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DIARY FOR SEPTEMBER.

17. Fri .....First Parliament of U. C. met at Niagara, 1792.
18. Sat .....Trinity term of Law Society ends. Quebec surrendered to the British 1759.
19. Sun.....*13th Sunday after Trinity.*
21. Tues...Sir Walter Scott died, 1832.
26. Sun.....*14th Sunday after Trinity.*
29. Wed. ..*Michaelmas Day.* W. H. Blake 1st Chan. 1849. Sir C. Pepys (afterwards Lord Cottenham) appointed Master of Rolls, 1834.

TORONTO, SEPTEMBER 15, 1886.

THE following notice has been promulgated by the Chancery Division by direction of the judges of the division, viz.: "After the present sitting of the Divisional Court of the Chancery Division, motions for new trials and to set aside verdicts in jury cases in the Chancery Division are to be made by notice of motion, which is to be given and set down according to the provisions of Rules 522 and 523, and unless for some special reason an order *nisi* will not be granted."

With the propriety of the practice which this notice lays down on its merits, we have nothing to say. We are, however, inclined to think that it would have been better if the regulation in question had emanated from the collective body of judges, who are empowered to make rules for the Supreme Court. Practitioners are unfortunately placed by it in this dilemma. Rule 308 expressly prescribes one method of practice, whereas this regulation of the judges of the Chancery Division has virtually abolished that practice and substituted another. The judges of the Chancery Division would no doubt uphold the validity of their own regulation, but the question the practitioner will have to face, is, Whether the Court of Appeal will also do so?

COMMON CARRIERS IN ONTARIO.

WHEN the laws of England were introduced into Canada in 1792, the liability of a common carrier was simply that of an insurer of the goods entrusted to him. He was responsible for their loss or damage from any cause whatever, except the act of God or the king's enemies. How is it then, that in the absence of any statutory enactment extending the rights of carriers, our Reports show so many cases exonerating carriers from liability where the damage was caused by their negligence or by other causes not included in the above exception?

One's curiosity is further increased on finding a special provision inserted in the Railway Acts, preventing railway companies from relieving themselves of liability, by any notice, condition or declaration, if the damage arise from any negligence or omission of the company or its servants (Con. Ry. Act, 1879, sec. 25, sub-sec. 4).

This was already amply provided for by common law, and there was no intermediate change by statute.

The greater portion of the carrying trade in this Province is doubtless done by railways: but a very large portion is done by other carriers to whom the Railway Acts do not apply. The question, therefore, is not without practical importance, and I think that a carrier's right to contract himself out of liability for negligence will be found to be not so extensive as is generally supposed.

In order to arrive at a starting-point in an inquiry we have to go back all the way to the time when the law of England was introduced into Canada.

The cases to which I shall subsequently refer show that shortly after 1792 carriers in England commenced a practice of qualifying their liabilities within certain limits, by posting up and advertising notices to the effect that they would not be responsible for goods above a certain value, unless the same was declared and an additional sum paid for the extra risk. This was only reasonable, for in those days, before railways were invented, the risks attending the carriage of goods in stage coaches, etc., were very much greater than they are now. The difference between such a qualification and a stipulation to protect the carrier from his own fraud or negligence is very manifest.

To entitle him to the benefit of such a notice it was always necessary to bring it home to the shipper's knowledge (*Kerr* v. *Willan*, 6 M. & S. 150); and when this was done the notice operated by way of contract (*Nicholson* v. *Willan*, 5 East 507).

As I have above remarked, even this liberty was not open to carriers when the English law was introduced here (*Leeson* v. *Holt*, 1 Stark, 186). But granting that carriers in this country had the same right to qualify their liabilities as their brethren in England had, let us see how matters proceeded there. The rapid increase of these notices, and the difficulties which they entailed upon both carriers and shippers led to the passing of the Carriers Act, 11 Geo. IV., and 1 W. IV., cap. 68. This Act did away with these notices almost entirely, but provided that nothing in the Act contained should be construed to affect any special contract between the parties for the conveyance of goods.

It soon became apparent that the Act gave undue advantage to the carriers, and that they made it an excuse for exempting themselves from just liabilities by means of protective conditions inserted in their contracts.

The climax appears to have been reached in *Carr* v. *The Lancashire and Yorkshire Ry. Co.*, 7 Ex. 707, when an alteration of the law was recommended by the court, and this was answered by the passing of the Railway and Canal Traffic Act, 1854.

The change effected by this statute may be shortly stated to be that while it left the carriers free to make such contracts as they pleased (in writing and signed by the shipper), it reserved to the Courts the power to say whether any particular condition relied on by the carrier was just and reasonable.

Soon after this Act came into force the railway companies adopted the plan of offering alternative rates to shippers, so that on payment of the higher or parliamentary rate the companies accepted their full common law liabilities; but if a shipper desired it, they carried his goods at a lower rate, and imposed such conditions as they saw fit.

This was a fair and reasonable system, and is well illustrated in the case of *Brown* v. *Manchester*, L. R. 8 App. Cas. 703, where it was held that a contract exempting the defendants "from all liability for loss or damage by delay in transit, or from whatever other cause arising," was not unreasonable in the case of a shipper who had chosen to take advantage of the lower rate. But even under these circumstances Lord Fitzgerald doubted whether the carrier would have been protected from wilful misconduct. So far as I am aware, this system of alternative rates has never been adopted in this country.

Bearing in mind then the changes effected by legislation in England since 1830, let us see in what manner our Courts have dealt with this branch of the law.

In *O'Rorke* v. *Great Western Ry. Co.*, 23 U. C. R. 427, the plaintiff sent some cattle from Beachville by defendants'

railway, signing a paper which declared "that he undertook all risk of loss, injury, or damage in conveyance and otherwise, whether arising from the negligence, default and misconduct, criminal or otherwise, on the part of the defendants or their servants." He was told by the station master that he would have to sign the conditions, which he did without taking time to read them. To an action for negligence in the carriage of the cattle, by which five of them were killed, the defendants pleaded these conditions, which the jury found the plaintiff had signed. It was held that he was bound by them, though he might not have read or understood the paper. It is clear that it could not have been so decided in England subsequently to the Railway and Canal Traffic Act, because there was no alternative rate and the condition was grossly unreasonable. And I think it will appear equally clearly that it could not have been so decided in England prior to the Carriers Act by reason of the authorities to which I shall refer below.

The decision is all the more remarkable when we look at the only two authorities cited in the judgment. The first of these was *Simons* v. *The G. W. R.*, 2 C. B. N. S. 620, decided in 1857. There the plaintiff had signed a contract, one of the conditions in which was that the company were not to be responsible for any loss or damage however caused. The plaintiff proved that his signature was obtained by the defendant's clerk, who told him the document was of no consequence but was a mere matter of form. The question left to the jury was whether or not the goods were delivered to and received by the defendants to be carried under a special contract, and the jury found for the plaintiff.

The judgment of the court was contained in the following words of Cockburn, C.J.:—"I see no ground for finding fault with the verdict in this case. To hold the plaintiff bound by a contract foisted upon him under such circumstances would be to permit the defendants to take advantage of their own fraud." It was, therefore, wholly unnecessary to consider the terms of the alleged special contract. The second case referred to is *Stewart* v. *London & N.-W. Ry.*, 10 L. T. N. S. 302, and 3 H. & C. 135, and all that I need say as regards this is that it has been since distinctly overruled, see *Cohen* v. *S.-E. Ry.*, L. R. 2 Ex. D. 253. A condition equally objectionable to that pleaded in *O'Rorke* v. *The G. W. Ry.*, was upheld in *Hood* v. *G. T. R.*, 20 C. P. 361, on the authority of the former case.

But the case on which this important point of carriers law mainly rests in our courts is *Hamilton* v. *The G. W. R.*, 23 U. C. R. 600, decided in 1864, and as it was both argued and decided entirely upon the authority of English cases, and as it has been followed in several subsequent judgments, it is well worth a careful examination. The head note is as follows:

"Defendants, a railway company, received certain plate glass to be carried for the plaintiff, who signed a paper partly written and partly printed, requesting them to receive it upon the conditions endorsed, which provided that they would not be responsible for damage done to any china, glass, etc., delivered to them for carriage; and defendants gave a receipt with the same conditions upon it. *Held*, that such delivery and acceptance formed a special contract which was valid at common law, and exempted defendants from injury to the goods, even though caused by gross negligence."

The authorities upon which this decision was based, according to the report, are the following:

(1) *Gibbon* v. *Paynton*, 4 Burr. 2299. decided in 1769. This was an action against the Birmingham stage coachman for £100 in money, sent from Birmingham to London and lost. It was hid in hay in

an old mail bag. The bag and hay arrived safe, but the money was gone. The plaintiff had been notified "that the coachman would not be answerable for money or jewels or other valuable goods, unless he had notice that it was money or jewels or valuable goods that was delivered to him to be carried."

