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DIARY FOR DECEMBER.

1. Wed..Lord Chr. Hardwicke born 1690.
2. Thur.Sittings of Div. Ct. Chy. Div. H. C. J. begin.
5. Sun...*2nd Sunday in Advent.*
7. Tues..C. C. York sittings for trials begin.
8. Wed..Sir Wm. Campbell, 6th C. J. of Q. B., 1825.
12. Sun...*3rd Sunday in Advent.*
14. Tues..C. C. sittings for trials commence, except in York.

TORONTO, DECEMBER 1, 1886.

OUR American cousins of the legal persuasion often poke fun, with or without cause, at some of what might be termed the aristocratic peculiarities of the Old Country. It is on the other hand, in our opinion, not only a democratic peculiarity, but in a legal writer ridiculous affectation, to use such a clumsy title as the following in an article which we see in a contemporary: "Liability of an employer to an employé injured by the negligence of a fellow employé." The use of the old-fashioned words, "master and servant," would be more intelligible, technical and "handy," and hurt no one's feelings. We do not believe that those who, by ennobling service, learn to rule, could possibly be offended by the old fashioned *terme de la ley* which all lawyers understand.

ON the 10th November last Sir James Bacon, at the advanced age of eighty-six, retired from the Bench and bade adieu to the Bar. The occasion was marked by the unusual compliment of all the other judges attending in court to take part in the valedictory proceedings. The Attorney-General, on behalf of the Bar, which was represented by numerous and influential barristers of high standing in the profession, tendered the aged judge an affecting farewell which was replied to in fitting terms. The career of the ex-Vice-Chancellor (who is the last judge to bear that title, which is now extinct so far as the English judges are concerned), is in some respects remarkable, and illustrates in a striking manner the extraordinary energy and vitality which characterizes so many men who attain high judicial positions in England. Appointed a judge at the age of seventy, when most men are thinking that their life work is at an end, he has for sixteen years discharged the duties of his office with satisfaction to the profession. His reputation as a lawyer was made in Bankruptcy, in which department of jurisprudence he was *facile princeps*. As an equity judge he also distinguished himself. His judgments, however, were not unfrequently reversed on appeal, a fact due, perhaps, to a disposition to strive after what appeared to him the justice of the case, with too little regard at times to the case law on the subject. In one instance which might be mentioned he was curiously led away by the opposite tendency, and gave judgment against what he admitted to be his inclination, by a too rigid adherence to the letter of a statute which he conceived precluded him from doing what he would like to have done, and what the evident merits of the case demanded. We refer to his decision in *Hall-Dare* v. *Hall-Dare*, 29 Chy. D. 133, which was subsequently reversed in the Court of Appeal.

Since his retirement it has come out that he was accustomed to relieve the monotony of judicial business by drawing likenesses in his note book of counsel, suitors and witnesses as the fancy struck him, and, no

doubt, the notes thus graphically made will for future generations have more interest than any dry record of facts or arguments.

A decision of much interest to those engaged in the temperance cause, and also to those engaged in the liquor traffic, was given by Mr. Justice Galt a few days ago. The police magistrate at Peterboro', before whom a defendant was charged with an infraction of the Scott Act, committed the defendant to gaol for refusing to answer questions which might tend to criminate himself. Sec. 123 of 41 Vict. ch. 16 makes the party opposing or defending, or the wife or husband of such party, competent and compellable witnesses under that Act and also under the Crooks Act, and until lately the interpretation of this statute has been that such persons could be compelled to answer, whether they had committed an infraction of the law or not. Mr. Justice Galt, in the case above referred to, following a decision of the Supreme Court of Prince Edward Island, has decided that whilst such persons are competent and compellable witnesses, the old maxim, *nemo tenetur seipsum prodere*, still exists, and is applicable to cases under the Scott and Crooks Acts. He ordered the discharge of the prisoner so committed by the police magistrate at Peterboro', on the ground that the questions he refused to answer might tend to criminate him, and that while he was a compellable witness he was not compelled to answer questions that might prove him guilty of a criminal offence. The court and the learned judge thereby, so far as their decisions go, make void a very necessary provision. What is the use in passing a law to compel a defendant to give evidence in a proceeding brought against himself, and then to tell him that all he has to do, in order to prevent compulsion, is to say that his answers might tend to criminate himself? Of course he will say so. Any saloon keeper knows enough for that; and in all probability the answers would criminate him. The Legislature evidently saw that the difficulty of getting at the facts in such cases required peculiar legislation. We presume some form of words might be devised to prevent misconception as to their meaning; but it seems to us the section means exactly what it says. Judges are not responsible for results; that is, generally speaking, the business of the legislature.

RECENT ENGLISH DECISIONS.

The *Law Reports* for November include 17 Q. B. D., pp. 601–689; 11 P. D., pp. 117–125; and 33 Chy. D., pp. 75–225.

Power of court to set aside verdict, and give judgment for opposite party—Eng. rules 1883—Ord. 58, r. 4 (Ont. rule 321).

Taking up first for consideration the cases in the Queen's Bench Division, the first to be noticed is *Millar* v. *Toulmin*, 17 Q. B. D. 603, in which the Court of Appeal held that under the English Rule, Ord. 58 r. 4 (see Ont. Rule 321), the court has power to set aside a verdict, and is not obliged to grant a new trial, but may, whenever it is satisfied that all the facts are before the court, give judgment for the party in whose favour the verdict ought to have been given.

The same practice has been adopted under Ont. Rule 321, in *Campell* v. *Cole*, 7 Ont. R. 127; *Stewart* v. *Rounds*, 7 App. R. 515; *Lauccy* v. *Brake*, 10 Ont. R. 428, and other cases.

Gas company—Gas stoves let for hire—Exemption from distress.

The Gas Light and Coke Company v. *Hardy*, 17 Q. B. D. 619, deserves a brief notice. By s. 14 of a Gas Company Act it was provided, "The undertakers may let for hire any meter for ascertaining the quantity of gas consumed or supplied, and any fittings for the gas . . . and such meters and fittings shall not be subject to distress . . . for rent of the premises where the same may be used." It was held by Mathew, J., that a gas stove let for hire by a gas company was not within the

words "fittings for gas," and was, therefore, not exempt from distress; but the Court of Appeal reversed this decision, holding that any apparatus which is used for the supply and consumption of gas would come within the meaning of the words, "fittings for gas."

PRACTICE—COSTS—ONE OF THE TWO PLAINTIFFS SUCCESSFUL—ENG. ORD. 16 R. 1 (ONT. RULE, S. 89,92).

Gort v. *Rowney*, 17 Q. B. D. 625, settles a point of practice which arises on a state of facts the offspring of the Judicature Act. Two plaintiffs joined in one action, claiming for separate and distinct causes of action, as they are empowered to do by Eng. Rule, 1883, Ord. 16 r. 1. (See Ont. Rules 89, 92.) The action was referred to arbitration, the costs to abide the event. One of the plaintiffs succeeded, and the other failed in the action. The question was under the circumstances how the costs of the action should be borne. A Divisional Court (Lord Coleridge, C.J., and Fry, L.J.), reversing Field, J., held that the successful plaintiff was entitled to so much of the costs as related to her claim, and that the defendant was entitled as against the unsuccessful plaintiff to so much of the costs as related exclusively to the latter's claim, and as to the general costs of the action, one-half was to be paid by the defendant to the successful plaintiff, and one-half by the unsuccessful plaintiff to the defendant. The Court of Appeal, however, set aside this elaborate apportionment of the costs in favour of the much simpler and more reasonable disposition of the costs made by Field, J., viz., that the successful plaintiff was entitled to recover the whole of his general costs of the action, and the defendant was only entitled to recover from the unsuccessful plaintiff the costs occasioned by joining such plaintiff.

LIBEL—PRIVILEGE—PUBLICATION OF JUDGMENT.

In *Macdougall* v. *Knight*, 17 Q. B. D. 636, the plaintiff complained of the defendants having published a report of a judgment delivered in a former action brought against them by the plaintiff without any report of the evidence, there being passages in the judgment reflecting on the plaintiff's character.

It having been found by the jury that the report in question was a fair and accurate report of the judgment, and that it was published *bona fide*, and without malice, it was held by Day and Wills, JJ., that it was no libel, and that the defendant was entitled to judgment on the findings, and that it was unnecessary to ask the jury whether the pamphlet was a fair report of the trial, and this decision was affirmed by the Court of Appeal.

