freed from the restriction above mentioned.

A. H. Marsh, for plaintiff.

J. Hoskin, Q.C., for infants.

Street, J.] Feb. 10, 1888.

REGINA *v.* GREEN.

Criminal law—Conviction for selling intoxicating liquor to an Indian—Variance as to date between evidence and conviction—R. S. C. c. 43, s. 87—Findings of magistrate, when reviewable.

A summary conviction by the police magistrate of the county of Brant for selling intoxicating liquor to an Indian in the township of Tuscarora, contrary to R. S. C. c. 43, stated that the offence was committed on the 29th September, 1887, but the information stated and the evidence disclosed that the offence was committed on the 27th September, 1887.

Held, that the date was not under the circumstances material, there being no suggestion that any wrong or injustice was caused by the mistake, and that s. 87 of R. S. C. c. 43, operated to cure this irregularity, as also certain other irregularities complained of, the offence having been clearly proved, the police magistrate having express jurisdiction by s. 96 of the Act, and the punishment imposed being within the power conferred upon him.

Held, also that where the proceedings before a magistrate are removed under 29 and 30 Vict. c. 45, s. 5, the judge is not to sit as a court of appeal from the findings of the magistrate upon the evidence; if any fact found by the magistrate is disputed, and he would have no jurisdiction had he not found that fact, then the evidence may be looked at to see whether there was anything to support his finding upon it; but if the jurisdiction to try the offence charged does not come in question as a part of the evidence, then the jurisdiction having attached, his finding is not reviewable as a rule except upon an appeal.

Mackenzie, Q.C., for the defendant.

Aylesworth, for the magistrate.

COUNTY COURT.

Peterborough.] [Feb. 14, 1888.

O'SULLIVAN *v.* BELLEGHEM.

Time—Computation—"Till."

The defendant obtained an order giving him till the 20th instant to file his statement of defence. The plaintiff on that day entered a note, under Rule 596, closing the pleadings against the defendant as in default of defence

L. M. Hayes moved to set aside the note citing *Dakins* v. *Wagner*, 3 Dowl. 535; *Kerr* v. *Jeston*, 1 Dowl. 538, N.S.; *Isaacs* v. *Royal Ins. Co.*, 5 Ex. 296; *McDonald* v. *McEwen*, 6 P. R. 18.

J. O'Meara contra.

WELLER, Co. J.—I am of the opinion that, in an order of the kind made by me, the word "till" (without some word, for example, "exclusive,") means inclusive of the day to which it is prefixed. Therefore the plaintiff was wrong in causing the pleadings to be noted closed on that day. The plaintiff, having taken the chance of being strictly correct, should pay the defendant's costs of the motion.