The jury found a verdict for the defendant. The court held that plaintiff had been guilty of a gross fraud, and on this ground the judgments mainly proceed. Mr. Justice Yates, however, held that a carrier may make a special acceptance, and that this was a special acceptance.

There is a wide difference between this special acceptance, and one exonerating the carrier from the negligence of himself or servants.

(2) The next case is *Leeson* v. *Holt*, 1 Stark. 186, decided in 1816. It consists almost wholly of Lord Ellenborough's summing up to the jury. The defendants relied on a notice intimating that all packages of looking-glass, plate-glass, household furniture, etc., were to be entirely at the risk of the owners as to damage, breakage, etc. His lordship said:

"If this action had been brought twenty years ago, the defendant would have been liable, since by the common law a carrier is liable in all cases, except two—where the loss is occasioned by the act of God, or of the king's enemies using an overwhelming force, which persons, with ordinary means of resistance cannot guard against. It was found that the common law imposed upon carriers a liability of ruinous extent, and in consequence qualifications and limitations of that liability have been introduced from time to time till, as in the present case, they seem to have excluded all responsibility whatsoever, so that under the terms of the present notice, if a servant of the carriers had in the most wilful and wanton manner destroyed the furniture entrusted to them, the principals would not have been liable. If the parties in the present case have so contracted, the plaintiff must abide by the agreement, and he must be taken to have so contracted if he chooses to send his goods to be carried after notice of the conditions. The question then is whether there was a special contract. If the carriers notified their terms to the person bringing the goods by an advertisement which, in all probability, must have attracted the attention of the person who brought the goods, they were delivered upon those terms; but the question in these cases always is, whether the delivery was upon a special contract."

The jury thereupon gave a verdict for plaintiff.

Now, it is to be observed that this was merely a *nisi prius* dictum of Lord Ellenborough, and the interpretation placed by him upon the notice, namely, that it would have protected the carriers from liability for the wilful and wanton misconduct of their servants, is opposed to several well-considered cases, for example, in *Lewis* v. *The G. W. R.*, L. R. 3 Q. B. D. 195, and cases there cited.

(3) The next case is *Nicholson* v. *Willan*, 5 East 507, decided in 1804. There the notice relied on was to the effect that the defendants would not be accountable for any passenger's luggage or any package whatever (if lost or damaged) above the value of £5, unless insured and paid for at the time of delivery, etc. The plaintiff's goods were of the value of £58, and they were not insured or paid for. It was admitted that a wilful and tortious act by the carriers would not have been protected by the notice; but in the absence of any proof of such an act a nonsuit was entered.

(4) The next case referred to was *Jackson's case*, 2 Peake 185, decided in 1850. The plaintiff wished to ship some tea from London to Leeds, and brought the tea to the carrier's office, but the carrier's book-keeper refused to book it unless 2*d.* was paid for so doing. The plaintiff refused to pay the charge and left the tea, which was subsequently stolen. Lord Kenyon said:—

"When no rate is fixed by law the carrier is entitled to say on what terms he will carry; he is not obliged to take everything which is brought to his warehouse, unless the terms on which he chooses to undertake the risk are complied with by the person who employs him." And a nonsuit was accordingly entered.

This decision merely relates to the duty of the shipper as regards payment of the carrier's charges. It was not contended that if the charges had been paid the defendant would not have been liable.

(5) The next case relied on in *Hamilton* v. *The G. T. R.* is *Harris* v. *Packwood*, 3 Taunt. 264, decided in 1810. The notice relied upon by the defendant was that he would not be accountable for any package whatsoever above the value of £20, unless entered, and an insurance paid over and above the price charged for carriage, according to their value. The parcel in question was worth £126, but was not entered nor was any insurance paid. The court held that in the absence of proof of express negligence the plaintiff could not recover.

These seem to be the authorities upon which the decision in *Hamilton* v. *The G. T. R.* is based, according to the report. There are several other cases referred to, but as they bear against the decision, I shall quote them in their appropriate connection. The above cases at most appear to decide that prior to the Carriers Act, carriers were permitted, by notice brought home to the shipper, to qualify their common law liability to a certain reasonable extent, and no doubt the cases referred to in *Hamilton* v. *The G. T. R.*, were the strongest which could be found.

But in none of these did the carrier, when paid his reasonable charges for carriage, attempt to contract himself out of liability for the negligence of himself or his servants. Such an encroachment upon the common law would not have been tolerated as will appear, I think clearly, from the authorities to which am about to refer.

(To be continued.)

RECENT ENGLISH DECISIONS.

The July numbers of the *Law Reports* comprise 17 Q. B. D., pp. 137–309; 11 P. D., pp. 69–76; and 32 Chy. D., pp. 245–398.

MARRIED WOMAN—JUDGMENT AGAINST MARRIED WOMAN—RESTRAINT ON ANTICIPATION.

Taking up the cases in the Queen's Bench Division, the first to be noticed is *Draycott* v. *Harrison*, 17 Q. B. D. 147, which is deserving of attention, both in regard to the point of practice involved, but also for the light it throws on the effect of the Married Women's Property Act of 1882, from which our Act of 1884 was taken. A judgment had been obtained against a married woman which, however, contained the special clause, "but that the execution hereon be limited to the separate property of the said defendant not subject to any restraint on anticipation (unless by reason of the Married Women's Property Act, 1882, such property or estate shall be liable to execution notwithstanding such restraint)." The only separate property the defendant was entitled to was an annuity of £180, which was subject, by the terms of the will under which it was payable, to a restraint against anticipation. After the receipt of sufficient instalments of the annuity to have enabled the defendant to satisfy the judgment debt, the plaintiff applied to a County Court Judge, and obtained an order to commit her to prison for 14 days for not paying the debt, having the ability to do so. From this order the defendant appealed. The plaintiff's counsel contended that there was no appeal, but the court, without deciding that question, said that in order to save expense and have the real question determined at once, it would mould the motion into the form of a rule for a prohibition, which would be the appropriate remedy, assuming the judge had no jurisdiction to make the order complained of. And on the merits the court (Mathew and A. L. Smith, JJ.,) set aside the order, holding that the section 5 of the Debtors Act, 1869, under which it was pur-

ported to be made, only authorized the order when there was a personal liability on the part of the judgment debtor to pay the debt, and that a judgment in the form above given created no personal liability. And furthermore, that the property the defendant married woman had, being subject to a restraint against anticipation, was not, in fact, property within the intent and meaning of the Act.

LIBEL—DISCOVERY.

In *Marriott* v. *Chamberlain*, 17 Q. B. D. 154, an application was made to compel the plaintiff to make further discovery under the following circumstances. In the course of an election contest the plaintiff had publicly charged the defendant with having written and sent a certain letter for the purpose of gaining a monopoly in his trade, and he stated that he had seen a copy of the letter, that his informant was a solicitor of high standing, and that two of the letters existed, one in the keeping of an eminent banking firm, and the other in the hands of a firm of manufacturers. Subsequently the defendant published a statement denouncing the plaintiff's statement as untrue, and the letter referred to as a fabrication, for which the plaintiff brought the present action of libel. The defendant pleaded that the alleged libel was true, and sought to compel the plaintiff to disclose the names and address of the "solicitor of high standing," and also of the firms alleged to hold the letters in question. The plaintiff sought to evade this discovery on the ground that he intended to call these parties as witnesses, but the Court of Appeal (affirming the order of Mathew, A. L. Smith and Field, JJ.,) held that the defendant was entitled to the discovery.

MARRIED WOMAN—TORT COMMITTED DURING COVERTURE—LIABILITY OF HUSBAND—MARRIED WOMAN'S PROPERTY ACT, 1884, ONT.

Seroka v. *Kattenburg*, 17 Q. B. D. 177, is one of the numerous cases which show how very difficult it is for the legislature, when dealing with the rights of married women, to effectuate what may presumably be considered to have been its real intention. Formerly, as our readers are aware, by the common law the husband by virtue of the marriage became the owner of his wife's personal property, and also a very substantial interest in her real estate. By various statutes, supposed to be in accordance with the necessities of modern civilization, all this has been changed, and a husband has now been virtually deprived of all interest in his wife's property, real or personal, during her lifetime. The common law, while giving the husband extensive rights in his wife's property, also imposed on him certain liabilities, and he was answerable for her torts committed during coverture. It now appears from this case that although the Married Women's Property Acts have divested the husband of the rights he was formerly entitled to in his wife's property, they have nevertheless left him burthened with the responsibility for her torts. The action was for libel by the female defendant. Her husband, who was made a co-defendant, contended that the statement of claim disclosed no cause of action against him, but the court (Mathew and A. L. Smith, JJ.,) held that the Act of 1882, though relieving a husband of liability for torts committed by his wife before coverture, left him responsible for those committed by her during coverture, notwithstanding the provision enabling the wife to be sued without her husband. We cannot believe that this carries out the real intention of the legislature.