The nature of the plaintiff's contention may be gathered from Lord Esher's remarks at p. 639, where he says:—

> The proposition on behalf of the plaintiff is that if a verbatim report of the judgment is published, and the judgment so published reflects on the character of any person, the publication cannot be defended unless a report of all the evidence given at the trial is also published, or, if this is not the proposition, it must then be suggested that the jury should be asked whether the judgment contained a fair and accurate representation of the facts proved.

This argument he answers further on at p. 640:—

> The question as to fairness arises only when the report is not *literatim et verbatim*; if it is so, no such question can arise. It has been decided, as I have observed, that a report of one day's proceedings may be published, and in the same way the judgment is quite a separate part of the proceedings. Suppose the judgment to be erroneous, still the people who were not in court, but who read the report, are put in the same position as those who were in court and heard the judgment delivered. The responsibility for the accuracy of the judgment rests on the judge who delivers it, not on the person who publishes the report of it. I am of opinion, therefore, that an accurate report of a judgment is not libellous.

PRACTICE—CONCURRENT WRIT—STATUTE OF LIMITATIONS.

In *Smallpage* v. *Tonge*, 17 Q. B. D. 644, the question submitted to the Court of Appeal was whether, after a writ of summons has been issued and renewed, a concurrent writ of summons for service out of the jurisdiction could properly be ordered when its issue would affect the operation of the Statute of Limitations. Wills and Grantham, JJ., had refused to authorize the issue of a concurrent writ under such circumstances; but the Court of Appeal (Cotton and Lindley, L.L.J.,) reversed this decision, and held that the right of action had been kept alive by the original writ which had been duly renewed, and that the court, in ordering the issue of a concurrent writ, was only making the action effectual by ordering service out of the jurisdiction.

Recent English Decisions.

Trial at bar—Actions in which the crown is interested.

Dixon v. *Farrer*, 17 Q. B. D. 658, is deserving of a passing notice for the somewhat interesting discussion by Wills, J., as to the right of the Attorney General to demand a trial at bar in any action in which the Crown is interested. He arrives at the conclusion that the right of the Crown to a trial at bar, when the Crown is the complaining party, is not a branch of the prerogative, but merely the survival in favour of the Crown of a right which was formerly common, alike both to sovereign and the subject, but which has been taken away from the latter by the Stat. Westminster 2. c. 30, which gives the writ of *nisi prius*, which does not apply to the Crown. But he also concludes that the Crown has the prerogative right to intervene in any cause, and on the statement of the Attorney General on his own authority that the Crown is interested in the subject matter of the suit, may claim a trial at bar.

Ship—Bill of lading—Damage caused by rats.

The short question decided in *Pandorf* v. *Hamilton*, 17 Q. B. D. 670, was that, where rats by gnawing a hole in a pipe on board a ship, had caused sea water to escape from the pipe so as to damage the cargo; that this was not a damage occasioned by a "danger and accident of the sea," for which, by the terms of a charter party, the ship-owner was exempted from liability, the Court of Appeal (Lord Esher, M.R., Fry and Bowen, LL.J.,) overruling Lopes, L.J., who held that it was.

Practice—Mortgage action—Costs—Appeal rules 1883 ord. 65 r. 1 (Ont. rule 428.)

Turning now to the cases in the Chancery Division, the first to be noted is *Charles* v. *Jones*, 33 Chy. D. 80, which was an action for redemption, in which charges of misconduct were alleged against the mortgagee. Bacon, V.C., had, notwithstanding, allowed him his costs, and it was on the propriety of his so doing that the plaintiff appealed. The defendant contended that the appeal, being in respect of costs, would not lie. And to this contention the Court of Appeal acceded. The result of their Lordships' decision may be gathered by the following passage in the judgment of Lopes, L.J.

A mortgagee has an absolute right to costs, unless they are forfeited by misconduct; if they are forfeited by misconduct, then they are within the discretion of the Judge. In the present case, assuming that there has been misconduct, the costs are within the discretion of the Judge. Then the Act says that where the costs are within the discretion of the Judge there shall be no apppeal unless leave be given by the Judge.

The effect of the decision is that though a mortgagee deprived of costs on the ground of misconduct may appeal on the ground that he has not been guilty of misconduct, yet it notwithstanding his misconduct, the court allows him his costs, that order is not appealable.

Promoter of company—Secret profit made by promoter—Liability to account—Solicitor.

Lydney & Wigpool Iron Ore Co., v. *Bird*, 33 Chy. D. 85, was noted by us, *ante* p. 139, when the case was before Mr. Justice Pearson. The action was brought to compel the defendant to account to the plaintiffs for a secret profit made by him as promoter of the company. That learned Judge, on the facts, was of opinion that the defendants were not in the position of promoters, and had dismissed the action; but this decision the Court of Appeal, taking a different view of the facts, have now reversed.

The Court of Appeal was of opinion that, on the facts, it was clear that the price of the property sold to the company had been increased at the instance of one of the defendants who took the principal part in getting up the company for the purpose of enabling the vendors to pay him the sum of £10,800, which the plaintiffs claimed to recover in this action, and that therefore this defendant was bound to account to the company for the profit so made; but in estimating the amount of the secret profit, for which he was accountable, it was held that he was entitled to be allowed legitimate expenses incurred by him in forming and bringing out the company, such as the reports of surveyors, the charges of solicitors and brokers and the costs of advertisements, but not a sum of money which he had paid to his co-defendant for guaranteeing the vendors to take up shares in order to float the company.

Pearson, J., in dismissing the action, had ordered a sum of money, which had been paid into court as security for costs, to be paid out

to the defendant's solicitors on account of the defendant's costs, and on the reversal of his judgment it was asked that the solicitors might be ordered to refund; but the court refused to make any such order in the absence of notice to the solicitors, and intimated that even if notice had been given no order could be made against the solicitors personally, and that although the money had been paid to them, yet their client alone, and not the solicitors, was responsible for the money.

WILL—CONSTRUCTION—GIFT PER STIRPES OR PER CAPITA.

In *Re Campbell's Trusts*, 33 Chy. D. 98, the Court of Appeal sustained the judgment of Pearson, J., noted *ante* p. 203. By the will in question the testator gave some houses to trustees in trust, to receive the rents and pay the same in equal moieties to his son and daughter during their lives, and after the death of either of them without issue living, upon trust to pay the whole thereof to the survivor during the life of such survivor; but in case there should be issue living of the first of them so dying, then upon trust to pay one moiety to the survivor and divide the remaining moiety between the children of the one so first dying; and after the decease of the survivor of the testator's children, on trust to sell the property and divide the proceeds equally amongst all and every of the child or children of each of them, the testator's son and daughter, who should attain twenty-one, in equal proportions. The son died, leaving eight children; the daughter had only one child, who attained twenty-one and died. The question was whether these grandchildren of the testator were entitled *per stirpes* or *per capita*, and the Court of Appeal and Pearson, J., held that they took *per stirpes*.

TRUSTEE ACT, 1850—RE-APPOINTMENT OF EXISTING TRUSTEES—VESTING ORDER.

In *Re Vicat*, 33 Chy. D. 103, an application was made under the Trustee Act of 1850 to appoint trustees and for a vesting order under the following circumstances: A, B and C were named as trustees in a will; A died. B became lunatic, and C appointed E and F trustees in the place of A and B. Part of the trust estate consisted of a mortgage of freeholds. The appointment of E and F was unquestionably valid; but the court was asked, on the authority of *Re Pearson*, 5 Chy. D. 982, to re-appoint them and make an order vesting the mortgage property in C, E and F. This the Court of Appeal declined to do, holding that the re-appointment by the court of trustees already validly appointed is a nullity. The court, however, gave leave to amend the petition by asking for the appointment of some person to convey in the place of the lunatic jointly with C to himself and E and F, and on the petition being so amended made an order accordingly.

TITLE DEEDS—CUSTODY OF DEEDS—SEVERAL PERSONS INTERESTED IN DEEDS.