PRACTICE—NOTICE OF MOTION RETURNABLE ON DIES NON—AMENDMENT.

In *Williams* v. *De Boinville*, 17 Q. B. D. 180, a notice of motion had been given returnable on a day on which the court did not sit, "or so soon thereafter as counsel could be heard." The opposite party appeared at the next sitting of the court and took the objection: but the court (Manisty and Mathew, JJ.,) allowed the notice of motion to be amended. See *McGaw* v. *Ponton*, 11 P. R. 328.

EXECUTION CREDITOR—GARNISHEE ORDER—PAYMENT INTO COURT—RECEIPT OF DEBT.

The short point determined by Manisty, J., in *Butler* v. *Wearing*, 17 Q. B. D. 182, is that where, in consequence of a third party intervening in a garnishee application, the money attached is ordered to be paid into court to abide further order, that does not constitute a receipt of the money by the attaching creditor as against a trustee in bankruptcy of the judgment debtor, even though the third party withdrew his claim subsequent to the appointment of the trustee

Recent English Decisions.

MASTER AND SERVANT—EMPLOYERS' LIABILITY ACT, 1880 (49 VICT., C. 28, ONT.)—MEANING OF "WORKS."

In *How* v. *Finch*, 17 Q. B. D. 187, Mathew and A. L. Smith, JJ., decided that the term "works" used in *The Employers' Liability Act*, s. 1. (see 49 Vict., c. 28, s. 3, O.) includes only completed works, and not works in course of erection, which when completed are intended to form part of the premises used by the employer.

MARINE INSURANCE—BURSTING OF ENGINE.

In *Hamilton* v. *Thames M. I. Co.*, 17 Q. B. D. 195, the question was whether damage occasioned by the bursting of the air chamber of an engine was covered by an insurance against "all the perils, losses and misfortunes that have or shall come to the hurt, detriment, or damage of the aforesaid subject matter of insurance or any part thereof." The engine was employed in the ordinary course of navigation to pump water into the boilers; but in consequence of a valve, which should have been open, being either by negligence or accident closed, the water was forced into the air chamber of the engine, which was split open. On the authority of *West India Telegraph Co.* v. *Home and Colonial Insurance Co.*, 6 Q. B. D., 51, Mathew and A. L. Smith, JJ., held that the plaintiffs were entitled to recover, and this decision was affirmed in the Court of Appeal by Lindley, and Lopes, LL.J., Lord Esher dissenting. It may, perhaps, be useful to quote from the concluding words of the judgment of the majority of the Court of Appeal the following passage:

> We do not think that the general words include all losses that may happen during a voyage by accident; but we think the general words cover all losses incident to the navigation of a vessel during the voyage, inclusive of losses arising from negligence or improper management, because these are *ejusdem generis* with perils of the sea.

RAILWAY COMPANY'S PASSENGER'S LUGGAGE—DELIVERY TO PORTER.

Fifteen pages of the reports are occupied by the case of *Bunch* v. *The G. W. R'y Co.*, 17 Q. B. D., 215, which was brought to compel the defendants to make good the loss of a "Gladstone" bag, which the plaintiff had left for ten minutes in charge of the defendants' porter while she went to get her ticket and meet her husband. The Court of Appeal held the defendants liable; but Lopes, L.J., dissented, because the bag in question was to have been put in the carriage with the plaintiff instead of in the luggage van, and he considered it was not the porter's duty to take charge of luggage except for the time reasonably necessary for placing it in the luggage van.

FRAUDULENT CONVEYANCE—13 ELIZ., C. 5—VOLUNTARY SETTLEMENT FOR WIFE AND CHILD.

Ex parte Mercer, 17 Q. B. D. 290, is a decision of the Court of Appeal affirming a judgment of Cave and Grantham, JJ. The case arose in bankruptcy; but the point involved is one of general interest. A man was married in Hong Kong on 31st May, 1881. In the following August an action was commenced against him by a lady in England for breach of promise of marriage, in which the writ was served on him in Hong Kong on 8th October following. At the time of his marriage he was entitled to a legacy of £500, which had become vested in possession by the death of his mother on May 11, 1881; but he was ignorant of her death until October, 1881, and on the 17th of that month, having learned of her death and that he was entitled to the legacy, he immediately executed a voluntary settlement of the fund, whereby he assigned it to a trustee to pay the income, during the joint lives of himself and wife, to the wife for her separate use, and after the death of either of them to pay the income to the survivor for life, and on the death of the survivor to hold the fund for the children of the marriage, and in default of children for the husband absolutely. On 20th July, 1882, judgment was recovered against the settlor in the action for breach of promise for £500 damages, and costs; and on 14th November, 1884, he was adjudicated a bankrupt, and the trustee in bankruptcy claimed to have the voluntary settlement declared void under the Statute of Elizabeth. The settlor swore that the settlement was *bona fide* for the purpose of making a provision for his family, and that he had no creditors, and that he had regarded the service of the writ as a mere threat, and fully expected the action would not have been prosecuted. The court came to the conclusion that there was no evidence of any fraudulent intent to defeat creditors, and the voluntary settlement was therefore upheld.

Recent English Decisions.

ADMINISTRATION WITH WILL ANNEXED—REVOCATION—MARRIED WOMAN.

The only case in the Probate Division which it is necessary to note, is *In the Goods of Reid*, 11 P. D. 70. This was an application to revoke letters of administration, with the will annexed, which had been granted to a woman who had subsequently married. She had contracted to sell certain leaseholds of the estate, but the purchaser objected to complete the purchase unless her husband joined in the conveyances; her husband, however had deserted her, and his concurrence could not be obtained. For the purpose of completing the sale it was desired that the letters of administration should be revoked and a new grant made to a third party, but Brett, J. held this could not be done, and the Court of Appeal affirmed his decision.

SOLICITOR—AGENT.

Turning now to the cases in the Chancery Division, *In re Scholes*, 32 Chy. D. 245, deserves a brief notice. London solicitors, acting for country solicitors duly authorized, obtained an order for taxation of costs. The petition for the order was indorsed with their own name without the name of their principals. On motion of the client the order was set aside as irregular, but without costs.

STATUTE OF FRAUDS—GUARANTY—CONSIDERATION.

In *Miles* v. *New Zealand Alford Estate Co.*, 32 Chy. D. 266, the plaintiff was equitable mortgagee of certain shares in the defendant company, of which he had given notice to the company. By the terms of the articles of association, it was declared that the company should have a first and paramount lien upon the shares of every member for his debts, liabilities, and engagements to the company. After the plaintiff had given notice of his mortgage, the mortgagor, who was also a director of, and vendor to the company, was threatened with proceedings, and in consequence gave a written guaranty for the payment of a minimum dividend for the period of ninety years. No consideration for the giving of the guaranty appeared on the face of the instrument. The defendants claimed to be entitled to priority in respect of this guaranty over the plaintiff's mortgage. North, J. held that there was sufficient consideration for the guaranty, but following the decision of Field, J., in *Bradford Banking Co.* v. *Briggs*, 29 Chy. D. 149, which had not then been reversed, he held the defendants were not entitled to priority. On appeal, Cotton and Fry, L.L.J., although agreeing that if there had been a valuable consideration for the guaranty the defendant company would have been entitled to priority on the authority of the decision of the Court of Appeal in *Bradford Banking Co.* v. *Briggs*, 31 Chy. D. 19, were however of opinion that there was no sufficient evidence of any intended claim by the company or the shareholders against the guarantor; or any contract binding the company to abandon such claim, and therefore, that the guaranty was without consideration. Bowen, L.J., on the other hand, agreed with North, J. The result was that although the majority of the Court of Appeal differed with North, J., on both points, they nevertheless affirmed his decision.

LUNATIC—VENDOR AND PURCHASER—TRUSTEE ACT, 1850

In *Re Colling*, 32 Chy. D. 333, certain persons having been authorized by the court to make sale of certain property of a lunatic, effected a sale, but, before payment of the purchase money or execution of the conveyance, the lunatic died. The present application was made under the Trustee Act, 1850, to have the deceased lunatic declared a trustee, and for the appointment of another person as trustee to complete the sale. But the Court of Appeal held the order could not be made; that a vendor cannot be deemed a trustee within the Trustee Act until he had been so declared by the decree of the court, inasmuch as there may always be a question whether the contract could be enforced by a suit for specific performance; and that it would be extremely inconvenient to declare a vendor a trustee upon a petition on which that point could not be decided.