Wright v. *Robotham*, 33 Chy. D. 106, was an action brought to compel the delivery up of certain deeds which had come into the possession of the defendants under the following circumstances:—

The defendants were the successors in business of certain solicitors to whom the owner of an estate had given the title deeds for safe keeping. Subsequently the owner settled the estate to which the deeds related, and under this settlement the plaintiff became entitled to part of the land, and the heir-at-law of the settlor to the residue. The heir-at-law could not be found and was not a party to the action. The Court of Appeal, affirming Kay, J., held that the defendants under these circumstances should not be ordered to deliver up the deeds to the plaintiffs, but that they should be directed to deposit them in court, with liberty to the plaintiffs to inspect them and take copies. Kay, J., directed an inquiry as to the heir-at-law; but, on appeal, this direction was struck out. The principal point was succinctly put by Lindley, L.J. "The question is reduced to this, where two persons are entitled to title deeds can one recover without the other? I am of opinion that Mr. Justice Kay was right in holding that he cannot."

SOLICITOR AND CLIENT—MORTGAGE BY CLIENT TO SOLICITOR TO SECURE DEBT PRESENTLY PAYABLE—UNIVERSAL PROVISIONS.

In *Pooley's Trustee* v. *Whetham*, 33 Chy. D. 111, an attempt was made to set aside a sale made under a power of sale in a mortgage upon an interest in a railway, executed by a client in favour of his solicitor, on the ground

that the solicitor had neglected to explain to the client that the power of sale was not in the usual form, and authorized a sale without notice. It appeared that the debt for which the mortgage was given was overdue and presently payable when the mortgage was given, and that the mortgage was in effect an arrangement for giving the client time for payment; and on this ground, therefore, it was held by Pearson, J., and also by the Court of Appeal that the doctrine of *Cockburn* v. *Edwards*, 18 Chy. D. 449, did not apply.

SELECTIONS.

EFFECT OF BANK MARKING A CHEQUE.

The case of *The Drovers' Bank* v. *The Anglo-American Co.* is of interest on this point. We find it reported in *Central Law Journal*, p. 182.

HEAD NOTE.—In the case of a certified cheque, the bank certifying the cheque is primarily liable for its payment, and it is negligent in a bank or agent for collection of such cheque to send it to the certifying bank itself for payment.

STATEMENT OF THE CASE.—The Anglo-American, etc. Co., placed in the hands of the Drovers', etc, Bank, a cheque drawn and certified by Rice & Messmore, bankers, of Cadillac, Michigan. The Drovers' Bank forwarded the cheque for collection to Rice & Messmore themselves. The cheque was not paid, and the Anglo-American Company brought suit for its amount against the Drovers' Bank and recovered judgment. The bank appealed.

SCHOFIELD, J., delivered the opinion of the court.

Assuming, first, that appellant is not chargeable with knowledge of the existence of any other bank than that of Wright & Messmore, at Cadillac, Michigan; and second, that all the information it had, or could reasonably obtain at the time in respect to the financial standing of Rice & Messmore was that they were solvent—were Rice & Messmore suitable agents to whom to transmit the certified cheque for collection after it was placed by appellee in appellants' possession? We do not think it is of much consequence whether appellant took the cheque as payment on account, or for the purpose merely of collection; for in either view it is entitled to show that the cheque, if it has discharged its duty by an effort to collect it, has availed nothing. Nor do we regard the evidence that certain banks in Chicago were in the habit of transmitting cheques drawn on other banks, to those banks for collection, as affecting the present question. That evidence hardly comes up to the requirement of this court in regard to proof of a common-law custom, as laid down in *Turner* v. *Dawson*, 50 Ill. 85, and subsequent decisions of like import; but if it did, that custom does not include cases in which certified cheques are sent for collection to the banks by which they are certified. In the case to which the evidence relates there is no primary liability on the part of the bank to which the cheque is sent; but in the case of a certified cheque the bank is primarily liable for its payment. So far as affects the present question, its position is precisely what it is where it makes its promissory note, bond, or other evidence of original indebtedness. *Bickford* v. *First Nat. Bank*, 42 Ill. 242, *et seq.*

The same person cannct be both debtor and creditor at the same time, and in respect of the same debt. How then can he who is debtor, be at the same time, and in respect of the same debt, the disinterested agent of the creditor? Can it be said to be reasonable care, in selecting an agent, to select one known to be interested against the principal—to place the principal entirely in the hands of his adversary? The interest of the creditor, when his debtor is failing, is that steps be taken promptly, and prosecuted with vigour, to collect his debt. But at such a time the inclination of the creditor quite often, and it may be, sometimes his interest too, is to procrastinate. The debtor may often be interested in bringing about a compromise with his creditors whereby his debts may be discharged for less than their face. But the creditor, whose debt can all be collected by legal proceedings can never be interested in producing that result. Surely it could not be held reasonable care and diligence in an agent holding for collection the promissory note given by

one individual to another individual, to send the promissory note to the maker, trusting to him to make payment, delay it, or destroy the evidences of indebtedness, and repudiate the transaction, as his conscience might permit. If this would not be held to be reasonable care and diligence, why should the same conduct be held to be reasonable care and diligence when applied to a bank?

It is to be borne in mind appellant was not compelled to accept this cheque for collection. It assumed the burden voluntarily, and it ought to have known that the certified cheque was not delivered to it merely to have it exchanged for the draft of Rice & Messmore on some other bank; for if this had been desired, it ought to have known that appellee would have obtained such a draft instead of a certified cheque. If appellant had no correspondent or agent at Cadillac, through whom to make collection, it should so have informed appellee, and then acted on the directions of appellee. This would have imposed no hardship, and would have protected all. It is true that when appellee placed the cheque in the hands of appellant, it was to be presumed that it was intended that appellant should collect by the ordinary and usual mode of collecting in such cases; but neither from facts proved, nor as a matter of law, was it to be inferred that the cheque was to be surrendered to Rice & Messmore to use their pleasure as to the time and manner of payment and the disposition of the cheque. If appellant was willing to take the step without special stipulations, appellee was authorized to assume therefrom that it was able to collect, and that it had a proper agent through whom to do it promptly.

Indig v. *City Bank*, 80 N. Y. 106, cited by counsel for appellant, is entirely different in its material facts from that in the present case, as we conceive. There the bank owed no primary duty to pay. The note was sent to it for collection, not from itself, but from the maker of the note. Its liability was solely that of an agent for collection.

In the recent case of *Merchant's Nat. Bank* v. *Goodman*, 2 Atl. Rep. 687, the Supreme Court of Pennsylvania however lay down the rule directly the opposite of that laid down by the New York Court of Appeals in *Indig* v. *City Bank*. The suit there involved the question whether the bank on which the cheque was drawn was a suitable agent to which to transmit the cheque for collection. And the court held that it was not. The court among other things said: "We think the principle may be stated as a true one, as the plaintiffs' counsel have presented it, that no firm, bank, corporation or individual can be deemed a suitable agent, in contemplation of law, to enforce in behalf of another a claim against itself. The only safe rule is to hold that an agent with whom a cheque or bill is deposited for collection must transmit it to a suitable agent, to demand payment in such manner that no loss can happen to any party, whether he is depositer and indorser, or the indorsee and holder. . . . We interpret the cases to which we have referred as establishing the rule of transmission to a suitable correspondent or agent, to mean that such suitable agent must, from the nature of the case, be some one other than the party who is to make the payment. By no other rule can the rights of indorsers be protected, if it is the interest of the party who is to make payment to hinder, postpone or defeat payment. This imposes no hardship on the institution undertaking to transmit for collection, which can always protect itself by stipulating that special instructions by the depositor shall be given, which will save the collecting bank from all risk or peril."

It is unnecessary to say that we concur in these views any further than they are applicable to the facts before us.

We find no cause to disturb the judgment below and it is therefore affirmed.

NOTE BY EDITOR OF "CENTRAL LAW JOURNAL."

To confide the collection of a money obligation to its payer would seem to be *quasi agnum committere lupo*, but it seems that an Illinois bank has come to grief by this precise form of misplaced confidence.

A certified cheque is an accepted bill of exchange, and all the legal attributes of the latter attach equally to the former.* The liability of the drawer of the cheque is precisely that of the drawer of a bill of exchange accruing only upon the protest for non-payment.† Certifying a cheque to be "good," is

*Harker v. Anderson, 21 Wend. 372; Conger v. Armstrong, 3 Johns. Cas. 5.

†Smith v. Jones, 20 Wend. 198; Merchants' Bank v. Spicer 6 Wend. 445; Murray v. Judah, 6 Cow. 484; Conroy v. Warren, 3 Johns. Cas. 259; Glenn v. Noble, 1 Blaukf. 104.

nothing more nor less than a promise by the bank to pay it when presented.‡ It follows of course that by certifying a cheque, the bank becomes the principal debtor, its obligation to pay being absolute, while that of the drawer is subsidiary and contingent.

All this is familiar law; the only questions raised by the principal case are whether it is negligence in the collecting bank to entrust the collection of the cheque to the bank by which it has been certified and is to be paid, and whether there is such a custom established as would defeat the charge of negligence.

It is the duty of the bank receiving for collection commercial paper payable at a distant point to transmit it speedily to a suitable agent at that place for collection, and when that is done, its liability is at an end.§ The question is, Who in case of the collection of a cheque is a suitable sub-agent. The Supreme Court of Pennsylvania says‖ that the bank upon which the cheque is drawn is not, because its interest is plainly to "delay instead of speeding payment." *A fortiori* is that the case, when by certifying a cheque it had become the principal debtor.

As to custom, the well established rule on that subject is that a custom to be binding must be uniform, long establishd, and generally acquiesced in, and so well known that parties contracted with reference to it, when nothing is said to the contrary,¶

It is often said that extremes meet, and it is a little curious to find that the managers of the defendant bank in this case, acute, wide awake men of business, *au fait* in all financial matters, as they no doubt are, have committed the precise blunder, for which, in a well-worn joke, the newspapers have laughed at two unsophisticated Dutch farmers. They were neighbours, friends, both ready money men who had never in their lives given or received a promissory note, but it so happened that one had occasion to borrow a small sum of money from the other. He suggested that "in case of death," he should give his note for the amount, and the note was drawn, inartistically perhaps, but probably it had the root of the matter in it. The question then arose: who was to keep the note? There was no precedent in the experience of either. The lender, however, solved the problem, shrewdly saying: "You keeps it Hans, for then you will know when the time comes for you to pay it."

‡*Beckford* v. *First. etc. Bank*, 42 Ill. 242.
§*Merchants Bank* v. *Goodman*, 2 Atl. R, 687, 690; *Bank of Washington* v. *Triplett*, 1 Pet. (U. S.) 25; *Fahens* v. *Mercantile Bank*, 23 Pick. 330; *Dorchester Bank* v. *New Eng. Bank*, 1 Cush. 182; *East Haddam* v. *Scoville*, 12 Conn, 308; *Ætna Ins. Co.* v. *Alton Bank*, 25 Ill. 247.
‖ *Merchants' Bank* v. *Goodman*, *supra*.
¶ *Turner* v. *Dawson*, 50 Ill. 85.

THE EVILS OF CASE-LAW.

(Continued from page 383.)

I have not time to go over the inherent badness of many lines of decisions; the confusion and uncertainty which arises from the conflicting decisions of different courts, and still worse, from conflicting decisions of the same court; the gross errors which have crept into the law in consequence of carrying precedents too far, or from applying the precedent of one case to another where it is inapplicable; and still further, from applying obsolete maxims and legal fictions to the obstruction of justice, when they were never devised or intended to be used except to promote justice. All these matters are familiar to every practitioner, and only need now to be alluded to. But what I wish to suggest is this: That where the result of a hearing or argument in the higher court is simply an affirmance of the judgment or decree of the court below, there is not, in a large majority of cases, any adequate or sufficient reason for the preparation of any written opinion at all, and still less for its publication. If the case is properly tried below, without substantial error, and the judgment or decree is correct, then the legal world is no better and no wiser, and sometimes it is made much less so, by the preparation and publication of opinions explaining the case, and answering the points of the losing party, especially as such points have already been effectually answered and disposed of in the court below. And it is because the writing of opinions which are unnecessary and useless only aggravates the evil of which I am speaking, that I again suggest, as has often been suggested before, that the judges should be relieved, or should relieve themselves, of such work.

A Common Pleas judge in one of our largest commercial cities, has for several years made it his practice, as I am informed, never to hold a case over night for consideration, never to write an opinion, and never to give a reason for a decision. And it was added by my informant, who was a prominent member of his bar, that his decisions were reversed less frequently, in proportion to the number appealed from, than those of any other judge in the State. And it was also said that

he did more business than any of his colleagues, of whom he had several, and gave better satisfaction to the bar.

The only cases in which, as it seems to me, the affirmance of a judgment or decree should be accompanied with a written opinion, are:

1st. When some new law has to be made or formulated, as in defining the rights of parties in commercial relations previously unknown; or,

2nd. In correcting errors in the law as previously formulated, understood or applied.

Otherwise I see no good reasoning for the rendering of a written opinion in the affirmance of a judgment or decree.

It has been said, I know, that subordinate tribunals, while reaching a perfectly correct conclusion, sometimes give erroneous reasons therefor, and that it is a part of the duty of the Court of Review to correct the errors so made. This is true in cases where the court below has, by written opinion, duly reported, put its errors of reasoning into permanent form, so that an affirmance of the conclusion might be construed as an adoption of the reasoning by which it is reached. But these cases are rare, and, being exceptional, may be treated accordingly. But where the opinion of the court below is not reported, as it seldom should be, its errors of reasoning, the result being correct, should not be replied unto. It is no part of the duty of the judge of a Court of Review to act as a schoolmaster to instruct subordinate judges. His duties are to see that justice is administered in accordance with law in those cases which come before him on writ of error, by appeal or otherwise, to state new law, whenever occasion arises, and to modify or correct erroneous statements or applications of old law whenever such shall be found to exist. This being done, his duty in this regard is at an end. And if he does more, he is only aggravating an evil which has already become an intolerable nuisance.

I am aware that in this suggestion many of you will differ with me. I know from personal experience how desirable it is, after gaining on appeal the affirmance of a decree made below, to have a written opinion of the higher court, which shall in substance affirm the views entertained by yourself, views on the basis of which you give advice, and in the following of which advice your client has risked a large investment or imperilled valuable rights. I know that it is exceedingly gratifying to a lawyer to know that his favourite and oftentimes important case of *Smith* v. *Jones* has a place in the authoritatively published reports of the land, and is cited with approbation by the bench and bar. Hence I expect your dissent, and merely suggest in reply, that personal considerations like these should give way to the public good.

The tendency to rely on cases and authorities, to the neglect of sound principles, is further aggravated by such publications as "Weekly Notes," abstracts of decisions, and the like. Convenient as they may be for the devotees of case-law practice, they are bad, and only bad, and bad all through, back again and cross-wise, as related to the making of good lawyers and sound practitioners. They create or foster an inordinate desire for the latest decision, for the newest point, for some novelty of rule or principle, to the disregard, neglect or forgetfulness of those fundamental principles which are, or ought to be, the basis of all decisions and all arguments. And I need only appeal to your own experience for cases in which opposing counsel, who have read an abstract of a late decision which you have not seen, wave it triumphantly before the court, and gently or aggravatingly hint that you are behind the times. And you, thinking you are, look carefully through "Weekly Notes" before you argue your next case.

I think of "Weekly Notes" much as Dr. O. W. Holmes does of medicines. If, with a very few exceptions, all the medicines in the world were thrown into the sea, it would be better for the human race, though far worse for the fishes.

The law-book publisher is the next great promoter of the evil of case practice. It is, and for many years has been, the custom with our leading Courts of Review, to order the official reporting of only such cases as they may deem worthy of preservation. It is a wise provision, and if the rule of exclusion had been applied more relentlessly the legal profession would be better off. But the bookmaker now steps in, and publishes everything,

rubbish and all. I do not know to what extent this abuse has reached our State Courts of Review, but from circulars which reach me, I learn that it soon will be here, as it now is with Federal Court decisions, as bad as it can be. Every written decision of every Federal Court in the nation, whether good, bad, or indifferent, whether of interest to everybody or to nobody, whether intelligible, as some are, or utterly meaningless, as many are, whether they contain good law, or bad law, or no law at all, all alike go into the hopper of the book mill, are ground out into book form, and the members of the profession have to foot the bill. And the evil has also reached State Courts of Review, to this extent, at least, that every opinion rendered in the highest courts of twenty-four States is now reported in full, and the rest are soon to follow. And the Territorial and District Court decisions are also going into the same mill.

I will not stop to characterize this abuse as it deserves, for there are worse things, professionally, yet before us. I received few days ago a circular, which advertised the preparation and publication of professional briefs on a miscellaneous variety of subjects, which briefs are represented to contain each a full and exhaustive compilation of cases in support of a stated proposition of law; and as I now recall the statements of the circular, briefs would be prepared and furnished, for a consideration, on any point desired.