JOINT STOCK COMPANY—SUBSCRIPTION FOR SHARES BY AGENT VERBALLY APPOINTED.

In re Whitely, 32 Chy. D. 337, was an application by a person who had been placed on the list of contributories of a company being wound up to have his name removed, on the ground that the subscription for the shares had been made by an agent verbally appointed, and was therefore not binding. But the Court of Appeal (affirming Bacon, V.C.,) held that

there being nothing in the statute requiring a special mode of signature, the ordinary rule applied that signature by an agent was sufficient, and, that though it was irregular for the agent to sign the name of his principal without denoting that it was signed by attorney, the signature was not on that ground invalid.

COMPANY—WINDING UP—SERVICE OUT OF JURISDICTION.

In *Re Anglo-African Steamship Co.*, 32 Chy. D. 348, an application was made to Kay, J., to authorize service of an order for a call upon certain contributories out of the jurisdiction, which was refused, and the Court of Appeal affirmed the decision. Cotton, L.J., says:

Service out of the jurisdiction is not a power inherent in the court, but is only given by statute so as to be binding on British subjects, and not on others. There is no proof that the persons to be served are British subjects. But if they are, I am of opinion that the court has no jurisdiction to make the order asked for,

See *Re Busfield*, *ante*, p. 239.

PARTNERSHIP—ACTION TO COMPEL PARTNER TO SIGN NOTICE OF DISSOLUTION FOR PUBLICATION—COSTS.

Hendry v. *Turner*, 32 Chy. D. 355, was an action brought to compel a retiring partner to sign a notice of dissolution for publication in the *Gazette*, no other relief being claimed. Pending the suit the defendant signed the notice, and a summons was then taken out by plaintiff, asking that defendant might be ordered to pay all the costs of the action. It was contended by the defendant that the action would not lie, but Kay, J., held that it would, and he ordered the defendant to pay the costs.

SETTLEMENT—AFTER ACQUIRED PROPERTY—RESTRAINT ON ANTICIPATION.

In *Re Currey*, *Gibson* v. *Way*, 32 Chy. D. 361, it was held by Chitty, J., that a restraint on anticipation is equivalent to a restraint on alienation, and therefore property of a married woman, acquired by her after marriage for her separate use, subject to such restraint, was not bound by a covenant for settlement of after acquired property contained in her marriage settlement.

WINDING UP ORDER—DISCHARGE OF EMPLOYEES.

In *Macdowall's case*, 32 Chy. D. 366, Chitty, J., held that the rule established by *Re Chapman*, 1 Eq. 346, that an order for winding up a company operates as a notice of discharge to the servants of the company when the business of the company is not continued after the date of the order, applies though the liquidator, without continuing the business, employs the servants in analogous duties to those previously performed by them for the company, with a view to reconstruction.

COMPANY—WINDING UP—PETITION BY EXECUTOR.

In *Re Masonic G. L. A. Co.*, 32 Chy. D. 373, Pearson, J., held that the executor of a creditor is entitled to present a winding up petition before he has attained probate, and that it is sufficient if he obtain probate before the hearing of the petition.

EASEMENT—LEASE—MERGER.

Dynevor v. *Tennant*, 32 Chy. D. 375, is a decision of Pearson, J., on the law of easements. The facts of the case were shortly these: Three joint owners of an estate granted a lease for 1,000 years of a certain strip running through it, for the purpose of making a canal, reserving the right to build bridges over the canal. Subsequently the three lessors partitioned the estate, and the bed of the canal was allotted to one of them who subsequently sold his reversion in it to the lessee through whom the defendant claimed. The plaintiff, who was a successor in title of one of the other co-owners, claimed the right under the reservation in the lease to build a bridge across the canal for the purpose of connecting certain parts of his estate which it intersected. Pearson, J., held that the easement was extinguished by reason of the reversion in the bed of the canal having become vested in the lessee, which had the effect of putting an end to the lease.

ACCUMULATION OF ENTIRE INCOME—MAINTENANCE.

The case of *In re Alford*, *Hunt* v. *Parry*, 32 Chy. D. 383, was one in which an attempt was made to induce the court to extend the principle of *Havelock* v. *Havelock*, 17 Chy. D. 807, without success. A testator gave his real estate and his residuary personal estate upon trust to accumulate the income for twenty years after his death, and subject to such trust upon trust for a nephew for life, with remainder to his first and other sons successively in tail. No provision was made for the maintenance of the nephew, who was an infant at the time of the testator's death. During his minority the court had, notwithstanding the trust

for accumulation, authorized the application of £300 a year for his maintenance. On his coming of age the present application was made to the court to continue the allowance to enable him to adopt the profession of a solicitor, but Pearson, J., refused to make any further order, considering he was bound to "allow the testator's folly to prevail."

SELECTIONS.

TRANSFERRED MALICE.

In *Regina* v. *Latimer*, noted in this week's Notes of Cases, the Crown Court decide that if a man strike at another and wound a woman he is guilty of unlawful and malicious wounding within the statute 24 & 25 Vict., c. 100, s. 20. The Lord Chief Justice was of opinion that *Rex* v. *Hunt*, 1 M. C. C. 93, a decision of all the judges briefly reported, virtually decided the question, but a close examination of that case shows that it was little in point. The indictment was not for maliciously wounding, but for feloniously cutting. No one doubts that if a man meaning murder kills the wrong man he is guilty of murder, and so of a felonious assault, but the law of murder depends on the common law. The question was whether the word "maliciously" in a statute is satisfied by a malice which had a different object for the blow. In *Regina* v. *Pembliton*, 43 Law J. Rep. M. C. 91, it was held that to aim at a man and to smash a window is not malicious; now it is held that to aim at a man and wound a woman is malicious. The distinction is fine, but it is probably sound, and ingenuity might suggest many similar complications of motive and act which chance-medley might bring about. For example, is it malicious to aim at a horse and wound the rider? We suppose it is, on the authority of the present decision, although the poor horse, hit in mistake for the rider, would probably be no better off than the plate-glass. The distinction is perhaps unsound in strict logic, but the fact is that the law very properly takes care of human life and limb, and when they are in danger ignores metaphysics. In the reign of William Rufus, we believe, the doctrine was carried further, and it was contended that when the man was a king it was treason to kill him in shooting at a stag, but as Coke gravely points out, Tyrrell was no poacher, but shot at a stag in the royal forest at the king's command, and the king's death was legally an accident. Personally Tyrell was not, we believe, confident of the soundness of his legal position, and was called away to the Crusades. The case suggests another complication. A man meaning to kill a fellow-subject kills the king. Is that treason, or murder, or neither? We commend this conundrum to debating clubs.—*Law Journal.*

The Court for the Consideration of Crown Cases Reserved last Saturday expressed their gratification at being able to deliver a judgment upon a question of considerable importance. Not because they were thereby laying down any new principles with regard to the criminal law, for, as they said, the case before them was clear, but for the decision of the court upon a case which, until examined, was apparently on all-fours with the case upon which they were called upon to decide, and which, to a certain extent, placed a qualification upon the application of the well-known doctrine that where a person in the execution of an unlawful act causes damage or injury, if such damage or injury was the natural consequence of the unlawful act, the law presumes malice upon the part of the person engaged in the unlawful act. The case before the court on Saturday was one in which a man named Latimer had been convicted upon an indictment for unlawfully and maliciously wounding Ellen Rolston under the following circumstances: Latimer and a man named Chapple had been quarrelling in a room, and Latimer had left the room and returned with a belt in his hand. In passing hastily through the room Latimer aimed a blow with the belt at Chapple, and struck him slightly, but the belt bounded off and struck Ellen Rolston, who was standing talking to Chapple, and wounded her severely. These being the facts, the learned Recorder, before whom the case was tried, left the following questions to the jury:—"1. Was the blow struck at Chapple in self-defence to get through the room, or unlawful and mali-