This, as it strikes me, embodies the perfection of case-practice, and is the fully developed fruit of a vicious system.

But the evil of case-practice has brought us another which is almost as bad, and if it continues as it seems likely to do, will certainly become worse. I refer to the text-book nuisance. Lawyers who argue solely or chiefly from adjudicated cases, instead of from legal principles, obviously are relieved from the necessity of much labour, which otherwise they would have to perform, if the cases are compiled for them. Labour-saving appliances exist outside of mechanics; and in the domain of law the book publisher is the fiend. A second or third-rate lawyer, first-rate, perhaps, as a compiler, is employed to prepare a text-book on some legal subject, the fundamental and governing principles of which he knows little or nothing about, and would care nothing about, if he did know them. He presents a compilation of decisions, classified as regards subject-matter, and the most of our late text-books are of that kind, and not classified as they ought to be, in their relation to the governing principles of right and wrong which are involved. A classification purely by subject-matter is suitable for a digest; but it is utterly wrong and vicious as a system for use in a text-book. It is grossly wrong in that it fails to show any connection between the decision as made and the principle of right or of law which governs it. It is wrong in that it presents all decisions as equally broad in their scope and as of equally binding authority. It is fatally vicious in that it leads the student away from instead of to or toward the fountain head of all just decisions—the immutable principles of right and wrong. And it is still further bad in that the statements of law so presented are so meagre as often to be false and misleading, and in the hands of one who is purely a case lawyer, tend to promote litigation, instead of preventing it.

Time was when the preparation of text-books was the work of the ablest members of our profession. Apparently that time has gone by. With here and there an exception, text-books are now prepared as a branch of the bookmaker's art or business, by men, who, though members of the bar, are not lawyers in the proper sense of the term. They are too often mere compilers; and unfortunately, the use of such compilations by the ordinary practitioner makes him more of a case-lawyer than he was before, and aggravates the evil, which is already too great. And this tendency of our law-book publishers to publish anything and everything that will sell, is also an operative element in increasing the flood of published reports.

Now I do not say that a case-lawyer is necessarily a poor lawyer; but I do say that a lawyer who rests his case primarily on principle, and then, so far as may be advisable, backs up his position by showing from the authority of well considered and carefully adjudicated cases, that the same or like questions, embracing a consideration of the same or like principles, have been decided in accordance with the views by him then advanced,—I say that such a practitioner occupies a vantage

ground dangerous to his opponent, and what is still more to the point, he is advancing the science of law, and making it more perfectly what it ought to be—the perfection of human reason. And the same characteristics I would seek in a good lawyer should, in a still greater degree, belong to a text-book writer. A knowledge of law as a science, and not as a system of statutory enactments and judicial decisions, an ability to state clearly and correctly the fundamental principles which underlie the law, and which make it an agency for good, and an aptitude in illustrating by orderly and systematic citation of decisions, how the law is and ought to be applied and enforced, and what is perhaps of equal importance, an ability to draw the lines by which to show where the particular principles under consideration cease to be applicable, and to make clear where and when decisions given have drawn dangerously near to or crossed such lines—these are characteristic qualities of a good text-book writer, which, unfortunately, are possessed by few, if any, of the writers of late years.

An old toper, it is said, once expressed the opinion that no whiskey was absolutely bad, though he admitted that some whiskeys were better than others. The same line of reasoning, though in a reverse direction, might be suggested as applicable to the bulk of our late text books. Most of them are bad, though it may be admitted that some are worse than others.

Our judges, of course, are recruited from the bar, and a bad training for lawyers results in correspondingly poor judges. And in defence of the crimes, or rather errors and mistakes charged against judges, I must say that I am only surprised that they do not make more. A man cannot help being what he is, when, under the training he received, he could not have been anything else. And a lawyer who is trained or trains himself to a subserviency to precedents and authorities, will, if he reaches the bench, be more or less a slave to them still. And then, when out of the mass of legal literature available, crude, undigested, confusing, contradictory and irreconcilable masses of law, or alleged law, are hurled at him by opposing counsel, is it any wonder that he should often make mistakes? Only a few days ago I was present in court when a lawyer of almost a national reputation sent to the law library for between forty and fifty volumes, to use in an argument as to a question of priority of lien, under an unauthorized corporation mortgage.

One eminent Federal judge of my acquaintance, some years ago, became so exasperated with the indiscriminate citation and almost endless reading of authorities, that he finally refused to listen to any prior decision, unless the facts in the case cited to him were in most, or all material respects, the same as in the case at bar. The rule was a good one; and in the case which I was arguing before him, the application of the rule resulted in a considerable shortening of the argument; and so far as I could judge, the application of the rule worked no injustice as regards the final result.

I have neither the time nor the patience to collect the data by which to ascertain with exactness the total number of volumes of regular reports, issued in series, which are published in this country, and to which, as they are all accessible to him, the American case practitioner may be supposed to refer from time to time, either for purposes of offence or defence; but from readily accessible facts and figures, an approximately correct estimate can be reached.

The official reports of our own State Supreme Court now number one hundred and seventy volumes, and new ones are being issued at the rate of three per year. For the last forty years the issue has averaged a little over two and one-half volumes per year. Besides these, we have between ninety and one hundred volumes of miscellaneous reports, issued in regular series, and fifteen volumes of weekly notes. This gives us an aggregate of over two hundred and seventy-five volumes of law reports confined to cases adjudicated in the courts of the State of Pennsylvania alone. As like causes, under like conditions, produce like effects, it is fair to estimate that the growth and amount of this style of literature has been and is about the same in other States as in our own, and facts and figures readily attainable, fully sustain the correctness of this estimate. Hence, making all due allowance for the short period which has elapsed since some of our younger States

entered the race, the total aggregate of such reports for all the States of the Union will fall but little, if at all, below five thousand volumes, and probably exceeds that number. And in making this estimate I exclude digests, compilations of cases on special subjects, text-books and legal publications not devoted specially to the reporting of legal opinions. Nor have I taken into account the numerous volumes of decisions of the Federal Courts, Canadian and English decisions, all of which, if counted in, would make a wilderness of authorities, of which the general practitioner must take knowledge, for as they are all accessible to him, he cannot safely ignore them, nor any of them, for they are liable at any time to be cited against him in court. And the badness of some of them makes them so much the more dangerous. If they contained only good law, the evils resulting from their abundance and voluminousness would be materially lessened.

And I give these figures, not so much on their own account, as for a basis for the question, What of the future? This is where we are at the end of but little over a hundred years of our judicial history. Where will we be at the end of another hundred years? Or, having lived to the present age of the Mother Country, say a thousand years, what will then be the condition of our legal literature? With an expanding country, a growing population, increasing and multiplying, and interlacing and conflicting social and commercial relations, is this literature to increase and grow correspondingly, step by step, from year to year, and century to century? If five thousand volumes of reports alone be the product of the first century—or, in fact, taking the average life of all States of our Union, of a good deal less than a century, what may we expect in the second century, or in the tenth century, or the twentieth? If it keeps on, as it seems likely to, what, in the language of the old Sunday School hymn—

"What will the harvest be?"

Now, I do not pretend to say that all this plethora of reports, existing and prospective, is due solely to the evil of case-law practice; but I *do* say, without doubt or hesitation, that such is the food on which this great legal Cæsar feeds, and feeding on which, he is rapidly becoming a public and professional nuisance. A few years ago, enquiries were common, "Will the coming man smoke?" or will he do this or that thing which was supposed or asserted to be incompatible with perfect manhood. Here and now, the like question is pertinent, Will the coming lawyer cite precedents, or discuss principles? Will the coming text-book writer reduce our modern law to a system founded on principles, or merely add several thousand additional authorities to the few thousand previously collated? Will the coming judge learn that, except as regards new questions or old errors, we have more law now than we know what to do with, and that the law-book publisher must in some way be suppressed?

My suggestions are these: That law as practised, or in a practical sense, is ceasing to be a science, and is becoming a system of technics.

That this evil, starting with case-practice, is aggravated by such practice, also by an unnecessary and useless excess of written opinions, prepared for publication and actually published, and still further by a vicious system of text-book writing, the latter resulting in part, at least, from the natural but pernicious desire of law-book publishers to make money.

And that this evil, now so serious at the end of but little over a century of our legal growth and development, is liable, if not checked or reformed, to work irreparable injury in a century or two more.

That the remedies lie with the members of the bar and law schools, in the training of law students; with examining committees and courts, in the demand for and exaction of higher attainments and qualifications for admission to the bar; with the judges, as regards the preparation of opinions, and with the judges and members of the bar at large, as regards methods of procedure and argument. I know of no way to checkmate and suppress publishers and compilers, except by the shot-gun remedy, which, however, as a remedy for this particular evil, has not as yet received the sanction of either statute-law or case-law. When it does, I have no doubt there will be willing hands to use it.

And for this purpose, when the time comes, if it ever does—I have a shot-gun to lend. And may God speed the day!—GEO. H. CHRISTY.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

SUPREME COURT OF CANADA.

Ontario.]

LANGTRY v. DUMOULIN.

Rectory endowments—Rectory lands—29 & 30 Vict. c. 16—Construction.

Held, affirming the judgment of FERGUSON, J. (7 Ont. R. 499), and the judgment of the Chancery Division of the High Court of Justice for Ontario (7 Ont. App. R. 644), that the lands in question in this case were covered by the terms of the Act 29, 30 Vict. ch. 16, entitled "An Act to provide for the sale of rectory lands in this Province."

Held, further, affirming the judgment of the Court of Appeal for Ontario (11 Ont. App. R. 544), that the said lands were held by the rector of St. James in the city of Toronto, as a corporation sole for his own use, and not in trust for the vestry and churchwardens, or parishioners of the rectory, or parish of St. James, and such vestry and churchwardens had therefore no *locus standi in curia*, with respect to said lands.

Howland and *Arnoldi*, for appellants.

H. Cameron, Q.C., for Diocese of Toronto.

Maclennan, Q.C., *Moss*, Q.C., for city rectors.

Hoskin, Q.C., for township rectors.

Appeal dismissed with costs.

Ontario.]

KINLOCH v. SCRIBNER.

Vendor and purchaser—Open and notorious sale—Actual and continued change of possession—R. S. O. cap. 119, sec. 5—Hiring of former owner as clerk.

S. having purchased from one M. a trader, his stock in trade, merchandise and effects, took delivery of the keys of the premises in which M. had carried on business and entered into possession, and immediately advertised the business in his own name in the newspaper of the place. The day after he so took possession he dismissed the clerk, who had remained after the change, and hired M. in his place, and M. continued for some time to sell goods in the store as he had done before the sale, but in the capacity of clerk to S.

Held, that notwithstanding the hiring of M. by the purchaser, there was "an actual and continued change of possession" in the goods in the store, which satisfied the requirements of R. S. O. cap. 119, sec. 5. See 12 Ont. App. R. 367.

Ontario Bank v. *Wilcox*, 43 U. C. R. 460, distinguished.

McCarthy, Q.C., and *Dougall*, Q.C., for the appellants.

W. Cassels, Q.C., and *Holman*, for the respondents.

Quebec.]

MCGREEVY v. THE QUEEN.

Petition of right—46 Vict. ch. 27, (P. Q.)—Appeal to Supreme Court of Canada.

Held, that the provisions of the Supreme and Exchequer Court Acts relating to appeals from the Province of Quebec apply to cases arising under the Petition of Right Act of the Province of Quebec, 46 Vict. ch. 27.

Malhiot, Q.C., for motion.

Irvine, Q.C., contra.

Motion to quash dismissed with costs.

Ontario.]

THOMSON v. DYMENT.

Contract for sale of lumber—Acceptance of part—Right to reject remainder as not being according to contract.

T. contracted for the purchase from D. of 200,000 feet of lumber of a certain size and quality, which D. agreed to furnish. No place was named for the delivery of the lumber, and it was shipped from the mills where it was sawed to T. at Hamilton. T. accepted a number of car loads at Hamilton, but rejected others because a portion of the lumber in each of them was not, as he alleged, of the size and quality contracted for.

Held, affirming the judgment of the Court of Appeal for Ontario (12 Ont. App. R. 569), that T. had no right to reject the lumber, his only

remedy for the deficiency being to obtain a reduction of the price, or damages for non-delivery according to the contract. FOURNIER and HENRY, JJ., dissenting.

Bain, Q.C., *Kapelle* with him, for appellants. *McCarthy*, Q.C., for respondents.

MCCALL v. MCDONALD.

Mortgage—Given in contemplation of insolvency—Suit by creditors to set aside—Parties to suit—Distribution of assets.

C, a trader, mortgaged his stock, and a few days after executed an assignment in trust for the benefit of his creditors. On a suit by a creditor, on behalf of himself and the other creditors, except the mortgagees, to set this mortgage aside as a fraudulent preference in favour of the mortgagees.

Held, affirming the judgment of the court below, 12 Ont. App. R. 593, that the suit could be properly brought without joining the mortgagees as plaintiffs, and that the mortgage could be set aside without attacking the assignment in trust.

Held, also, reversing the decision of the court below, that the proceeds of the sale of the mortgaged property, which had been paid into court to abide the result of the appeal, should be paid over to the assignee under the trust deed to be distributed as part of the assets of the estate, and not dealt with by the court as ordered by the Court of Appeal. The decree of the Court of Appeal was varied, and the judgment of Ferguson, J., 9 O. R. 185, restored in full.

Robinson, Q.C., and *Geo. Kerr*, for appellants. *Blake*, Q.C., and *McDonald*, Q.C., for respondents.

BEATTY v. NEELON.

Company—Action by shareholders of, against promoters—Misrepresentation—Delay in bringing action—Parties injured.

An action was brought by B and others, shareholders in a joint stock company, against N and others, who had been the promoters of the company, for damages caused by the fraudulent misrepresentation, as was alleged, the said promoters in the formation of the company. The plaintiffs and defendants ha been owners of rival lines of steamboats, and the plaintiffs claimed that the defendants had proposed to the plaintiffs to amalgamate the two lines and form a joint stock company, and as an inducement to the plaintiffs' consent to such amalgamation the defendants had represented that they had a four years' contract with the Government for carrying the mails from Windsor to Duluth, whereas the fact was that they had only a verbal contract for carrying such mails from year to year, which was discontinued after the formation of the company, which was the misrepresentation complained of, and also that the defendants had received a bonus from the town of Windsor, and refused to pay to the plaintiffs their portion of the same as agreed upon when the said company was formed.

The evidence on the trial showed that the plaintiffs had been aware of the true state of the said mail contract a short time after the company was formed, but had allowed the business of the company to go on for four years before taking proceedings against the promoters.

Held, Strong, J., dissenting, that the alleged injury, if any, was to the company and not to the plaintiffs, and the action should have been brought in the name of the company or on behalf of all the shareholders.

And *held*, also, affirming the judgment of the court below, 12 Ont. App. R. 50, that if the action could be brought by the plaintiffs the long delay and the conduct of the plaintiffs in allowing the business of the company to proceed without making a speedy claim for redress, disentitled them to relief.

McCarthy, Q.C., and *McDonald*, Q.C., for the appellants.

Robinson, Q.C., and *Cassels*, Q.C., for the respondents.

QUEEN'S BENCH DIVISION.

Wilson, C.J.] [November 11.

REGINA v. ORGAN.

Vagrant—Conviction—Evidence—32 & 33 Vict. ch. 28, sec. 1 (D.).

The defendant was summarily convicted under 32 & 33 Vict. ch. 28, sec. 1 (D.), as "a person who, having no peaceable profession or calling to maintain himself by, but who does, for the most part, support himself by crime, and then was a vagrant," etc.

The evidence shewed that the defendant did not support himself by any peaceable profession or calling, and that he consorted with thieves and reputed thieves; but the witnesses did not positively say that he supported himself by crime.

Held, that it was not to be inferred that the defendant supported himself by crime: that to sustain the conviction there should have been statements that witnesses believed he got his living by thieving, or by aiding and acting with thieves, or by such other acts and means as shewed he was pursuing crime.

Bigelow, for the defendant.

COMMON PLEAS DIVISION.

REGINA v. MARTIN.

Conviction—Beating a drum contrary to by-law—Offence.

A conviction found that the defendant on the 16th May, 1886, created a disturbance on the public streets of the village of Lakefield by beating a drum, tambourine, etc., contrary to a certain by-law of the village. The information was in like terms, except that the act is said to have been done on Sunday, 16th May. The by-law under which the conviction was made was "the firing of guns, blowing of horns, beating of drums, and other musical or tumultuous noises on the public streets of Lakefield on the Sabbath day strictly prohibited." The evidence was of a person who said he saw defendant playing the drum on the street on the day in question.