ciously? 2. Did the blow so struck, in fact, wound Ellen Rolston? 3. Was the striking Ellen Rolston purely accidental, or was it such a consequence as the prisoner should have expected to follow from the blow he aimed at Chapple?" and the jury found: "1. That the blow was unlawful and malicious; 2. That the blow did, in fact, wound Ellen Rolston; 3. That the striking Ellen Rolston was purely accidental, and not such a consequence of the blow as the prisoner ought to have expected." Upon these findings a verdict of guilty was entered, and the question before the Court for the Consideration of Crown Cases Reserved was, whether upon the facts and the findings of the jury the prisoner was rightly convicted of the offence for which he was indicted. The Court held that he was, and the only difficulty which they experienced in coming to that decision arose in consequence of their previous decision in the case of *Reg.* v. *Pembliton* (L. Rep. 2 C. C. R. 119). In that case the prisoner had been fighting with persons in a street, and threw a stone at them, which struck a window and did damage to an amount exceeding £5. He was indicted under the Malicious Injury to Property Act for "unlawfully and maliciously" causing this damage. The jury convicted him, but found that he threw the stone at the people he had been fighting with, intending to strike one or more of them, but not intending to break the window: and the Court for the Consideration of Crown Cases Reserved held, that by this finding the jury negatived the existence of malice, either actual or constructive, and the conviction must therefore be quashed. Now, as in *Reg.* v. *Latimer*, the prisoner was indicted for "unlawfully and maliciously" wounding Ellen Rolston, it was naturally argued, upon the authority of *Reg.* v. *Pembliton*, that, as the jury had found that the striking of Ellen Rolston was purely accidental, they had here too negatived the existence of malice, either actual or constructive, and that therefore the prisoner could not be convicted. At first sight it would, no doubt, appear impossible to distinguish the two cases; but when once the learned counsel for the prisoner was obliged to admit in answer to the bench that had Ellen Rolston been killed instead of only being wounded, the prisoner would clearly have been guilty of manslaughter, it became obvious that the case of *Reg* v. *Pembliton* must in some respect be distinguishable. In the first place, the Master of the Rolls expressed his dissent with the third question which was left to the jury, as not being a material question, and pointed out that, under 24 & 25 Vict., c. 100, s. 20, under which the prisoner was indicted, the question was whether the prisoner unlawfully and maliciously wounded any other person; and although the use of the word "maliciously" rendered it necessary that the prisoner should be proved to have intended to wound, yet the section was quite general, and therefore it was not necessary to prove that the prisoner intended to wound the person actually wounded. The question for the jury therefore was, whether the prisoner, intending to wound some person, wounded a particular person. This at once led to the possibility of distinguishing the case of *Reg.* v. *Pembliton* from the case before the court, for in the former case the prisoner was indicted under 24 & 25 Vict., c. 97, s. 51, under which section the offence was to unlawfully and maliciously commit any damage to any property whatsoever; and it was therefore necessary, in order to convict under the section, that the prisoner should have committed damage to property intending to commit damage to some property. In *Reg.* v. *Pembliton* the jury having negatived the fact that the prisoner intended to commit damage to any property at all, it followed that the evidence did not support the indictment, which charged that the prisoner "maliciously did commit damage, injury and spoil upon a window." In this way the court, while they approved of the decision in *Reg.* v. *Pembliton*, showed that it was clearly distinguishable from the case before them, and added that, had the prisoner there been found to have intended to commit damage to property, though other than the property actually damaged, and in the execution of such intention had damaged the window actually damaged, the decision would probably have been different. For, as Mr. Justice Blackburn in that case said: "The jury might perhaps have found on this evidence that the act was malicious, because they might have found that the prisoner knew that the natural consequence of his act would be to break

the glass, and although that was not his wish, yet that he was reckless whether he did it or not; but the jury have not so found, and I think it is impossible to say in this case that the prisoner has maliciously done an act which he did not intend to do." The case of *Reg.* v. *Pembliton* being thus distinguished, it only remained for the court to apply to the case before them the ordinary rule of law that, where it is necessary to prove an act was done maliciously, it is not necessary to prove malice on the part of the prisoner against a particular individual, and Lord Coleridge, C.J., pointed out that, but for the case of *Reg.* v. *Pembliton*, the case was *res judicata*, for in *Reg.* v. *Hunt*, in 1825 (1 Moo. C. C. 93), it was held that, on an indictment for maliciously cutting, malice against the individual cut is not essential; general malice is sufficient. On behalf of the prisoner in *Reg.* v. *Latimer*, it was argued that the decision in *Reg.* v. *Hewlett*, in 1858 (1 F. & F. 91), was to the contrary effect, for there it was held that where a person strikes A., and B. interposing receives the blow, a conviction for wounding with intent to do grievous bodily harm to B. cannot be sustained. But the Court pointed out that there Mr. Justice Crowder said the evidence would not sustain the charge of wounding with intent to do grievous bodily harm to B.; but that the prisoner might be convicted of unlawfully wounding. The case of *Reg.* v *Faulkner*, (13 Cox C. C. 550) was also cited on behalf of the prisoner. In that case a sailor entered a part of a vessel for the purpose of stealing rum, and while he was tapping a cask of rum a lighted match, held by him, came in contact with the spirits which were flowing from the cask, and a conflagration ensuing the vessel was destroyed, but the prisoner was nevertheless acquitted of the crime of arson. Mr. Justice Barry, in delivering his judgment in that case, said: "Perhaps the true solution of the difficulty is, that the doctrine of constructive malice or intention only applies to cases where the mischief with which the accused stands charged would be, if maliciously committed, an offence at common law. . . . The jury were, in fact, directed to give a verdict of guilty upon the simple ground that the firing of the ship, though accidental, was caused by an act done in the course of, or immediately consequent upon a felonious operation, and no question of the prisoner's malice, constructive or otherwise, was left to the jury;" and the Court in *Reg.* v. *Latimer* pointed out that in *Reg.* v. *Faulkner* there was no evidence of malice at all which could have been left to the jury.—*Law Times.*

REPORTS.

MAGISTRATES' CASES—POLICE COURT.

SOCIETY FOR PREVENTION OF CRUELTY TO ANIMALS v. COURSOLLES.

43 Vict. cap. 38, sec. 2—Torturing domestic birds.

Pigeon shooting from traps at a shooting match, accompanied by the usual cruelty and misusage incident to the birds under such circumstances,

Held, not to be an offence under the above statute.

[Ottawa, July 15, 1886.]

The complaint was laid under 43 Vict. cap. 38, sec. 2—"Whosoever wantonly, cruelly or unnecessarily beats, abuses or tortures any domestic bird shall," etc.

From the evidence of Mr. Baker, secretary of the Metropolitan Society for the Prevention of Cruelty, it appeared that the pigeon-shooting tournament was advertised as under the conduct of the St. Hubert Gun Club. The matches were open to all who paid the entrance fees. The shooting was for various prizes as advertised. It took place in the south-eastern portion of the city. The defendant was one of those who took part in the shooting. The birds used were tame or domesticated pigeons. They were brought into the field from a barn, in which they had been stowed for some time in boxes. They were greatly overcrowded in the boxes; and were left exposed to the sun in this crowded condition until required to be shot at. They were taken out by a boy and placed singly in traps; these were small boxes of sheet iron so constructed that upon a rope being pulled it fell apart and freed the bird. A second rope was used with one end fastened beyond the box by which the bird was beaten or whipped up till forced to fly.

The first bird placed for Coursolles was whipped up. It rose; was fired at, and wounded; one leg apparently broken and the wing disabled. It was

left fluttering on the ground until others had been placed in the traps, and another shooter had taken his stand, when the judge or referee called out, "gather your bird, Mr. Coursolles." The boy was sent out, caught and carried it in, wrung its neck and threw it into a pile of dead birds. The great majority of the birds did not rise until beaten up by the whipping-up rope. They almost invariably flew towards the shooters. Many were so crippled from confinement as to be unable to rise from the ground, and after further trial were pronounced "no birds" by the judges. These were put into a separate box as useless for the purpose of living targets. Many were wounded and escaped outside the bounds. One bird was fired at and flew in among the crowd. It was followed up by the shooter who after some time succeeded in knocking it down with his hand inside the rope. He carried it to the judges, who after long handling and examination, and failing to detect traces of blood drawn by the shot, pronounced it "no bird"; its neck was then wrung, and its body thrown into the pile. The birds bore evidence of having been badly treated before being fired at. Saw several left rotting on the field after being shot. I witnessed the shooting at clay pigeons which are thrown into the air by a spring trap; these were more difficult to hit than the live birds, and furnished tolerable practice.

Dr. R. J. Wicksteed.—The object of the prosecuting society, and of the law under which it works, is twofold—deterrent and educational. Every act of cruelty which is perpetrated is a practical lesson in immorality. We wish to protect the animals, and also to prevent scenes which are calculated to harden the minds of the people. In this case we have to prove that the act complained of was: 1st, committed within the jurisdiction of the magistrate; 2nd, that the birds shot at were domestic; 3rd, that the birds were cruelly or unnecessarily ill-treated, abused or tortured; 4th, that they were so abused, etc., by the party summoned.