Held, that the conviction was bad and must be quashed; for it should have alleged that the beating of the drum was without any just or lawful excuse.

CHANCERY DIVISION.

[September 6.

BLACK v. BESSE.

Exclusion of witnesses at trial—Witness remaining in court—Rejection of his evidence—New trial.

At the trial of an action the witnesses were put out of court, and before the case was closed defendant's counsel tendered a witness who had remained in court, but the presiding judge refused to allow him to be examined. On a motion for a new trial it was

Held, *per* BOYD, C., that there must be a new trial.

Per PROUDFOOT, J.—The practice is to receive such evidence, but with care.

S. H. Blake, Q.C., and *J. W. McCullough*, for the motion.

Chapple, contra.

Divisional Court.] [September 22.

HALL v. FARQUHARSON.

Tax sale—Improper assessment—Payment of taxes—Non-resident lands—Admissibility of evidence to correct roll.

H., being the owner of four islands, called them O., F., B. and C. islands, and improved O. by building a house, etc., on it. O. had previously been known to some people as island D., and was described by that name in the patent. H. ascertained what taxes he owed and paid all that were demanded. The assessor, from general information, assessed the islands, and so assessed island D. on the non-resident roll for the years in question. The taxes were not paid on island D., and it was consequently sold at a tax sale. In an action by H. to set aside the sale, in which it was shown that F. island was assessed by mistake as the improved island on the resident roll, and O. island on the non-resident roll as island D., it was

Held (affirming the judgment of FERGUSON, J.), under the provisions of the Assessment Act, R. S. O. c. 180, that as to errors in non-resident land assessments the county treasurer is not bound by the roll, but can receive evidence and correct errors therein; and that in this case he could have done so as to the "incorrect description," and the "erroneous charge" based thereon, and that the taxes were paid; and satisfactory proof being made on these points it would have been his duty to stay the sale, and if so, it is the duty of the court to interfere and undo the wrong. The Assessment Act recognizes the possibility of evidence being given to evade or neutralize entries upon the roll and official books. And the sale was set aside.

McCarthy, Q.C., and *Pepler*, for the appeal.
McMichael, Q.C., contra.

Divisional Court.] [Nov. 17.

GORDON ET AL. v. GORDON ET AL.

Mortgage by executors—Mortgage by specific devisees—Priority—Amount found due by master not appealed against—Variation.

The judgment of PROUDFOOT, J., reported *ante*, 11 O. R. 611, upheld in part.

By the court.—There should be no alteration in the amount found due by the Master when such amount was not appealed against.

Moss, Q.C., for the appeal.
E. D. Armour, contra.

PRACTICE.

Ferguson, J.] [Nov. 2.

CAMPBELL v. MARTIN.

Motion, enlargement of—Violating terms.

The plaintiff asked an enlargement of a motion for the purpose of answering it by affidavits. The enlargement was granted upon terms, and it appeared when the motion came up again that the plaintiff had violated the terms.

Held, that the plaintiff was not entitled to read the affidavits.

Hoyles, for defendant.
Holman, for plaintiff.

Mr. Dalton, Q.C.] [Nov. 5.
Ferguson, J.] [Nov. 8.

RE LEAK.

Master in Chambers, jurisdiction of—R. S. O. ch. 120, sec. 23.

The Master in Chambers has jurisdiction to entertain a motion under R. S. O. ch. 120, sec. 23, to annul the registry of a mechanic's lien, where the amount in question is over $200.

J. B. Clarke, for the land-owner.
F. E. Hodgins, for the lien-holder.

Ferguson, J.] [Nov. 8.

RE MCDOUGALL TRUSTS.

Infants' money—Payment out of court—Directions of will.

A sum of money left by McD. in his will to his daughter, who predeceased him, was paid into court by McD.'s executors. The daughter by her will had disposed of her moneys which she expected from her father's estate, leaving part to her husband and part to her infant children, naming her husband executor, and directing him to invest the infants' share and expend the interest for their maintenance. It was admitted by the official guardian on behalf of the infants that there was no reasons to anticipate danger to the money if paid out to the executor.

Held, that the will of the testatrix should be respected, and the infants' moneys paid out to the executor.

Watson, for the executor.
J. Hoskin,, Q.C., for the infants.

Ferguson, J.] [Nov 8.

RE S——— INFANTS.

Habeas corpus—Return—Infant, custody of—R. S. O. ch. 130, sec. 1.

A return was made by the mother of the infants, in whose custody they were, to a writ of *habeas corpus* obtained by the father with the object of compelling the delivery of the custody to him. The return stated that the infants were all under twelve, the age mentioned in R. S. O. ch. 130, sec. 1.

Held, upon demurrer, that the return must be considered in the light, not only of the common law, but of the statutory provisions with regard to the custody of infants, and that the return was sufficient in law.

Re Murdoch, 9 P. R. 132, explained and followed.

J. Maclennan, Q.C., and *H. J. Scott*, Q.C., for the father.

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

[By a slip in the printing office the name of the first case on p. 386 *ante*, was omitted. Please insert *Furlong* v. *Reid*.]

LAW STUDENTS' DEPARTMENT.

"I WILL"—A question that troubles young lawyers is where to locate and what branch of practice to select. This puzzle lasts even into middle life with many able men, and some never solve it—life itself is an unsolved riddle.

There is a place for every one of genius and ability somewhere, and only let him say, *I will reach it*, and he is half to it already. Men live where their hopes are, and prosper when they *will* prosper. Men invent when they have courage to think out problems alone and advance them. The man who surrenders to a theory like this: I'm only a little moth around the candle of the earth, burning my wings with each flutter, and doomed to fall unknown and early into an unforgotten hereafter, is very likely to do so—he is halfway on the journey.

Men who have within them the *I will be a lawyer and a good one*, the *I will live happily, battle bravely*, the *I will succeed*, must make a bright mark some day, for such lives are never failures; they are heard of, marked, remembered. "Make up your mind to have a front seat in life, and you attract to you the powers that carry you to it."

Confidence in yourself, the "I will" is everything. Look at the leaders of great enterprises! They seem to care little for competition; most of them are sharpened by it. They aspire to be first, and the chair is ever just ahead of them. They have already half reached it when once fairly started. *Think* to the front and you will get to the front; lag to the rear and it is ever ready for you.

Get out of the notion that the man who cites the most law and reads the most reports, is the best lawyer. No man carried less books to court than did Carpenter, but he carried his manhood there always, his clear insight was thought out by himself, and his facts applied to principles and results demanded. It is not the most learning but the best wisdom that wins. What a weak ambition one must have to spend a life-time in dreaming over the prospects of personal failure! Why not anticipate success and aim for it? The courage of the *I will lawyer* secures him, first standing room; next an opening, and then, early, a front seat in the ranks of his profession. If you never have set your heel down with emphasis, in an "I will" determination to win, the sooner this resolution is reached the nearer you will be to the goal of ambition. The hand is never stronger than the heart, and the man is never greater than his mind. His life is below or above his true condition, very much as he wills it, and no one will cheer him till he wins something worthy of applause. The world is both stingy and liberal, reluctant to risk on uncertainty, and willing to advance thousands on ventures when successful. The demonstration of success is what they wait for and demand.—*Central Law Journal*.

REVIEWS.

A MANUAL ON THE LAW AFFECTING VOTERS' LISTS FOR LEGISLATIVE AND MUNICIPAL ELECTIONS IN ONTARIO. By Thomas Hodgins, Q.C. 2nd Edition. Toronto: Carswell & Co., 1886.

WE owe an apology to the learned editor for not referring before this to the volume before us. Its value is well known to many who, since its publication, have made practical use of it.

Mr. Hodgins' name is well known in connection with all matters touching the franchise, and elections; and the second edition of his manual keeps up the good reputation he had previously earned for himself as an intelligent and industrious annotator on those important subjects.

This book contains the Voters' Lists Act (R. S. O. cap. 9); the Voters' Lists Finality Act, 1878; the Voters' Lists Amendment Act, 1879; the Voters' Lists Amendment Act, 1885; the Franchise Clauses of the Election Act, amended by the Franchise and Representation Act, 1885; together with an appendix containing the opinions of the judges of the Court of Appeal on cases under the Voters' Lists Acts, and a schedule of forms.