The first and fourth points have been proved by the witness Baker. As to the third point, the birds used were common house pigeons. Do they come under the class, "domestic birds," of the statute? This may be inferred from the remarks of the judges in *Bridge* v. *Parsons*, 32 L. J. N. S. See also, Dallas' Natural History, p. 497, and Nicholson's Manual of Zoology, where we find the expressions "domestic varieties" and "common domestic breeds of pigeons."

The third and most important point we have to make is—were the birds unnecessarily abused and tortured? Judge Grove, in *Swan* v. *Saunders*, 44 L. T., 426, says, "I prefer to define cruelty as unnecessary ill-usage by which the animal substantially suffers." Now, although these birds may have been bought for the market, and the defendant and his companions were only acting the part of amateur butchers or poulterers, yet the work of killing was bunglingly done, and the calling in of these men and the use of the shot gun, I hold to be unnecessary ill-usage; the birds substantially suffered, and we have the definition of cruelty complete. Scientific men and even sportsmen admitted that under any conditions the shooting of pigeons from a trap was an act of cruelty and brutality. In the debates in the English House of Commons on 5 & 6 W. IV. c. 59, 1835, Col. Sibthorp said, "I think shooting and hunting are amusements which none will deny to be cruel." Sir M. W. Ridley said, "In my opinion the amusements of hunting, coursing, shooting and fishing are as much breaches of the Act as cock-fighting and bull-baiting"; see "Mirror of Parliament," vol. 29, 1835, p. 1883.

In *Temple Bar*, 1870, p. 367, we read, "What applies to any shooting in the matter of cruelty applies to all—pigeon-shooting included. Nevertheless, we feel strongly tempted to some sort of agreement with Mr. Freeman when he calls it 'the lowest brutality of all,' because the tameness of the quarry, and the total absence of some of the nobler elements of sport—such as adventure, exercise and the pitting of one's wits against the instinct of the animal—almost degrades this particular pastime to amateur butchery."

W. Stanley Jevons, in the *Fortnightly Review* for 1876, p. 674, says: "Can any one deny that what is known as sport—including hunting, coursing, deer-stalking, shooting, battue-shooting, pigeon-shooting and angling—is, from beginning to end, mere diversion founded on the needless sufferings of the lower animals."

Stonehenge, in his "Encyclopaedia of Rural Sports," writes: "All pursuit of game merely for sport has an element of cruelty attending it; and it should always be remembered that this stain must be subdued, and, if possible, washed out by the many counterbalancing advantages." And again, "There can be no reason why hunting or shooting should not be carried on without any drawback, except the inherent cruelty attending upon them."

Robert Blakey, in his work on shooting, writes of pigeon-shooting: "Looking to its attraction as a matter of sport, little or nothing can be said in its favour, when put into competition with the more noble and manly enjoyment of the sports of the field."

An able writer in the *Cornhill Magazine*, vol. 29, 1874, p. 218, expresses himself in these forcible

terms: "As regards shooting, there are forms of the sport which seem carefully designed to exclude the fatigue, the exposure, the uncertainty, which give it genuine excitement, and to substitute an excitement which, as being chiefly sustained by the quantity of game killed, belongs rather to the poulterer than to the sportsman. There is no inconsistency, therefore, in saying that pigeon-shooting is cruel, and that deer-stalking and partridge-shooting is not cruel. The pigeon suffers no more than the partridge, but he suffers without any man being the better for it. The one sport is a source of health and pleasant excitement; the other gives just so much health as can be imparted by a drive from London to Fulham, and so much excitement as might be obtained on a croquet lawn, provided that the balls could feel pain. Everything that tends to make sport physically easy tends in the same proportion to make it morally hurtful. The line between the man who loves cruelty for cruelty's sake and the sportsman would soon be effaced if the ideas of exertion, of self-denial, of endurance, of labour, of submission to privation, were altogether dissociated from field sports."

Dr. Wicksteed concluded by remarking that a very perfect bill against cruelty to animals, forbidding the use of live animals as targets, had been introduced into the House of Commons last session, but had been burked through the influence of the gun clubs.

O'GARA, Q.C., Police Magistrate.—There has been nothing illegal proven under the statute. The prosecution had better wait until public opinion had changed the law. There is no question but that if a bird be properly shot it suffers less than if it had its head cut off. If a man were to kill a sheep, and yet not cut the right artery, he could not be punished. The intention of the party shooting was clearly to kill the bird; if he failed it was an accident.* The case is dismissed.

Wicksteed, *Bishop* and *Greene*, for the prosecuting society.

Christie and *Belcourt*, for the defendant.

*With many so-called sportsmen the killing and not the wounding would be the accident. Apart, however, from this practical observation there will be many who will doubt the soundness of this decision.—EDITOR *Law Journal*.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

COURT OF APPEAL.

Osler, J.A.] [July 16.

REGINA v. SANDERSON.

Canada Temperance Act—Offence—Conviction—Habeas Corpus—Certiorari—Distress warrant—Commitment.

A prisoner having been convicted of an offience under the Canada Temperance Act, an application for her release was made under a *habeas corpus*, and a writ of *certiorari* was also issued,

Held, that the writ of *certiorari* must be superseded, and following *Regina* v. *Wallace*, 4 O. R. 127, that such writ cannot issue merely for the purpose of examining and weighing the evidence taken before the magistrate.

Held, also, that no minute of the conviction need be served on the defendant, and that she must take notice of the conviction at her peril.

Held, also, that the truth of the return of the distress warrant cannot be tried upon affidavits.

Held, also, that the bailiff's duty was to execute the warrant of commitment, and that he had no authority to receive the penalty and costs.

Held, also, that the warrant of commitment need not be dated at all if not issued too soon.

Held, also, that the conviction was regular on its face, and could not be reversed or quashed on this application. While unrevised it warranted the commitment, and the prisoner was therefore remanded.

Kappele, for the application.

Irving, Q.C., contra.

PRACTICE.

C. P. Div. Court.] [June 26.

IRELAND V. PITCHER.

Action against magistrates—Costs, scale of—R. S. O. ch. 73, secs. 12, 18, 19—Appeal from taxation—Time—Rule 427 O. J. A.

In an action against Justices of the Peace for false imprisonment, etc., the Divisional Court (10 O. R. 631) ordered judgment to be entered for the plaintiff for $25, the damages assessed by the jury, leaving the costs to be taxed according to such scale and with such rights as to set-off as the statute and rules of court might direct. Upon appeal from taxation,

Held (CAMERON, C.J., *dubitante*), that the effect of R. S. O. ch. 73, sec. 19, read in connection with sec. 12 of that Act, and with R. S. O. ch. 43, sec. 18, sub-sec. 5; R. S. O. ch. 47, sec. 53, sub-sec. 7; and R. S. O. ch. 50, sec. 347, is not to provide that the plaintiff should have costs on the Superior Court scale when his recovery is within the competence of an inferior court.

Per CAMERON, C.J.—The case came under sec. 18 rather than 19 of R. S. O. ch. 73.

Per Curiam.—The action was within the proper competence of the Division Court, and the plaintiff should have costs only on the scale applicable to that court, and the defendants should have their proper costs by way of deduction or set-off.

Appeals from taxation should be brought on within a reasonable time, and within eight days—the time limited for appeals—under rule 427 O. J. A., is a reasonable time.

Stark v. *Fisher*, 11 P. R. 235, and *Quay* v. *Quay*, 11 P. R. 258, approved.

Aylesworth, for the appeal.

Beck, contra.

CORRESPONDENCE.

ULTRA VIRES.

RAILWAYS TO THE PROVINCIAL BOUNDARIES.

To the Editor of the LAW JOURNAL:

SIR,—Can a Provincial Legislature, under the British North America Act, validly create a company with power to construct a line of railway running to the boundary of the Province?

This is a question that has been much debated of late years, more especially in connection with the repeated disallowance of Manitoba railway charters, and it is with the hope of removing some of the doubts thrown around it by the politicians that I write this letter. Let me first set down the language of the B. N. A. Act governing the subject.

Sec. 92. In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say—

ss. 10. Local works and undertakings other than such as are of the following classes:

(*a*) Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province.

(*c*) Such works as, although wholly situate within the province are, before or after their execution, declared by the Parliament of Canada to be for the general advantage of Canada, or for the advantage of two or more of the provinces.

Now I find it difficult to see in this language anything to prevent a local legislature from authorizing a railway to be constructed and operated from any one point in the province to any other point therein, even if one or both of such points is or are on the very border.

Such a railway is not a road "connecting the province with any other province or extending beyond the limits of the province," however much the promoters may wish or intend to form such connection or extension afterwards. The latter element has nothing whatever to do with the question of the power to legislate as aforesaid. But the framers of the B. N. A. Act evidently foresaw that a provincial line, though wholly within the Province, might be made part of a system connecting two provinces or connecting a province with a foreign country; and they therefore reserved the power to the Parliament of Canada, after declaring such work to be for the general advantage of Canada or for the advantage of two or more o

the provinces, to legislate with respect to such work, either before or after its execution.