As the writer says, whilst the franchise for legislative elections has been gradually approaching

manhood suffrage, the municipal franchise has remained as fixed in 1873, subject to the changes made in 1874, 1877 and 1884, as to income voters, farmers' sons and women voters. Whatever may be said as to manhood suffrage in legislative action, it would be contrary to common sense that, in the expenditure of municipal taxes and the management of our local affairs, the person who pays nothing towards the taxes, and has no stake in the country, should have as much to say in the election of representatives as the man who owns large properties and pays heavy taxes. Beyond all question, there should be some representation of property. Why should not some such principle as that adopted in voting on shares in a joint stock company be adopted; so that large taxpayers should have a proportionate voice in the money they pay into the general treasury. In connection with this we read with interest the editor's notes on pp. 7 and 141, where he shows that manhood suffrage was in a sense the common law franchise of England, but under a very different state of things from what exists now.

Clerks and assessors will look upon the book as a boon to them as well as all others who have duties to perform under the Act. Their duties are specially referred to at pp. 3 and 89, and incidentally in other places.

The practical suggestions for the revision of voters' lists, with definitions of the various classes of voters, are very useful features of the book, and happy is the political party at the present crisis which has given most heed to the hints there given.

Most valuable will be found the appendix containing the opinions (ten in number) of the judges of the Court of Appeal on questions submitted by them under 41 Vict. cap. 21, sec. 11. Head notes carefully drawn give the pith of the decisions.

SUPPLEMENT TO THE CANADIAN FRANCHISE ACT, 1885, containing the Amending Act of 1886, with explanatory notes by Thomas Hodgins, M.A., Q.C. Toronto: Rowsell & Hutchison, Law Publishers, 1886.

The first thing that meets our eye after the Index of Cases is a Table of the Electoral Franchise. A prominent politician has publicly pronounced the present Franchise law as "anomalous, contradictory, artificial and almost incomprehensible." Without discussing this subject, though many will agree with him, Mr. Hodgins has done his best to make it, at least, "comprehensible;" and to make the matter as clear as we can to the reader we take the liberty of copying this table.

TITLE OF VOTER.	OCCUPATION OF PREMISES OR RESIDENCE IN THE ELECTORAL DISTRICT.	VALUE.
Real Property Franchise.		
(1) *Owner*—		
(*a*) in his own right	Ownership prior to or at the date of the revision of the Voters' Lists	Cities, $300.
(*b*) in right of wife		Towns, $200.
(*c*) his wife own'r		Other places $150
(2) *Occupant*—		
(*a*) in his own right		
(*b*) in right of wife		
(*c*) his wife occupant		
(3) *Farmer's Son*—	Both occupation and residence for one year next before: (1) the date of his being placed upon the List of Voters; or (2) the date of the application for the placing of his name on the List of Voters	Farm, or other real property, if equally divided among the father and sons, or (if mother the owner) among the sons, sufficient, according to the above values, to give each a vote.
(*a*) Father own'r		
(*b*) Mother own'r		
(4) *Owner's Son*—		
(*a*) Father own'r		
(*b*) Mother own'r		
(5) *Tenant*—		$2 monthly, or $6 quarterly, or $12 half yearly, or $20 yearly.
(6) *Tenant-farmer's Son*—		
(*a*) Father tenant		
(*b*) Mother tenant		
(7) *Fisherman* ..... (owner)	Prior to or at the date of the revision of the Voters' List.....	$150, land, boats, fishing tackle, etc.
(8) *Indian*		$150 of improvements.
Income Franchise.		
(9) *Income*	Prior to or at the date of the revision of the Voters' List, and one year's residence in Canada ...	$300 a year.
10) *Annuitant*	Residence for one year prior to the revision of the Voters' Lists	$100 a year.

The editor notes as he goes along, the alterations made by the Amending Act, so that one can tell at a glance what the law was and is. Mr. Hodgins has evidently spared neither time nor trouble in giving the result of his research. A number of useful forms and a full index complete this useful little book.

ARTICLES OF INTEREST IN CONTEMPORARY JOURNALS.

Common words and phrases. (Abutting—Account—Balance—Cut—Family—Funds—Habitual drunkard—Household goods—Intoxicants—Necessary appendage—Peddler, merchant—Produce—Pecuniary ability—Dwelling house—Bond—Wanton—Drainage, sewerage.)—*Albany L. J.*, Aug. 7.

Life tenant and remainderman.—*Ib.*, Aug. 21.

The enforcement of usurious foreign contracts.—*Ib*, Sept. 25.

Foreign administrators and executors.—*Ib.*, Oct. 2

Damage caused by felony.—*Irish Law Times*, Aug. 7.

Niceties of distress for rent.—*Ib.*, Aug. 14.

Malicious prosecution against corporation aggregate.—*Ib.*, Sept. 11.

Expulsion from a club.—*Ib.*, Sept. 18.

Variance between recitals and operative part of a deed.—*Ib.*, Oct. 2.

The husband and his wife's torts.—*Law Journal* (England), Sept. 18.

Mortgages from client to solicitor.—*Ib.*

Rights and liabilities of sureties on official bonds.—*Central Law Journal*, Aug. 6.

Carriers' servants.—*Ib.*

Principal and agent—Rules as to purchase by agent of principal's property.—*Ib.*

Excusable negligence—What will relieve the maker of a negotiable instrument from his liabilities to a *bona fide* purchaser.—*Ib.*, Aug. 13.

Personal liabilities of bank officers.—*Ib.*, Aug. 20.

Trustee purchasing trust property.—*Ib.*

Banking—Effect of bank certifying cheque.—*Ib.*

Formalities as essential to the validity of a marriage.—*Ib.*, Sept. 3.

Liability of the property of married women on mechanics' lien.—*Ib.*, Sept. 10.

Injunction to restrain a creditor's proceedings in a foreign jurisdiction.—*Ib.*, Sept. 17.

Liabilities of a married woman for improvements to her separate real estate.—*Ib.*, Sept. 24.

Liability of a master to a servant injured by the negligence of fellow-servant.—*Ib.*, Oct. 1.

Carrying concealed weapons.—*Criminal Law Mag.*, October.

Oral wills and death-bed gifts.—*Law Quarterly Review*, October.

Useful law studies.—*Ib.* (Reprinted *ante* p. 366.)

The Government of Ireland Bill and the sovereignty of Parliament.—*Ib.*

Liability of railway company in relation to passenger's luggage.—*Ib.*

The mystery of seisin.—*Ib.*

FLOTSAM AND JETSAM.

CAUSE AND EFFECT.—"I hear," said some one to Jeckyll, "that our friend Smith the attorney is dead, and leaves very few effects." "He could scarcely do otherwise," returned Jeckyll, "he had so very few causes." This is as old as the hills—old enough to be quite new to the junior class.—*Ex.*

THE INFERIOR MAGISTRATES.—At the urgent request of several interested parties, Dr. Wicksteed will print a second edition of his pamphlet on "The Inferior Magistrates"—the first edition of five hundred copies having been exhausted.

The object of this work is to obtain the separation of the magistracy from the practising bar. The pamphlet has been highly spoken of by the editors of law publications. It is looked upon by those who have read it as an able and clear exposition of this most important question. The Hon. Mr. Mowat himself wrote a complimentary letter to the author, but declined, for reasons assigned, to amend the law in the direction sought for.

It is not too much to expect that the next Parliament of Ontario will put an end to the anomaly complained of.—*Evening Journal, Ottawa.*

TOO MUCH FOR THE JURY.—The following plan is stated to have been pursued by some officials at the late Worcester Sessions to hasten the decision of a refractory jury who were locked up to consider their verdict. It was past supper time, and the court officials had no relish to pass the night in waiting upon the twelve good men who were so excessively conscientious. A large dish of beefsteaks fried with onions, giving off a body of aroma sufficient to fill the largest hall in England, was brought into the passage close to the door of the unhappy journeymen's prison. The bailiff, who wished the "stand-outs" at Jericho, opened the door; the cover was taken off the dish; the aroma of the steaks and onions floated in; it invaded and pervaded every square inch of the black hole; and the jury's nasals were violently affected. Mere mortal Englishman couldn't long stand out against such a remembrance of supper. A second opening of the door and advancement of the dish enabled the jury to find a verdict.

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