This does not mean that such declaration of the Parliament of Canada voids the prior valid legislation of the Province respecting the work, but only that after such declaration, the provincial legislature can legislate no further respecting such work, which comes thereafter under the jurisdiction of the Dominion Parliament. Nor does it mean that the Dominion Parliament can properly legislate so as to prevent the execution, completion, or operation of any such line of railway, even after making such a declaration as aforesaid; for the declaration is that the work, not the stoppage of the work, is for the general advantage of Canada, etc., and it would be nothing but bad faith and trickery of the worst kind to make a solemn declaration of that kind and then falsify it by stopping the work.

Indeed no such action ever has been or could or would be taken by Parliament. Whenever Parliament has made such a declaration, the railway has been continued and operated under Dominion laws. The Canada Southern Railway in Ontario is a notable example of this. It was first chartered by the Ontario Legislature to run from a point on or near the Niagara River to a point on or near the Detroit River, and was evidently intended to form part of a through line connecting the States of New York and Michigan, yet the Act was not disallowed. It was clearly not considered to be *ultra vires*. The same has happened in several other instances which I cannot at present name. If, therefore, the Manitoba Legislature should charter a railway to run to the border, even though the promoters expected and intended to form a connection there with some American road, the Act would not be *ultra vires*, and its disallowance by the Dominion Government could not be put on that ground. Neither could it be put on the ground that the contract with the Canadian Pacific Railway Company requires such disallowance, for as to the old Province of Manitoba, it does not and could not require it; though the case would be different in the added territory.

This point, however, does not come within the range of my subject, which is limited to the B. N. A. Act. I might remark, however, whilst keeping strictly to my subject, that under the B. N. A. Act it would not be possible for the Dominion Parliament, even if it tried, to legislate away the right of any province conferred upon it by the B. N. A. Act. In the case of the C. P. R. Co. Parliament has not, as I say, even attempted to legislate away any of Manitoba's rights. Upon what pretext, then, has the Dominion Government repeatedly disallowed Acts of the Manitoba Legislature chartering railways to the border in the old Province? Simply this, that they have the power to do it under the B. N. A. Act, with or without assigning any reason; and the only reason assigned is, that such lines would be competitors with the C. P. R.; and that it is for the general advantage of the Dominion to protect the C. P. R. from such competition for at least a limited period. To discuss the sufficiency of this reason, whether the Dominion Government are justified in acting on it as they have done, would be a question of politics and beyond the scope of this series of letters.

Yours, etc.,

GEORGE PATTERSON.

Winnipeg, July, 1886.

OSGOODE HALL LIBRARY.

The following is a list of books received at the Library during the months of April, May, June and July, 1886:

Abercrombie's Medical Jurisprudence, London, 1885.
Austin's Farm and Game Laws, Boston, 1886.
Archibald's Practice at Judges' Chambers, London, 1886.
Anson on Contracts, Oxford, 1886.
Anson's Law and Custom of the Constitution, Oxford, 1886.
Blackstone's Contract of Sale, London, 1885.
Brice on Patents, London, 1885.
Blyth's Analysis Snell's Equity, London, 1885.
Bennett's Compensation for Injuries, London.
Best on Evidence, Boston, 1883.
Consolidated Statutes, Canada, Ottawa, 1885.
Champion's Digest Cases since Wine Act, '69, London, 1885.
Clifton on Innkeepers, London, 1885.
Cobbett's Cases on International Law, London, 1885.
Cavanagh's Money Securities, London, 1885.
Castle's Law of Rating, London, 1886.
Cooley on Taxation, Chicago, 1886.
Daly's Reports, N. Y., Common Pleas, 12 vols., New York, 1868-85.
Decolyar on Guarantees, London, 1885.
Dowell's Income Tax Acts, London, 1885.
Digest of Cases—Law Reports, 1881-85, London 1886.
Eversley's Law of Domestic Relations, London, 1885.
Elphinstone, N. and C. Interpretation of Deeds, London, 1885.
Ellis' Income Tax, London, 1886.
Ellis' House Tax, London, 1885.
Emden's Building Contracts, etc., London, 1885

Emden's Practice in Winding up Companies, London, 1883.
Foster's "Men at the Bar," London, 1885.
Freeman on Judgments, San Francisco, 1881.
Geary's Law of Theatres, London, 1885.
Gibson and McLean's Practice, London, 1885.
Gniest's History English Constitution, London, 1886.
Howell's Annotated Statutes, Michigan, Chicago, 1882–83.
High on Receivers, Chicago, 1886.
Hastings on Torts, London, 1885.
Hawkins on Wills, Philadelphia, 1885.
Herman on Estoppel and Res Judicata, Jersey City, 1886.
Hilton's Reports, New York, Common Pleas Vols. 1 and 2, New York, 1859–70.
Hardcastle's Election Petitions, London, 1885.
Jones on "Torrens System," Toronto, 1886.
Jenkin's Public Worship, London, 1880.
Kellen's Digest Massachusetts Reports, Boston, 1886.
Knight's Model By-Laws, London, 1885.
Lely and Pearce's Agricultural Holdings Act, London, 1885.
Lushington's Admiralty Reports, London, 1864.
Lawrence's Deed of Arrangements, London, 1886.
Montreal Law Reports, Vol. 1, Montreal, 1885.
Martindale on Abstract of Title, St. Louis, 1885.
Marsden's Admiralty Cases, London, 1885.
Moores' Instruction to Young Solicitors, London, 1885.
Mushet on Trade Marks, London, 1885.
Macqueen's Husband and Wife, London, 1885.
Moore's Practical Forms, London, 1886.
Moore's Abstracts of Titles, London, 1886.
McArthur's Contract of Marine Insurance, London, 1885.
Nova Scotia Statutes, 5th series, Halifax, 1884.
Newson's Law of Salvage, London, 1886.
North-West Territories Ordinances, Regina, 1885.
Oregon Reports, Vols 1 to 12, San Francisco, 1852–85.
Oldham and Foster's Law of Distress, London, 1886.
Ontario Statutes, 1886, Toronto, 1886.
Pratt's Income Tax Act, London, 1885.
Pollock's Essays on Jurisprudence, London, 1882.
Paterson on Master and Servant, London, 1885.
Prideaux's Precedents in Conveyancing, London, 1885.
Palmer's Company Precedents, London, 1884.
Ralston on Discharge of Contracts, Philadelphia, 1886.
Roscoe's Seamen and Safety at Sea, London, 1885.
Rowe's Parliamentary Poll Book, London, 1885.
Revised Statutes of Maine, Portland, 1884.
Rogers on Elections, London, 1885.
Smith's (E. D.) Reports, New York, Common Pleas, 4 vols. New York, 1855.
Sedgwick and Wait on Trial of Title to Land, New York, 1886.
Smith's Guide to Patents, London, 1886.
Scrutton's Roman Law, Cambridge, 1885.
Stephen's International Law, London, 1884.
Stimson's American Statutes, Boston, 1886.
Spear on Extradition, Albany, 1885.
Stephen's Commentaries (4 vols.), London, 1886.
Stephen's National Biography, Vol. 6, London, 1886.
Slater on Awards, London, 1886.
Story's Equity Jurisprudence, 13th edition, Boston, 1886.
Twistleton and Chabot, Handwriting of Junius, London, 1871.
Taylor's Landlord and Tenant, Boston, 1879.
Theobald on Wills, London, 1885.
Taswell Langmead's English Constitutional History, London, 1886.
Underhill's Modern Equity, London, 1885.
U. S. Digest, N. S. Vol. 16, Boston, 1886.
White and Tudor's Leading Cases in Equity, London, 1886.
Wigram's Justice's Note Book, London, 1885.
Winslow on Private Arrangements, London, 1885.
Wood on Limitations of Actions, Boston, 1883.
Woodfall's Landlord and Tenant, London, 1886.
Wilson's Judicature Act, London, 1886.

D.

Law Society of Upper Canada.

OSGOODE HALL.

EASTER TERM, 1886.

During this Term the following gentlemen were called to the Bar, namely:—Messrs. George Goldwin Smith Lindsey, Arthur Eugene O'Meara, Edward Albert Holman, Alson Alexander Fisher, Edmund James Bristol, Henry James Wright, Alexander McLean, Robert George Code, Robert Alexander Dickson, Donald Macfarlane Fraser, Peter Doy Cunningham, Robert Franklin Sutherland, John Mortimer Duggan, John Graham Forgie, Thomas Hobson, Thomas Evan Griffith, William Morris, Herbert Macdonald Mowat, Joseph Mackenzie Rogers, Hugh Thomas Kelly, William James Church, Harry Hyndman Robertson, George Herbert Stephenson, Richard Armstrong, John Thacker, George Edgar Martin, William Davis Swayzie.

The following gentleman received Certificates of Fitness, namely:—Mr. T. E. Griffiths, who passed in Michaelmas Term, 1885; and Messrs. R. Armstrong, E. J. Bristol, A. E. Kennedy, E. A. Holman, A. A. Fisher, G. Wall, D. A. Givens, W. T. McMullen, N. A. Bartlett, Thomas Hobson, F. C. Powell, H. F. Jell, J. C. Mewburn, W. G. Fisher, A. W. Ford, D. C. Hossack, W. G. McDonald, W. R. Smyth, G. H. Stephenson.

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

Graduates.—John Howard Hunter, M.A., Archibald Bain McCollum, M.A., Arthur James Forward, B.A., William Henry Irving, B.A., George E. Kynaston Cross, B.A.,

Matriculants of Universities.—William James Fleury.

Junior Class.—William Hardy Murray, D'Arcy Fenton, Norman MacKenzie, William John Glover, William Senkler Buell, Arthur Hervey Selwyn Marks, David Mackenzie, Thomas Joseph Murphy, Newton Wesley Rowell, James William McColl, Alexander Grant McLean, Herbert Lavallin Puxley, Percy Allan Malcolmson, Robert Burnham Revell, Robert Moore Noble, Robert Alexander Montgomery, James Albert McMullen, William Alexander Sutherland.

The following graduates were admitted on 29th June, their admission to date as of first day of Term under new Rule 29, namely:—William Gregor Bain, Thomas Walter Ross McRae, Donald Murdoch Robertson, Gordon James Smith, Francis Pedley, Charles Swaling, Samuel Hugo Bradford, Hume Blake Cronyn, Horace Harvey, Alexander McLean Macdonnell, Dugald James MacMurchy, Francis James Roche, Thomas Alfred Rowan, Roland William Smith.

SUBJECTS FOR EXAMINATIONS.

Articled Clerks.

1884 and 1885.
- Arithmetic.
- Euclid, Bb. I., II., and III.
- English Grammar and Composition.
- English History—Queen Anne to George III.
- Modern Geography—North America and Europe.
- Elements of Book-Keeping.

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

Students-at-Law.

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

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

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

Translation from English into Latin Prose.

MATHEMATICS.

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

ENGLISH.

A Paper on English Grammar.
Composition.
Critical Analysis of a Selected Poem:—
1884—Elegy in a Country Churchyard. The Traveller.
1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

HISTORY AND GEOGRAPHY

English History from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography, Greece, Italy and Asia Minor. Modern Geography North America and Europe.

Optional subjects instead of Greek:

FRENCH.

A paper on Grammar,
Translation from English into French prose.
1884—Souvestre, Un Philosophe sous le toits.
1885—Emile de Bonnechose, Lazare Hoche.

or NATURAL PHILOSOPHY.

Books—Arnott's elements of Physics, and Somerville's Physical Geography.

First Intermediate.

Williams on Real Property, Leith's Edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and cap. 117, Revised Statutes of Ontario and amending Acts.

Three scholarships can be competed for in connection with this intermediate.

Second Intermediate.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three scholarships can be competed for in connection with this intermediate.

For Certificate of Fitness.

Taylor on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

For Call.

Blackstone, vol. 1, containing the introduction and rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris' Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law and Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

1. A graduate in the Faculty of Arts, in any university in Her Majesty's dominions empowered to grant such degrees, shall be entitled to admission on the books of the society as a Student-at-Law, upon conforming with clause four of this curriculum, and presenting (in person) to Convocation his diploma or proper certificate of his having received his degree, without further examination by the Society.

2. A student of any university in the Province of Ontario, who shall present (in person) a certificate of having passed, within four years of his application, an examination in the subjects prescribed in this curriculum for the Student-at-Law Examination, shall be entitled to admission on the books of the Socity as a Student-at-Law, or passed as an Articled Clerk (as the case may be) on conforming with clause four of this curriculum, without any further examination by the Society.

3. Every other candidate for admission to the Society as a Student-at-Law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this curriculum.

4. Every candidate for admission as a Student-at-Law, or Articled Clerk, shall file with the secretary, six weeks before the term in which he intends to come up, a notice (on prescribed form), signed by a Bencher, and pay $1 fee; and, on or before the day of presentation or examination, file with the secretary a petition and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The primary examinations for Students-at-Law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity and Michaelmas Terms.

7. Graduates and matriculants of universities will present their diplomas and certificates on the third Thursday before each term at 11 a.m.

8 The First Intermediate examination will begin on the second Tuesday before each term at 9 a.m. Oral on the Wednesday at 2 p.m.

9. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

10. The Solicitors' examination will begin on the Tuesday next before each term at 9 a.m. Oral on the Thursday at 2:30 p.m.

11. The Barristers' examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2:30 p.m.

12. Articles and assignments must be filed with either the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

13. Full term of five years, or, in the case of graduates of three years, under articles must be served before certificates of fitness can be granted.

14. Service under articles is effectual only after the Primary examination has been passed.

15. A Student-at-Law is required to pass the First Intermediate examination in his third year, and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second vear, and his Second in the first six

months of his third year. One year must elapse between First and Second Intermediates. See further, R.S.O., ch. 140, sec. 6, sub-secs. 2 and 3.

16. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive certificates of fitness, examinations passed before or during Term shall be construed as passed at the actual date of the examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

17. Candidates for call to the Bar must give notice, signed by a Bencher, during the preceding Term.

18. Candidates for call or certificate of fitness are required to file with the secretary their papers and pay their fees on or before the third Saturday before Term. Any candidate failing to do so will be required to put in a special petition, and pay an additional fee of $2.

FEES.

Notice Fees	$1 00
Students' Admission Fee	50 00
Articled Clerk's Fees	40 00
Solicitor's Examination Fee	60 00
Barrister's " "	100 00
Intermediate Fee	1 00
Fee in special cases additional to the above.	200 00
Fee for Petitions	2 00
Fee for Diplomas	2 00
Fee for Certificate of Admission	1 00
Fee for other Certificates	1 00

PRIMARY EXAMINATION CURRICULUM

FOR 1886, 1887, 1888, 1889 AND 1890.

Students-at-law.

CLASSICS.

1886.
- Cicero, Cato Major.
- Virgil, Æneid, B. I., vv. 1-304.
- Cæsar, Bellum Britannicum.
- Xenophon, Anabasis, B. V.
- Homer, Iliad, B. VI.

1887.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. VI.
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. I.
- Cæsar, Bellum Britannicum.

1888.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. IV.
- Cæsar, B. G. I. (vv. 133.)
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. I.

1889.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. IV.
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. V.
- Cæsar, B. G. I. (vv. 1-33)

1890.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. VI.
- Cicero, In Catilinam, II.
- Virgil, Æneid, B. V.
- Cæsar, Bellum Britannicum.

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's Arnold's Composition, and re-translation of single passages.

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

MATHEMATICS.

Arithmetic: Algebra, to the end of Quadratic Equations: Euclid, Bb. I., II., and III.

ENGLISH.

A Paper on English Grammar.

Composition.

Critical reading of a Selected Poem:—

1886—Coleridge, Ancient Mariner and Christabel.

1887—Thomson, The Seasons, Autumn and Winter.

1888—Cowper, the Task, Bb. III. and IV.

1889—Scott, Lay of the Last Minstrel.

1890—Byron, the Prisoner of Chillon; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography — Greece, Italy and Asia Minor. Modern Geography—North America and Europe.

Optional Subjects instead of Greek:—

FRENCH.

A paper on Grammar.

Translation from English into French Prose.

1886, 1888, 1890 } Souvestre, Un Philosophe sous le toits.

1887, 1889 } Lamartine, Christophe Colomb.

Or, NATURAL PHILOSOPHY.

Books—Arnott's Elements of Physics; *or* Peck's Ganot's Popular Physics, and Somerville's Physical Geography.

ARTICLED CLERKS.

Cicero, Cato Major; *or*, Virgil, Æneid, B. I, vv. 1-304, in the year 1886: and in the years 1887, 1888, 1889, 1890, the same portions of Cicero, *or* Virgil, at the option of the candidates, as noted above for Students-at-Law.

Arithmetic.

Euclid, Bb. I., II., and III.

English Grammar and Composition.

English History—Queen Anne to George III.

Modern Geography—North America and Europe.

Elements of Book-Keeping.

Copies of Rules can be obtained from Messrs. Rowsell & Hutcheson.